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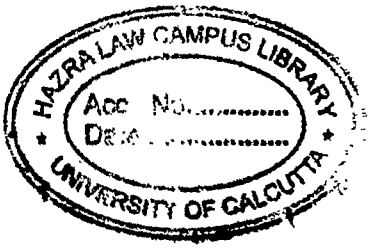
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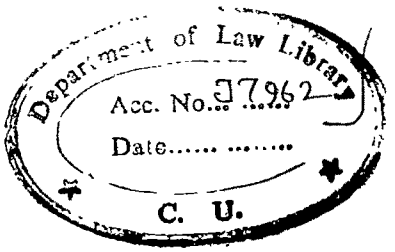
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INDIAN CASES.

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CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 3 OF 1915.

January 4, 1918.

Present: - Mr. Justice Fletcher, Mr. Justice Greaves and Justice Sir Shamsul Huda, KT.

Nawab Syed MAZAFFAR ALI KHAN, PRESIDENT OF THE ENDOWED COMMITTEE OF BASAUT ALI KHAN'S ESTATE— FIRST PARTY—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND ANOTHER—OPPOSITE PARTY —RESPONDENTS.

Land Acquisition Act (I of 894), s. 23—Quarry, compensation for, mode of calculation of

Per *Fletcher* and *Greaves, JJ. (Huda, J.*, dissenting)—The basis of the compensation to be paid for acquiring a quarry is the amount of workable stone likely to be gotten therefrom taken at a rate to be determined from the evidence [p. *, col. .]

Per *Huda, J*—In cases of this kind it is generally necessary to take two or all the methods of valuation available in order to arrive at a fairly correct valuation, as exact valuation is practically impossible and approximate market value is all that can be aimed at. [p. 3, col. 1.]

Letters Patent Appeal against the decree of Mr. Justice Beachcroft, differing in opinion from Mr. Justice D. Chatterjee, dated the 2nd of August 1915, in Appeal from Original Decree No. 345 of 1913.

Dr. *Sarat Chunder Basak* and Babu *Hamendra Coomar Das*, for the Appellant.

Babu *Ram Charan Mitter*, for the Respondents.

JUDGMENT.

FLETCHER, J.—This appeal is preferred under clause 15 of the Letters Patent.

The only question involved in the appeal is, what was the market value of certain land compulsorily acquired under the provisions of the Land Acquisition Act.

The land acquired is a hill in the Sonthal Perganas which is called Bahadurpur and Belpahari. It was acquired in connection with the construction of the Lower Ganges Bridge. The value of the land as a quarry was the subject-matter of the enquiry in the proceedings out of which this appeal arises and also was the basis of the argument before us.

The declaration is dated the 9th August 1909.

The Collector awarded Rs. 976-6-0 in respect of the land the subject of the present appeal. The District Judge increased this amount to Rs. 3,125.

On appeal to this Court the appeal came to be heard by Digambar Chatterjee and Beachcroft, JJ. They were divided in their opinion, Digambar Chatterjee, J. was of opinion that the amount awarded by the District Judge ought to be increased to Rs. 8,734-4-0 whilst Beachcroft, J., was of opinion that no ground had been shown for increasing the amount awarded by the District Judge. Before the District Judge as well as before Digambar Chatterjee and Beachcroft, JJ., there were two claimants. The present appellant who was the claimant No. 1 and is the proprietor of the land. The claimant No. 2, Mr. Atkinson, took a lease for 4 years of the property on the 5th August 1908.

The claimant No. 1 alleges that the lease to Atkinson covers only 6 *bighas* of the property, although the property acquired contains an area of 127 *bighas*.

Claimant No. 2 before the Collector claimed Rs. 31,00,000. Claimant No. 1 did not make any claim before the Collector as he was not served with notice, but on his application for a reference to the Judge he claimed Rs. 1,60,000. The Collector valued the land in 3 villages at Rs. 1,394-8-0. We are only concerned with the land in 2 villages Banjikand and Shampur and as already mentioned the amount awarded in respect of these 2 villages was Rs. 976-6-0

The Collector relied on a valuation made by Mr. Green, Superintending Engineer to the Government. Foolishly a copy of this valuation was not annexed to the award and for some time the parties were refused a copy of the same. A copy, however, was ultimately given and the claimants do not appear to have been prejudiced in any way by the refusal to supply a copy in the first instance.

Claimant No. 1 has preferred this appeal under clause 15 of the Letters Patent. No appeal has been preferred by claimant No. 2.

In the first place I will deal with the suggestion that was made that the lease to Atkinson comprised only 6 or perhaps 20 *bighas*. The lease is of the Khaspatil Belpahari hill in *Mouza* Belpahari excepting lands settled with tenants. The northern boundary is given in the lease as *Mouza* Banjikand and the southern boundary as Shampur. The lands according to the description in the lease bear the *Khasra* No. 2 in *Mouza* Belpahari. The claimant No. 1 produced a *khasra* Exhibit 2 of *Mouza* Shampur, which they say is the *khasra* referred to in the lease. The claimant No. 1 also called a witness Ketabuddin Sheikh who stated that Shampur is also called Belpahari. This witness perhaps by oversight was not cross-examined on this point. But if Shampur and Belpahari are one and the same, the southern boundary as given in the lease of Shampur is not explained. It may be that the *khasra* referred to in the lease is a false demonstration. The evidence in my opinion does not show that all that Atkinson got under his lease was 6 or 20 *bighas*. The main point, however, argued on this appeal is as to the amount of compensation to be allowed. The present appeal is valued at Rs. 8,734-4-0, the amount that Digambar Chatterjee, J., thought should be allowed. The valuation of that learned Judge proceeded on this basis. He took the terms of a provisional agreement, dated the 29th of April 1909, as varied on the 28th of May 1909 between Mr. Atkinson and Mr. Gales, the Engineer-in-Chief in charge of the construction of the Lower Ganges Bridge, Under the terms of that agreement the Engineer-in-Chief was to get a lease from Mr. Atkinson of Belpahari up to October 1912, the date when Atkinson's lease from the claimant No. 1 terminated. The terms of the proposed lease were a monthly rent of Rs. 42, a royalty of 7 annas per 100 cubic feet of material removed from the quarry, the minimum amount to be removed being guaranteed at 40,000 cubic feet a month and that the agreement could be determined by the lessee on one month's notice. On this basis Digambar Chatterjee, J., thought that the compensation should be based, on the assumption that this agreement should run untill October 1912 and calculating the minimum amount to be worked a month at the royalty of 7 annas per 100 cubic feet and adding the dead rent he arrived at the figure of Rs. 8,734-4-0.

I am wholly unable to agree with the view of the learned Judge.

The evidence of Mr. Green, which in my opinion is not really challenged, shows that the amount of stone that could be conveniently and profitably worked was 4,81,032 cubic feet.

Suggestions have been made that Mr. Green neglected to take into consideration stone when the overlay was more than 3 feet and also when the stone lay below 15 feet. The evidence does not show that with regard to the land in question Mr. Green's method was inaccurate and it is obvious that a prudent purchaser before he acquired an unopened quarry would consult an expert as to the amount of stone likely to be gotten. There is nothing to suggest that an expert so consulted would have proceeded differently or come to a conclusion other than that arrived at by Mr. Green.

Evidence of what may be the working conditions or the value of stone in other quarries seems to me to be of little or no value. I think the estimate of Mr. Green as to the quantity of stone capable of being

worked should be accepted, and as to the rate that should be paid there is no difficulty. The parties agreed upon a rate of 7 annas per 100 cubic feet and this cannot be departed from on the ground that the Government paid in excess of this rate with regard to small quantities either to terminate disputes or to avoid litigation. In the result I think the proper basis of the compensation is the amount of workable stone as estimated by Mr. Green taken at the agreed rate of 7 annas per 100 cubic feet.

On that basis the amount given to the claimants by the learned District Judge is in excess of the value. The present appeal I think, therefore, fails and must be dismissed with costs. Three hundred rupees.

GREAVES, J.—I agree.

SHAMSUL HUDA, J.—I regret I am unable to agree with the majority of the Court in the conclusions arrived at by them. As observed in the case of *Harish Chunder Neogy* v. *Secretary of State for India* (1), it is generally necessary in cases of this kind to take two or all the methods of valuation available in order to arrive at a fairly correct valuation. Exact valuation is practically impossible. The approximate market value is all that can be aimed at. In this case three methods of valuation have been discussed before us. The first is the valuation based on Mr. Green's report supported by his evidence in Court. Mr. Green, however, is not an expert in matters of quarrying. He made his valuation on the result of certain trial pits that he dug all over the land at regular intervals. He admitted that he had not before tried this method for the purpose of valuing quarries. Mr. Green's valuation, I may state, was the basis of the Collector's award. The District Judge, however, did not accept his valuation, as he considered the royalty of 4 annas per hundred cubic feet of stone was too low. In this Court Mr. Justice D. Chatterjee did not accept his valuation also and Mr. Justice Beachcroft was not wholly satisfied with it. "It may be," says Mr. Justice Beachcroft, "that in fact Mr. Green has under-estimated or over-estimated the quantity of workable stone. But that is not the point. The question is, would a prospective purchaser, apart from the question of low rates, have come to much the same conclusion." I am unable to accept Mr. Green's estimate for two main reasons. In the first place, Mr. Green only valued stone that could be reached within 3 feet of the surface and he also did not take into account any stone below a depth of 15 feet. In this respect the other expert witnesses are not in accord with him. For instance in regard to the overlay of more than 3 feet, Mr. Martin, the first witness for the Secretary of State, said that it would pay to remove about 5 or 6 feet of earth unless one struck solid stone; and regarding the depth up to which a quarry can be worked, Mr. Edward, Executive Engineer of State Railways of India, who had actual experience of quarrying at Belpahar, being in charge of the quarries for over a year, says that in his experience it does not pay to work down more than 15 or 20 feet on a slope such as Belpahar. I think, therefore, Mr. Green's estimate is an under-valuation and should not be accepted.

The second method of valuation is based on the lease granted to Atkinson, the claimant No. 2, by the claimant No. 1, dated the 5th August 1908. It seems that Atkinson had taken a lease for some land in Belpahar for four years at a rental of Rs. 250 a year, the whole of which amount, namely, Rs. 1,000 was paid in advance. The difficulty in basing a conclusion on this lease has arisen from the uncertainty regarding the quantity of land covered by it. It has been contended on behalf of the appellant that this lease covered an area of 6 *bighas* only as it is expressly stated in the lease to belong to *khasra* No. 2. It appears from Exhibit 2 that *khasra* No. 2 of *Mouza* Shampur has an area of 6 *bighas* and 5 *cottas* only. It has, however, been contended on behalf of the Secretary of State that Shampur is different from Belpahar, and that, therefore, Exhibit 2, the *khasra* of Shampur, gives no indication of the quantity of land covered by the lease. As has been pointed out by Mr. Justice D. Chatterjee, the first witness examined on behalf of the first party stated in the very boginning of his examination-in-chief, "I know the Bandi Khord and Sham-

(1) 11 C. W. N. 875.

pur *Mahal*. Shampur is also known as Belpahari", and there was no cross examination on the point. I cannot think that the statement like this would have gone unchallenged if it were untrue. Assuming, however, that the lease covered the whole of the waste land of the *mouzah*, as pointed out by Mr. Justice D. Chatterjee, it would cover an area of 20 *bighas*. It was, however, claimed by claimant No. 2 that the lease covered the entire area of the *mouzah*, but it is clear that his lease was in respect of the Khaspalit hill excepting the settled land and lands cultivated by tenants. On the footing of the lease covering an area of 20 *bighas*, the rent for 4 years of 127 *bighas* would amount to Rs. 6,350. It is not, however, shown that four years' quarrying by Atkinson would have exhausted the entire quantity of stone and left the property wholly valueless. All that can be said on the basis of this lease is that the value should in no case be less than Rs. 6,350.

The third basis of valuation is the provisional agreement between claimant No. 2 and the Engineer-in Chief of the Lower Ganges Bridge. By that lease the lessee agreed to pay to Atkinson for Belpahar a rental of Rs. 42 per annum for the period from April 1909 to October 1912. Three other *mouzahs* were also included in this lease on similar terms with a difference in the rent. When the Secretary of State took possession in December 1909 the lease had 35 months yet to run. If that lease had been in force under its terms as subsequently varied, Atkinson would have received for Belpahari Rs 42 *into* 35 = Rs 1470 as rent and royalty calculated on a minimum quantity of 40,000 cubic feet of stone per month at the rate of 7 annas per hundred cubic feet, which would have amounted to Rs. 6,125, the whole amounting to Rs. 7,595. The only question as to the acceptance of this basis is that the lease was terminable on a month's notice. No doubt the lessee guarded himself against contingencies by this special provision, but there is nothing to show that such an option was at all likely to be exercised by the lessee. It is noticeable that in accordance with the terms of the provisional lease a formal lease was subsequently executed in respect of the three other *mouzahs*. When the evidence in Court was being recorded, the term of the lease of the three *mouzahs* had expired and yet there is not a word in the evidence to suggest that as regards those *mouzahs* the option had to be exercised in any case and I have no reason to think that the term of the provisional lease, namely, the period from April 1909 to October 1912 did not represent an expectation on the part of the lessee to continue quarrying till the end of the lease. The reason why Belpahar had to be acquired, instead of being held in lease like the other three *mouzahs*, was that there was a defect in the title of the lessor. That, however, does not affect the present question. The valuation on this basis is strongly supported by the valuation based on Atkinson's lease of 5th August 1905, the difference between Rs. 6,350 and 7,595 being accounted for by the chance of some value being still left in the quarries at the end of Atkinson's lease, which there is nothing to negative. I would, therefore, agree with the valuation arrived at by Mr. Justice D. Chatterjee and decree accordingly.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 127 OF 1916.

October 8, 1917

Present:—Mr. Justice Oldfield and Mr. Justice Bakewell.

MALLIDI DORAYYA—DEFENDANT—PETITIONER—APPELLANT

versus

SATTI VEERAYYA—PLAINTIFF—COUNTER-PETITIONER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O XXI, rr. 43, 54, 55—Attachment of property, order for, after hearing judgment-debtor's objections—Application, subsequent, for raising attachment, maintainability of.

Where an order for attachment of the judgment-debtor's property is passed after hearing his objections, the order is conclusive and debars the judgment-debtor from raising other objections in the same proceedings. [p. 5, col. 2.]

Mungul Pershad Dihcit v. *Grija Kant Lahiri*, 8 C. 51; 11 C. L. R. 113; 8 I. A. 123; 4 Sar. P. C. J. 249; 4 Ind. Dec. (N. S.) 32, followed.

Appeal against the order of the Court of the Temporary Subordinate Judge,

Cocanada, in Appeal Suit No. 47 of 1916, preferred against the order of the Court of the District Munsif, Peddapur, in Execution Petition No. 3231 of 1915, in Original Suit No. 264 of 1905.

FACTS.—Respondent, in execution of a decree obtained by him against the appellant, attached the latter's property. The order for attachment was passed by the Court after notice to the judgment debtor and after disallowing his objection that the decree was satisfied. The appellant subsequently filed an application praying that the attachment might be raised on various grounds. The Court refused to raise the attachment and the judgment-debtor applied against that order, first to the lower Appellate Court and then to the High Court.

Mr. *G. Venkatramiah*, for the Appellant.—The attachment has been ordered without considering the available pleas of the appellant. The Court did not discuss or decide on the question of limitation. It is open to the judgment debtor to move for the raising of the attachment.

Mr. *P. Narayanmoorthy*, for the Respondent.—The order has been passed after notice to the judgment-debtor. He raised the plea that the decree was satisfied and, consequently, that there could be no attachment. The Court negatived his contention, and passed an order for attachment. The order has become final and it is no more open to the judgment-debtor to question it by fresh objections in the same proceeding.

Mr. *G. Venkatramiah* was heard in reply.

JUDGMENT.—We can dispose of this appeal on only one of the grounds in the appeal memo., the fifth, and we, therefore, express no opinion on the others.

The order under appeal is one refusing to raise the attachment of the property of the defendant-appellant in execution of respondent's decree. The appeal has been resisted on the ground that appellant had notice to appear on 14th August 1915 and show cause against the attachment and that he appeared accordingly, but that the Court after considering his contention, that the decree was satisfied, made an order for attachment which, it is contended, debars him from subsequent objection on any ground. There is no doubt regarding the facts: and following *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (1), we must hold that the order was conclusive. Argument to the contrary has been based on the fact that the order was passed without reference to the plea of limitation now relied on and in fact without its being submitted to the Court. We do not think it necessary to go through the authorties cited to show that, in such circumstances, the propriety of the order can be questioned by a subsequent petition, because they all relate to attempts to question it in subsequent distinct proceedings, suits or execution petitions, not as here in the same proceeding at a later date. To allow appellant's contention would deprive the decision reached at any particular stage in an execution proceeding of finality and enable the judgment-debtor to protract that proceeding indefinitely. Law and convenience being against him, the appeal must fail. The respondent, however, has succeeded on a point not taken in the lower Courts. We, therefore, dismiss the appeal but in the circumstances without costs.

Appeal dismissed.

M. C. P.

(1) 8 C. 51: 11 C. L. R. 113; 8 I. A. 123; 4 Sar. P. C. J. 249; 4 Ind. Dec. (N. S.) 32.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 386 OF 1915.

December 14, 1917.

Present:—Mr. Justice Fletcher and Justice Sir Shamsul Huda, Kt.

MATHURA DASS KARNANI—DEFENDANT No. 1—APPELLANT

versus

SRIKISSEN KARNANI AND OTHERS—RESPONDENTS.

Hindu Law—Mitakshara—Adoption by widow of separated brother—Consent of husband's relatives, whether necessary—Maintenance, deed of, agreement as to, whether family arrangement.

After the death of *A.*, a Maheswari Hindu governed by the Mitakshara School, his business was carried on by the defendant, who was the son of a deceased separated brother of *A*. Disputes having arisen between the defendant and *A.*'s widow regarding the latter's maintenance, agreements were entered into between the parties on the footing that on the death

of the widow the defendant would be entitled to the estate of *A.*, and the defendant in pursuance of the agreements deposited a sum with a Bank providing for the maintenance of the widow with interest thereof. Subsequently the plaintiff was adopted by the widow without the consent of her husband's relatives:

Held, (1) that the deeds of agreement entered into by the widow only with reference to her maintenance could not be set up as deeds of family arrangement between the members of the family then in existence as barring the rights of the adopted son; [p. 9, col. 1.]

(2) that as *A.* was separated from his brothers, his widow was entitled to adopt of her own motion without the consent of her husband's kinsmen, although she had no authority from her husband to do so. [p. 9, col. 1.]

Appeal against the decree of the Subordinate Judge, Darjeeling, dated the 2nd March 1915.

Mr. *S. N. Banerjee* and Babu *Probodh Kumar Dass*, for the Appellant.

Babu *Hiralal Chakrabutty*, for the Respondents.

JUDGMENT.

FLETCHER, J.—This is an appeal by the defendant No. 1 against the judgment of the learned Subordinate Judge of Darjeeling, dated the 2nd March 1915, decreeing the plaintiff's suit. The plaintiff brought his suit on the allegation that he was the adopted son of a deceased Hindu of the Maheswari caste of Bikaneer—the name of the person who had adopted being Amar Chand Karnani—and he sought to recover from Mathura Das Karnani and others, who were the natural relations of the deceased Amar Chand Karnani, a certain property and for consequential relief by way of accounts and discovery. The case set up by the plaintiff was that there was a Hindu of the Maheswari caste called Swairam Karnani. He had three sons, Katchi Das who was the father of Mathuradas, the defendant No. 1, Amar Chand Kernani the adoptive father of the plaintiff, and Jaithrupa who was the husband of the defendant No. 3. The plaint alleged that Amar Chand had been adopted by one Gangadas and, therefore, according to the ordinary rules of the Hindu Law, Amar Chand ceased on that adoption to be a member of the family of Swairam and passed into the family of Ganga Das. That allegation was made distinctly in the pedigree that formed a portion of the plaint and it was not traversed in the written statement nor in the course of the trial. It is, therefore, an admitted fact that Amar Chand passed out of the family of Swairam and passed into the family of Ganga Das. No evidence was offered as to who Ganga Das was. There has been a suggestion made in reply that Ganga Das was some sort of relation of Swairam and that, therefore, although Amar Chand in his adoption passed out of the family of Swairam, it does not follow that the other sons of Swairam, who remained joint with their father, ceased to be the reversionary heirs of Amar Chand on his death. That case was not made or suggested in the course of the proceeding and it is much too late in the course of the reply to put forward a case unsupported by any evidence or any statement made in the Court below.

Now, the facts are these—and these facts are not disputed. The three sons of Swairam had built up a business in the district of Darjeeling. Katchi Das, the eldest son, died in 1880 and his only son and heir is the defendant No. 1. Jaithrupa died in 1888 leaving his widow the defendant No. 3. Amar Chand died in 1899 after having been adopted by Ganga Das, leaving him surviving his widow the defendant No. 2. The business after the death of Amar Chand was carried on by the 1st defendant. There were some disputes between the defendant No. 1 and the widow of Amar Chand, the defendant No. 2, in the year 1903 and apparently her remittances that she had been accustomed to get from the business in Darjeeling were stopped. She then went to Darjeeling and there the parties arrived at certain agreements which were reduced in writing, the agreements being dated the 21st April 1903. Under the terms of those agreements, a sum of Rs. 7,500 was deposited with certain Marwari bankers, the interest being payable to the defendant No. 2 for her maintenance and the capital sum to go to the defendant No. 1 on the death of the defendant No. 2. The documents seem to me to have been quite clearly executed on the footing that the defendant No. 1 would on the death of the defendant No. 2 become entitled to the estate of the deceased Amar Chand Karnani. The agreements do not seem to have put an end to the disputes between the parties, and in 1903 the defendant No 2 is said to have adopted

the plaintiff as the adopted son of her deceased husband Amar Chand Karnani.

The main controversy in this case has turned on the question as to whether the evidence establishes the case that the plaintiff was duly adopted. Both parties admitted that the parties were governed by the Mitakshara School of Hindu Law. The learned Counsel for the defendant-appellant in opening the appeal asserted that the admission meant that the rights of the parties were regulated by the Benares School of Hindu Law. But after consideration of the evidence the learned Counsel was bound to admit that the evidence established important variations applicable to the parties which were not in accordance with the opinion held by the Benares School of Hindu Law. It is quite true that he did not admit that the rights of adoption applicable to the parties were different to those laid down by the Benares School of Hindu Law; but he was bound to admit that in certain particulars the rights of the parties in this case were shown to be different from those prevailing in the Benares School of Hindu Law. It seems to me that that is an important fact, because you at once get rid of the suggestion put forward that the admission meant that the parties were governed by the Benares School of Hindu Law *simpliciter* because it is admitted that there were variations from that. The Mitakshara as varied from the Benares School applies in a large portion of India. It applies in Bombay, Western India and Southern India, and in all those different Schools of Law there are variations of Mitakshara not consistent with the view adopted in the Benares School. It seems to me quite clear in the present case that the admission did not amount to a statement that the rights of the parties as to adoption could be ascertained from the principles held by the Benares School of Hindu Law. If you get to that, you have got to look at the evidence. The evidence that has been given in this case as to what is requisite for a valid adoption is not the evidence of learned persons but the evidence of shop keepers, Marwaris being largely a trading caste. These shopkeepers, it may be said, do not know the principles of the Hindu Law, but the evidence shows without doubt that these shopkeepers have undergone the process of adoption, as many as four times. The evidence also shows that the ceremonies required for a valid adoption by a person belonging to this class are not formal. The evidence is that on the adoption of a boy the guests and relations receive cocoanuts and sweets and the adopted son has got to have *payjama* placed on his head. These seem to be the only ceremonies that are requisite for a valid adoption. The adoption is not also limited, according to the evidence, to the case of children of tender age. There may be an adoption, as in this case, of a person of full age and it does not matter whether that person is married or not. That is the evidence in this case and the learned Judge says that the custom seems to be the same as that obtaining in Bombay or in Western India. It has been suggested that the learned Judge of the Court below stated that the law as applicable in the Presidency of Bombay applied in the State of Bikaneer. I do not read the judgment of the learned Judge in that way. I think what he remarks is that the evidence shows that the law as to adoption is the same in Bikaneer as in Western India.

Then, the question was whether the consent of the relatives was necessary. That seems to be the point that was debated not only in the Court below but also in the suit in the Bikaneer Court, and the view that was taken was this: That this was not the case of a widow adopting a son to introduce him into the family consisting of the defendants, but it was the case of a widow of a separated brother who, although she had no authority from her husband to adopt, had adopted of her own motion the plaintiff. That seems to have been the case put forward. Then the learned Judge came to the conclusion that that case had been established in accordance with the custom prevailing in Bombay and Western India. The evidence, it is quite true, is not all one way; there are statements made by the witnesses on both sides. But the learned Judge had the opportunity of seeing the witnesses in the witness-box and remarking who were the most intelligent and also the truthful witnesses amongst them, and he came to the conclusion that this custom had been satisfactorily established. There does not seem to be any reason to disagree with

the conclusion arrived at by the learned Judge of the Court below.

The next question that was raised was as to whether the adoption had or had not been made. That does not seem to have been seriously contested in the Court below. The widow, that is, the defendant No. 2 who adopted the plaintiff, states in her deposition that the child was given to her by his natural father and received by her in adoption and there do not seem, according to the evidence, to be any other ceremonies required beyond those observed in this particular case.

Then reference has been made to the proceedings of the Court at Bikaneer and it is said that the adoption cannot have taken place on the date alleged by the plaintiff. I do not read the proceedings of the Court at Bikaneer in the way that the learned Counsel for the appellant has attempted to read them. The proceeding originated out of an application by the widow for what is called a *khola*, that is, a certificate of adoption. That is a certificate of the Court at Bikaneer that the widow has, in fact, adopted the plaintiff as a son to her deceased husband, Amar Chand. On that application being made for certificate, the present defendant No. 1, that is, the plaintiff in the Bikaneer Court, brought a suit for an injunction to restrain the widow, that is, the adoptive mother of the present plaintiff from proceeding on the footing of the adoption, for the reason that by the deeds of 1903 the widow had precluded herself from making an adoption of any person, and the grounds so far as I can gather from the judgment of the Judges of the Chief Court at Bikaneer were these:—That the deeds executed in 1903 operated as a release by the widow of Amar Chand of her interest in the property so as to accelerate the estate of the defendant No. 1 Muthura Das, so that he having taken an absolute interest in the estate of Amar Chand, the widow was incapable of making an adoption so as to defeat him of the rights in the properties he had acquired. The case came on before one of the Munsifs in the State and he decided one of the issues against the present defendant No. 1. On appeal to the Sudder Nizamut of the State, the Judge of that Court held that the appropriate fee payable to the State on the plaint not having been paid the suit must fail. On appeal to the Chief Court, the learned Judges of that Court disagreeing with the view of the Judge of the Sudder Nizamut held that the plaint was properly stamped but they came to the conclusion that there was nothing in the deeds to prevent the widow of Amar Chand from proceeding to adopt the present plaintiff. That, so far as I gather from the judgment of the Chief Court at Bikaneer, was the matter in dispute there. After the determination of that litigation, the *khola*, that is, the certificate of adoption, was issued by the State to the widow of Amar Chand. This is the fact, so far as it can be ascertained from the judgments of the Courts at Bikaneer.

It is said in this case that the plaintiff asked the Court to set aside the deeds of 1903 on the ground that they had been obtained by fraud or undue influence. The learned Judge of the primary Court came to the conclusion that there was no fraud or undue influence. That seems to be clearly correct because there is no evidence of either fraud or undue influence having been exercised by the defendant No. 1 in obtaining the deeds. Then the learned Judge remarks that the deeds would appear to show that the parties had entered into them on the footing of a common mistake, because they had been entered into by the widow of Amar Chand and the present appellant on the footing that the present appellant was the sole reversionary heir to the estate of his natural brother Amar Chand. But the learned Judge says that it is an admitted fact that Amar Chand had passed out of the family on his adoption by Ganga Das and that, therefore, the deeds could not be by way of a family arrangement, as the appellant before us was not a member of the same family as the deceased Amar Chand. He, therefore, came to the conclusion that as against the plaintiff, the adopted son of Amar Chand, the deeds could not be set up as a bar to his rights to Amar Chand's properties that he would acquire on his adoption. That, I think, is right. The evidence in this case, as we have it, shows quite clearly that it is an admitted fact that Amar Chand passed out of the family of which the present appellant is a member into the family of Ganga Dass. There is

nothing on the record to suggest that Ganga Dass was a close or any relation of Swairam, the grandfather of the appellant, so that on the death of Amar Chand his reversionary heir would be his brother's son Mathura Das, the present defendant No. 1. That is the case that has been suggested in reply, but there is not a word to support such an allegation on the record. It seems to me quite clear in this case that these deeds entered into by the widow only with reference to her maintenance cannot be set up as deeds of family arrangement between the members of the family then in existence barring the rights of the adopted son, the plaintiff in the present suit. If that is so, the plaintiff is entitled to recover the share of Amar Chand and the learned Judge of the Court below has decreed to the plaintiff relief in that form. No objection has been raised or urged that the form of the relief that the learned Subordinate Judge has given to the plaintiff is incorrect, nor is it suggested that the finding that the learned Judge has arrived at, namely, that the plaintiff is entitled on his adoption to $\frac{2}{3}$rd of the properties is wrong. If that is so, I think there are no reasons to come to any conclusion different from that arrived at by the learned Judge of the Court below, namely, that the plaintiff having proved that he was duly adopted by the widow of Amar Chand as a son to her deceased husband is not barred by the deeds of April 1903 from recovering the property of the deceased Amar Chand.

A point has been made in this case that there is a decision reported somewhere in some of the unauthorized reports (27 Indian Cases*) of the Chief Court in the Punjab to the effect that an adoption of this sort amongst Maheswari Hindus is not permitted. The case does not establish anything of the sort. In that case, it was stated that one of the widows in a joint and unseparated Hindu family had attempted to adopt without the consent of the kinsmen a son into the joint family. That is a totally different case from the case of a widow of a separated brother adopting of her own motion a son to her deceased husband, as in the present case.

I think the conclusion arrived at by the learned Subordinate Judge of Darjeeling was correct. The present appeal, therefore, fails and must be dismissed with costs.

SHAMSUL HUDA, J.—I agree.

Appeal dismissed.

*See 27 Ind. Cas. 701.—*Ed.*

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 143 OF 1915.

December 17, 1917.

Present:—Mr. Justice Shah Din and Mr. Justice Scott Smith.

ALLAH YAR—PLAINTIFF—APPELLANT

versus

THAKAR DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Lekha mukhi *mortgage—Redemption, suit for—Failure of mortgagee to keep full and regular accounts, effect of Presumption—Civil Procedure Code (Act V of 1908, O XXII, r. 4—Death of respondent—Application for bringing legal representative on record not made within limitation—Appellant living at great distance from respondent—Sufficient cause—Limitation Act IX of 1908, s. 5*

In a suit for redemption of a *lekha mukhi* mortgage, the question of the liability of the mortgagor and the mortgagees *inter se* was referred to a Local Commissioner, who found that the mortgagees did not keep full and regular accounts of the income and expenditure of the land in suit and who, therefore, based his report on the statement of the mortgagees' *daubir*:

Held, (1) that it was the duty of the mortgagees to keep full and regular accounts of the income and expenditure of the mortgaged land; [p. 11, col. 1.]

(2) that in view of their failure to keep such accounts every presumption should be made against them; [p 11, col. 2.]

(3) that the report of the local Commissioner based on the statement of the mortgagees' own *daubir* must be accepted as correct. [p. 12, col. 1.]

One of the respondents in an appeal died on the 7th April 1915. An application to bring his legal representative on the record was not made till the 3rd December. It appeared from the affidavit of the appellant that the deceased lived in Multan City while the appellant himself lived in a village in Muzaffargarh District and that, therefore, he did not know of the death of the respondent till shortly before he made the application:

Held, that the appellant had sufficient cause for not making the application within the prescribed period of limitation. [p. 10, col. 1.]

Appeal from the decree of the District Judge, Multan, dated the 12th October 1914, decreeing the claim on payment by the plaintiff of the sum of Rs. 7,200 to defendants.

The Hon'ble Mr. *Muhammad Shafi*, for the Appellant.

ALLAH YAR *v.* THAKAR DAS.

Bakhshi *Tek Chand*, for the Respondents.

JUDGMENT.—The learned Pleader for the respondents has urged as a preliminary objection that since one of the respondents, Sukha Nand, died on the 7th April 1915 and no application to bring his legal representatives on the record was made till after the expiry of more than six months from that date, the appeal has abated. From the affidavit, which the appellant filed in support of his application, dated the 3rd December 1915, it appears that Sukha Nand deceased lived in Multan City, while the appellant lives in a village in the Muzaffargarh District, and, therefore, did not know of the death of Sukha Nand until shortly before he made the application of the 3rd December. We think that the appellant had sufficient cause for not making the application of the 3rd December within the prescribed period of limitation and we, therefore, set aside the abatement, and overrule the preliminary objection.

This appeal has arisen out of a suit brought on the 13th October 1912 by plaintiff-appellant against the defendants-respondents for possession, by redemption, of 2·37 *kanals* 8 *marlas* of land, situate at Khera Shahamad in the District of Multan, which was mortgaged with possession to the defendants-respondents other than Sheikh Abdul Hakim by a registered mortgage-deed, dated the 12th March 1896 (Exhibit P 2), for a sum of Rs. 7,500. One of the original mortgagees was one Kaura Malik, who had advanced to the mortgagor Rs. 6,000 out of the mortgage money; a few years after the date of mortgage he transferred his rights to Sheikh Abdul Hakim, and the latter has, therefore, been sued by the plaintiff as a mortgagee in possession. In his plaint the plaintiff alleged that the whole of the mortgage money Rs. 7,500 had been paid off from the produce of the mortgaged land, and that in fact on a proper settlement of accounts it would be found that the mortgagees had realised from the produce a larger amount than was due to them on account of the principal mortgage money and the interest due thereon and the expenses incurred by them, and the plaintiff, therefore, claimed a decree for possession of the mortgaged property without payment of any money and for recovery of the surplus amount, if any, that may be found due to him from the mortgagees according to the *lekha mukhi* accounts. In their written *jawab-i-dawa*, dated the 10th November 1912, the mortgagees pleaded, *inter alia*, that besides the principal mortgage money, Rs. 7,500, a sum of Rs. 7,794-13-9 was due to them by the mortgagor on account of interest and *lagat* under the terms of the mortgage-deed, and that the total amount of the charge on the land was, therefore, Rs. 15,294-13-9, without payment of which amount the plaintiff was not entitled to redeem the mortgage. Upon the pleadings of the parties the District Judge framed seven issues, which are printed at pages 105 and 106 of the paper-book. Of those issues the last three are the most important, as in view of the arguments advanced before us at the hearing, it has become wholly unnecessary to record any decision on the first four issues.

The District Judge appointed Mehta Tek Chand, Pleader, as local Commissioner to examine the account books of the mortgagees and to submit a report regarding the income and expenditure of the mortgaged land during the currency of the mortgage. Mehta Tek Chand submitted his report on the 2nd January 1914, which is printed at pages 123 to 127 of the paper-book. The District Judge also appointed another local Commissioner, Munshi Abdul Rahman, for inquiry and report regarding issues Nos. 5, 6 and 7 (page 106 of the paper-book), and Munshi Abdul Rahman submitted his report on the 25th January 1914 (pages 131 and 132 of the paper-book). On the 22nd January 1914 the mortgagees filed objections to the report of Mehta Tek Chand, and on the 2nd March 1914 they also filed objections to Munshi Abdul Rahman's report. Munshi Abdul Rahman was examined in Court as a witness on the 17th June 1914 (pages 139 and 140), and Mehta Tek Chand was similarly examined on the 23rd June 1914 (pages 143 and 144). On the 12th October 1914 the District Judge delivered his judgment by which he gave the plaintiff a decree for redemption of the land in suit on payment of Rs. 7,200 by the end of November 1914 and directed the parties to pay their own costs.

The plaintiff has appealed to this Court and in support of his appeal the principal

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contention advanced by [illegible] Counsel is that since the District Judge has held that the mortgagees, who had held possession of the mortgaged land under a *lekha mukhi* mortgage, had not kept full and proper accounts of the produce realised by them, every presumption should be made against them, and that, therefore, the District Judge should have accepted the report of Munshi Abdul Rahman, based as it is on the statement of the mortgagees' own *daubir* Sewa Ram that during the seventeen years that the mortgagees had held possession of the land the estimated value of the produce realised by them amounted to Rs. 36,325-15-9. According to that report, it has been contended by the learned Counsel, the mortgage money, together with interest due thereon and the amount of the expenditure legitimately incurred by the mortgagees under the terms of the deed of mortgage, have been paid off out of the produce of the land and a considerable surplus is due to the mortgagor from the mortgagees, for which he should be given a decree in this case.

The first and most important question for consideration is whether the mortgagees had kept full and regular accounts of the income and expenditure of the land as they were bound to do under their *lekha mukhi* mortgage. On this point the report of Mehta Tek Chand is clear and his conclusion has been accepted by the District Judge. The District Judge says in his judgment at page 147: "Tek Chand's report as to accounts is clear and well reasoned. No accounts are forthcoming for the first four years after the mortgage, as they were with the previous mortgagees from whom the defendants, to whom the mortgage was assigned, have derived their title. The books of accounts produced by the mortgagees defendants are not regularly kept, and no daily balances are struck in them. An entry in such books can be made at any time and they carry no presumption of correctness as attaches to regular books of accounts."

The learned Counsel for the mortgagor strongly relies on the above finding recorded by the District Judge and urges that in view of that finding and according to the uniform current of decisions of this Court and of the High Courts, every presumption should have been made against the mortgagees and that his client was entitled to get credit for the income which could have been derived from the mortgaged land by the highest estimate. The mortgagees' own *daubir* Sewa Ram was examined by Munshi Abdul Rahman, local Commissioner, and his statement is printed at page 130. Munshi Abdul Rahman says in his report (page 131): "The parties have not produced before me any proof in respect of the rates of produce. Papers relating to the income of produce from 21 harvests, *i. e.*, from *kharif* 1902 to *kharif* 1912, were prepared and the rate was charged according to the statement of Sewa Ram, *daubir* of the defendants. According to these papers, after deduction of expenses on *kamins* and fodder for bullocks Rs. 21,936-15-9 on account of the *mahsul* of produce is realised for 21 harvests, and Rs. 500 on account of *mahsul bhusa*, the estimate whereof has been made, according to the statement of the defendants' *daubir* Sewa Ram, at the rate of 4 annas per maund of wheat, the total of which comes up to Rs. 22,436-15-9. As regards the calculation of income of the remaining 13 harvests, there are no other means but that it may be made in proportion to the income of the above mentioned 21 harvests, which amounts to Rs. 22,436-15-9. According to this proportion, the estimate of the income of 13 harvests comes up to Rs. 13,889. Adding them to Rs. 22,436-15-9 on account of the income of 21 harvests, the estimate of income of 34 harvests in suit comes up to Rs. 36,325-15-9." The mortgagor's learned Counsel has laid great stress on this part of Munshi Abdul Rahman's report, and has strongly urged that, in view of the absence of proper and regular accounts which the mortgagees were in law bound to keep, his client is entitled to take credit to the extent of Rs. 36,325-15-9 as the value of the produce that must be presumed to have been taken by the mortgagees during the period of their possession of the mortgaged land. It is further contended that since Munshi Abdul Rahman has, in his statement in Court, fully supported his report which has not been shown to have been based upon wrong data, there is no reason whatever for not accepting that report in full. This part of Munshi Abdul Rahman's report is based on a detailed statement prepared by him according to the rates

given by Sewa Ram, *daubir* of the mortgagees, which statement, though not printed on account of its great length, is on the record of the District Judge and constitutes a valuable piece of evidence in support of the plaintiff's claim. Nothing was brought out in the evidence of Munshi Abdul Rahman in Court to show that the statement prepared by him was in any particular erroneous.

It will be seen from Munshi Abdul Rahman's report that he also prepared an estimate of the income of 21 harvests according to the *jhar bandobast* and that according to that estimate the income of the produce, after necessary deductions, comes up to Rs. 15,283-15-0. Calculated on the above basis, the estimate of the income of 34 harvests amounts to Rs. 26,850-3-6. In dealing with Munshi Abdul Rahman's report the District Judge has accepted the estimated income according to the *jhar bandobast* from the produce of 21 harvests as a more reliable figure than the estimated income of the same number of harvests according to the statement of the mortgagee's *daubir* Sewa Ram, which amounts to Rs. 22,436-15-9. The District Judge has also set off the expenditure of the first four years of the mortgage against the income of the land during the same period, and calculating the estimated income for the remaining thirteen years or 26 harvests on the basis of the *jhar bandobast* he has arrived at the conclusion that the mortgagees must be taken to have realised an income of Rs. 18,922-11-0 from the produce of the land during the entire period of their possession. According to him, the total amount of money which the mortgagees are entitled to recover from the mortgagor up to *kharif* 1912 comes to Rs. 26,200-14-6; and deducting from this figure the sum of Rs. 18,922-11 0 above referred to as the estimated income of 26 harvests, he finds that the balance due to the mortgagees is Rs. 7,278-13-6 (page 148 of the paper-book). The District Judge further holds that during the two years from the *rabi* 1913 to *kharif* 1914, *i. e.*, the period during which the suit was pending in his Court, the income derived by the mortgagees exceeded the amount due to them by the mortgagor on account of interest, land revenue and other expenses by Rs. 92. He accordingly held that a round sum of Rs. 7,200 was due by the mortgagor to the mortgagees at the end of *kharif* 1914.

In our opinion there is great force in the contention advanced by the mortgagor's learned Counsel that the estimated income of the land for the period of seventeen years during which the mortgagees have been in possession, as based on the statement of their *daubir* Sewa Ram, should be accepted as more reliable than the estimated income based on the *jhar bandobast*, especially in view of the fact that the mortgagees have omitted to keep full and regular accounts of the income and expenditure of the land. But even if this contention be not accepted in its entirety, we fail to understand why the District Judge has not accepted the estimated income according to *jhar bandobast* for the full period of seventeen years during which the mortgagees have been in possession, and which, according to the report of Munshi Abdul Rahman, comes to Rs. 26,853-3 6. Since no accounts of the income and expenditure are forthcoming for the first four years of the mortgage, every presumption must be made against the mortgagees, and it is not right to counterbalance the expenditure against the income during that period, for the gist of Munshi Abdul Rahman's report is that the income derived from the land was much more than the amount of interest due on the mortgage money and the expenditure incurred by the mortgagees in possession. The case is one in which it is impossible to be mathematically accurate in defining the respective liabilities of the mortgagor and the mortgagees in terms of the amounts of money due by each party to the other, and the result must be based on rough calculations. After giving the matter our best consideration, we have come to the conclusion that the one thing which is clear and established on the record is that the mortgagees have, during the period of their possession of the mortgaged property, derived an amount of produce the value of which is at least equal to the total amount of money to which the mortgagees are entitled under their *lekha mukhi* mortgage of the 12th March 1896.

Upon this finding the plaintiff-appellant is entitled to a decree for possession by redemption of the mortgaged land without payment of any money. We accordingly

accept this appeal and in modification of the decree of the District Judge grant a decree in the above terms. The mortgagees will pay the costs of the mortgagor in both Courts.

Appeal accepted.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 87 OF 1916.

August 29, 1917.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Walmsley.

Srimati NAGENDRA BALA DASSI, WIFE OF NABAKUMAR HAZRA—DECREE-HOLDER—APPELLANT

versus

DEBENDRA NATH MAHIS AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Execution - Assignment of decree—Question whether assignee real or ostensible transferee, whether can be decided in execution proceedings—Pleader and client—Pleader for judgment-debtor purchasing decree, effect of—Judgment-debt, whether satisfied.

N took an assignment of a mortgage-decree and applied to the execution Court to have her name substituted in the place of the decree-holder The judgment-debtors lodged an objection to the effect that *N* was not the real assignee of the decree, but that her husband, who was the Pleader for the judgment-debtors in the execution case, was the real purchaser of the decree, and that the effect of the purchase of the decree by the Pleader for the judgment-debtors was to satisfy the decree and to discharge the judgment-debtors:

Held, that the Pleader was not and could not be a party to the execution case and no question could consequently be decided as between him and his wife as to who was the beneficial owner of the decree. [p 14, col. 2.]

That the effect of the purchase of a decree by the Pleader for the judgment-debtors is not to satisfy the decree and to release the judgment-debtors from their liability, although the Pleader holds the decree assigned to him in trust for his clients, and, if called upon by his client to do so, is bound to assign the decree to him. No Court will, however, decree such a re-conveyance except upon equitable terms. [p. 15, col. 1.]

Appeal against the order of the Subordinate Judge, 1st Court, Midnapore, dated the 11th March 1916.

Mr. *C. R. Dass* and Babus *Biraj Mohun Majumdar* and *Mohini Mohun Chatterjee*, for the Appellant.

Babus *Brojolal Chakravartty* and *Santimoy Majumdar*, for the Respondents.

JUDGMENT.—This is an appeal against an order in an execution case to the effect that the decree must be considered as satisfied and the judgment-debtors fully discharged The events which have led up to this order are not in controversy at this stage. On 19th February 1907, Rani Mrinalini, wife of Raja Narendra Lal Khan of Narajole, obtained a consent decree in a mortgage suit against the respondents. There were various proceedings in execution, which need not be recited for our present purpose. On the 15th February 1915, the present appellant, Nagendra Bala Dassi, applied to the execution Court to have her name substituted in the place of the decree-holder, on the allegation that she had taken an assignment of the decree on the 7th February 1915. On the 20th February 1915, the original decree-holder intimated to the Court that she had transferred the decree and had no objection to the grant of the application. The judgment-debtors took time to put in objections, but as they did not enter appearance on the day fixed, the name of the appellant was duly substituted and execution was directed to proceed at her instance. Four of the judgment-debtors subsequently applied to the Court to reconsider the matter, and their application was granted. Thereupon, they lodged an objection to the effect that the appellant had not really taken an assignment of the decree, but that her husband Babu Nabakumar Hazra, who was the Pleader for the judgment-debtors in the execution case, was the purchaser of the decree and had put forward his wife as the ostensible transferee. The Subordinate Judge then proceeded to determine the question, whether Nagendra Bala Dasi or Babu Nabakumar Hazra had taken an assignment of the decree and came to the conclusion that the Pleader had purchased the decree with his own money. The Subordinate Judge also found that the assignment had been taken for Rs. 11,500, while a much larger sum was due under the decree. The Subordinate Judge next proceeded to consider what he calls the legal and equitable aspect of this transaction and held that the effect of the purchase of the decree by the Pleader for the judgment-debtors was to satisfy the decree and to

discharge the judgment-debtors. Nagendra Bala Dassi has now appealed to this Court, and on her behalf the decision of the Subordinate Judge has been assailed substantially on two grounds, namely, *first*, that the evidence does not establish that she was not the real purchaser of the decree, assuming that the question can be raised in execution proceedings, and *secondly*, that the decree cannot be treated as extinguished even if it be found that her husband had made the purchase with his own money. We are of opinion that the order of the Subordinate Judge cannot possibly be supported.

In the first place, the Subordinate Judge has decided the question of the reality of the assignment of the decree to the appellant, as if her husband were a party to the present proceedings. The Pleader, however, is not and could not be a party to the execution proceedings, and no question could consequently be decided as between him and his wife as to who was the beneficial owner of the decree.

In the second place, even if it were assumed that the Pleader had taken an assignment of the decree (which we do not decide upon the evidence), it is plain that the decree could not be deemed as extinguished and the judgment-debtors treated as fully discharged. The Subordinate Judge has not correctly appreciated the law applicable to cases of this character. It is well settled that while the relation of Pleader and client continues, the Pleader cannot as against his client acquire absolutely a beneficial interest in or title to the subject-matter of the litigation antagonistic to that of his client; in the language of the framers of section 88 of the Indian Trusts Act, 1882, a legal adviser, who under such circumstances gains a pecuniary advantage, must hold for the benefit of his client the advantage so gained. The reason for this rule is obvious; no person in the position of a Pleader, who rightly enjoys the confidence of his client, can be allowed to derive any benefit to the detriment of his client by reason of information acquired during the course of his employment. In *Hobday* v. *Peters* (1) a mortgagor consulted a solicitor who turned her over to his clerk to assist her gratuitously. The clerk, by reason of information derived during such consultation, bought up the mortgage for less than half the amount. It was ruled by Romilly, M. R., that he was a trustee for the benefit of the mortgagor. In *Macleod* v. *Jones* (2) a solicitor who had purchased securities given by his client for smaller sums than the amount secured, was not allowed to hold the purchased securities as a security to himself for a larger sum than the amount which he had expended in making the purchase. But as the Court had a discretion with regard to the allowance of interest in such cases, the solicitor was allowed five per cent. on the sum he had expended in making the purchase. *Macleod* v. *Jones* (3), *Unsworth's Trust, Re* (4) and *Douglas* v. *Culverwell* (5). The leading decision on the subject is that of *Carter* v. *Palmer* (6), where the House of Lords ruled that the employment of Counsel as Legal Adviser disqualified him from purchasing for his own benefit charges on his client's estates without provision, and that even though the confidential employment ceases, the disability continues as long as the reason on which it is founded continues to operate. *Broun* v. *Kennedy* (7), *Pisani* v. *Attorney-General* (*Gibraltar*) (8), *MacPherson* v. *Watt* (9), *Luddy's Trustee* v. *Peard* (10), *Rhodes* v. *Bate* (11) and *Austin* v. *Chambers* (12). These principles have been

(1) (1860) 28 Beav. 349; 29 L. J. Ch. 780; 2 L. T. 590; 6 Jur. (N. S.) 794; 8 W. R. 512; 54 E. R. 400; 126 R. R. 162.

(2) (1883) 24 Ch. D. 289; 53 L. J. Ch. 145; 49 L. T. 321; 32 W. R. 43.

(3) (1884) 32 W. R. 660; 53 L. J. Ch. 534; 50 L. T. 358.

(4) (1865) 2 Dr. & Sm. 337; 13 W. R. 448; 62 E. R. 649, 143 R. R. 150.

(5) (1862) 4 De G. F. & J. 20; 3 Giff. 251; 5 L. T 484; 31 L. J. Ch. 65 & 543; 10 W. R. 189 & 327; 6 L. T. 272; 45 E. R. 1089; 135 R. R. 11.

(6) (1842) 8 Cl. & Fin. 657; 11 Bligh (N. S.) 397; 8 E. R. 256; 54 R. R. 145.

(7) (1864) 4 De G. J. & S. 217; 33 L. J. Ch. 71 & 342; 9 L. T. 302 & 736; 10 Jur. (N. S.) 141; 12 W. R. 224 & 360; 46 E. R. 901; 140 R. R. 47; 33 Beav. 133; 9 Jur. (N. S.) 1163.

(8) (1874) 5 P. C. 516; 30 L. T. 729; 22 W. R. 900.

(9) (1878) 3 A. C. 254.

(10) (1886) 33 Ch. D. 500; 55 L. J. Ch. 884; 55 L. T. 137; 35 W. R. 44.

(11) (1866) 1 Ch. 252; 35 L. J. Ch. 267; 12 Jur. (N. S.) 178; 13 L. T. 778; 14 W. R. 292.

(12) (1838) 6 Cl. & Fin. 1; 7 E. R. 598; 49 R. R. 1.

recognised and applied in a variety of cases in Indian Courts. *Fuzeelun Beebee* v. *Omdah Beebee* (13), *Nundeeput Mahta* v. *Mr. Alexander Shaw Urquhart* (14), *Subbarayudu* v. *Kotayya* (15), *Aghore Nath Chuckerbutty* v. *Ram Churn Chuckerbutty* (16) and *Goshain Jug Roop Geer* v. *Chingun Lal* (17). These cases, however, do not support the view taken by the Subordinate Judge. Assume that a decree for Rs. 10,000 has been purchased, by the Pleader for the judgment-debtor, from the decree-holder for Rs. 5,000. On principle and on the authorities, the Pleader holds the decree assigned to him in trust for his client, and, if called upon by his client to do so, is bound to assign the decree to him. But no Court will decree such re-conveyance except upon equitable terms. It is impossible on any conceivable principle to justify the position that the effect of the assignment to the Pleader is forthwith to extinguish the judgment-debt and to release the judgment-debtor from liability. In the case before us, such of the judgment-debtors as have entered appearance have not offered to bring into Court the sum which, according to their own case, the Pleader had paid for the purchase of the decree. An additional difficulty has been created by the fact that there are several sets of judgment-debtors, whose liabilities are apparently distinct under the decree and who have from time to time paid different sums in reduction of their respective liabilities. Under these circumstances, it is not practicable in these proceedings to go behind the decree and to alter the liabilities of the parties, after investigation of the sum which would be equitably payable by the judgment-debtors to the assignee of the decree before they can obtain a re-conveyance thereof. We hold accordingly that this appeal must be allowed and the order of the Subordinate Judge set aside. The assignee (the appellant before us) will be entitled to proceed with the execution of the decree and the execution proceeding will stand revived for that purpose. No steps, however, will be taken in execution till the 1st January 1918, so that the judgment-debtors may have ample time to institute, if they are so advised, a suit against the assignee of the decree and her husband to obtain a transfer of the decree in their own favour, on proof of the allegations they have made and upon payment of such sum as the Court may determine. The appellant is entitled to her costs both here and in the Court below. We assess the hearing fee at five gold *mohurs* in this Court.

Appeal allowed

(13) 10 W. R. 469; 11 B. L. R. 60*n*.
(14) 13 W. R. 209; 4 B. L. R. A. C. 181.
(15) 15 M. 389; 5 Ind. Dec. (N. S.) 623.
(16) 23 C. 805; 12 Ind. Dec. (N. S.) 535.
(17) 2 N. W. P. H. C. R. 46.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 266 OF 1916.

September 19, 1917.

Present:—Sir John Wallis, KT., Chief Justice, Mr. Justice Bakewell and Mr. Justice Kumaraswami Sastri.

SRINIVASA RANGA RAO PANTULU (DIED) BY THE OFFICIAL ASSIGNEE, HIGH COURT, MADRAS, AND ANOTHER—PETITIONERS—APPELLANTS

versus

RAJA KUMARA VENKATA PERUMAL RAJA BAHADUR VARU, MINOR RAJA OF KARVETNAGAR, BY HIS GUARDIAN MR. VARADACHARIAR—COUNTER-PETITIONER—RESPONDENT.

Madras Court of Wards Act (I of 1902), *s.* 41, *scope of—Unnotified claims—Failure to give notice, effect of—Cessation of interest, finality of—Notified claims, priority of payment of, effect of, on unnotified secured claims—Executing Court, functions of, whether affected by section—Civil Procedure Code* (*Act XIV of* 1882), *ss.* 323, 325.

The penalty provided in the first part of section 41 of the Madras Court of Wards Act as to cessation of interest on unnotified claims is final, the claimant being left to prosecute his legal remedies for the amount already accrued due to him. [p. 16, col. 2.]

A restrictive construction should not be put on the highly general provisions of section 41 of the Madras Court of Wards Act. [p. 16, col. 2.]

The latter part of the section postponing unnotified claims to those notified or admitted under section 38 cannot be construed as depriving secured creditors who have notified their security or as authorising the application of money raised on their securities otherwise than in satisfaction of their claims. It only prohibits payments to them by the Court of Wards out of the unencumbered funds at its disposal, and does not prohibit the realisation of

the security and satisfaction out of the proceeds of the secured creditors' claims. [p 16, col. 2; p. 17 col. 1.]

The prohibition of payment in the section is confined to the Court of Wards and does not extend to the authorities executing decrees even during the continuance of its superintendence. Creditors, whether they have notified or not, are not prevented from obtaining decrees and executing them. [p. 17, col. 1.]

The provisions of the section do not affect the duties of executing Courts or the functions of the decree-collector under sections 321 to 325 (c) of the Civil Procedure Code of 1882. [p. 17, col. 1.]

Depuru Kalappa v *Umade Rajaha*, 8 Ind. Cas. 392; (1911) 1 M. W. N. 75; 8 M. L. T. 297, explained.

Appeal, under clause 15 of the Letters Patent, against the judgment of Mr. Justice Oldfield, in Civil Miscellaneous Appeal No. 107 of 1912, reported as 40 Ind. Cas. 811, preferred against that of the District Court of North Arcot in Civil Miscellaneous Appeal No. 148 of 1911, in Execution Petition No. 132 of 1905, in Original Suit No. 7 of 1894.

Mr. *T. Narasimha Aiyangar*, for the Appellants.

Mr. *L. Venkatragava Iyer*, for the Respondent.

JUDGMENT.

WALLIS, C. J.—In construing the provisions of section 41 of the Madras Court of Wards Act, I of 1902, regard must be had to the scope and object of the amendments introduced into the Madras Court of Wards Regulation V of 1804 by Madras Act IV of 1899 and reproduced without substantial alteration in the Act of 1902. The object was to save the estates of embarrassed proprietors or at least a portion of them for their owners, and it was hoped that, with the aid of the additional powers conferred on it, the Court of Wards would be able to provide for the full discharge of the proprietor's debts and liabilities. If not, the creditors were left to their ordinary remedies, which were only interfered with as expressly provided. Among the powers conferred on the Court of Wards and its agent the Collector, specified in the order under section 19 of the Act, was that of requiring all persons having pecuniary claims on the ward, whether decrees or not, to notify those claims within a specified period, failure to do so being visited with the penalties prescribed by sections 41 and 42. With the information thus acquired and with further powers of ousting usufructuary mortgagees from possession and converting them for the time into simple mortgagees and of reviving improvident leases, it was hoped that the Court of Wards might find itself in a position to raise sufficient money to discharge all the liabilities. Section 41 imposes two penalties with regard to claims which have not been duly notified. The first of them is that "it shall, notwithstanding any law, contract, decree or award to the contrary, cease to carry interest from the expiration of the period prescribed by section 37, for notifying claims." This threatened loss of interest was strong inducement to notify claims and having regard to the express provision that interest shall cease even when payable under a decree and to the absence of any provision as to its again becoming payable except in the event specified in section 55 (4), I agree with both the learned Judges that under the section, the cessation of interest is final and that the claimant is left to prosecute his legal remedies for the amount already accrued due to him.

As regards the second penalty that the unnotified claim "shall not be paid until after the discharge or satisfaction of the claims notified or admitted under section 38", it may be observed, in the present place, that the provision cannot be construed as depriving secured creditors of their security or as authorising the application of money raised on their securities otherwise than in satisfaction of their claims. If not paid, the secured creditor is entitled to retain his security till he is paid. In these circumstances to hold that the Court of Wards is prohibited by this section from raising money on the security and discharging the secured creditor and applying the surplus in the discharge of the general indebtedness would merely be to prevent the Court from raising money for the beneficial purposes specified in section 323 (3), Civil Procedure Code, and would unnecessarily embarrass it in the discharge of the difficult function entrusted to it without advantage to anybody. This cannot, I think, have been the intention of the Legislature, and I think that, therefore, we are not justified in putting a restrictive construction on this highly general section and that in the case of secured creditors who have not notified, it only prohibits payments

to them by the Court of Wards out of the unencumbered funds at its disposal, and does not prohibit the realization of the security and satisfaction out of the proceeds of the secured creditors' claim.

If the prohibition of payment in section 41 is directed to the Court of Wards, it follows, of course, that it must cease, as held by Krishnan, J., when the Court of Wards withdraws from superintendence. I am disposed to think that it must be confined to the Court of Wards, and that it does not extend to the authorities executing decrees even during the continuance of the superintendence of the Court of Wards. Creditors, whether they have notified or not, are not prevented from obtaining decrees and proceedings to execute them. If the execution is left to the Civil Courts, each Court must execute the decree before it with due regard to the rights of secured creditors and to the rights of the unsecured decree-holders to rateable distribution. It can hardly have been intended that, on each occasion of executing a decree, the executing Court should have to embark on an enquiry whether all the notified debts have been paid, and I think that sufficient effect may be given to section 41 without construing it as affecting the duties of executing Courts, and that if it had been intended to affect them there would have been express provisions to that effect. Again, when the Local Government exercises its power under section 45 of transferring decrees against the Ward to the Collector for execution, I think the same considerations apply and that the provisions of section 41 as to the order of payment do not affect the decree-collector, as he is called, in the discharge of his duties under sections 321—325 (c) of the old Code of Civil Procedure, which are made applicable by section 47 subject to the rules prescribed by the Local Government under section 45 (2) which, however, apply only to procedure and do not affect the substantive right of the parties. In the case of decrees such as the present obtained by secured creditors ordering the sale of immoveable property in pursuance of a contract specifically affecting the same, the decree-collector has the powers conferred upon him by section 321 and is required by section 324 (a) to apply the moneys realized by him, subject to the claims of maintenance-holders, in execution of the decree for which the Court ordered the sale of the immoveable property, and in the case of other decrees to apply such moneys by way of rateable distribution. Under section 323 (3) the decree-collector is also empowered to discharge the claim of any encumbrancer, whether it has matured or not, "for the purposes of improving the saleable value of the property available or any part thereof or rendering it more suitable for letting or managing, or for preserving the property from sale in satisfaction of an encumbrance". I do not think that the second part of section 41 was intended to affect the decree-collector as regards these powers and duties.

This is an attempt to execute a mortgage decree passed in 1895 It is stated by the District Judge of North Arcot in his order on the connected Execution Petition No. 79 of 1912, dated 21st November 1912, that the Court of Wards assumed management on 26th July 1899 and gave up management of the estate on 27th September 1905, and that decrees were transferred to the Collector for execution and re-transferred to the Civil Courts on 27th February 1903. It is also stated that the Court of Wards again assumed superintendence on the 27th August 1907 and relinquished it on 15th January 1910, but it is stated that decrees were again transferred to the Collector for execution during that period, and that execution still remains with the Civil Courts. As it is now more than 18 years since the Court of Wards first took over management and the other secured and unsecured claims have not yet been satisfied, it seems exceedingly unlikely that they ever will be satisfied and if they are not, the money which has been realised on account of the defendant's security and which is in Court must, according to the District Judge's order, remain there for ever, a result which the Legislature can certainly not have contemplated. In passing the order, the learned District Judge relied on a ruling contained in a judgment to which I was a party with Krishnaswami Ayyar, J., in *Depuru Kalappa* v. *Umade Rajaha* (1) that the provisions of section 41 are absolute,

(1) 8 Ind. Cas. 392; (1911) 1 M. W. N. 75; 8 M. L. T. 297.

except in so far as they are cut down by section 55 (3) and Oldfield, J., has also relied on this ruling. That was an appeal against an order in which the District Judge had held that the *zemindari* was not liable to be proceeded against for money debts incurred by the previous holder and the order was reversed on the ground that his view was wrong. Apparently the District Judge's ruling in that case, that section 41 was not applicable when the decree was being executed in the Civil Court, was also questioned before us; and, as to this, I now think we expressed ourselves too broadly, because while I am still of opinion that the provisions of section 41 as to the cessation of interest continue to apply, I have come to the conclusion on a fuller consideration of the subject that the further provisions of the section are inapplicable, for the reasons already given, to the present case. In the result we agree with the order proposed by Krishnan, J. Costs of the appeal to abide the result.

BAKEWELL, J.—I agree.

KUMARASWAMI SASTRI, J.—I agree.

Appeal allowed.

M. C. P.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1891 OF 1915.

January 11, 1918.

Present:—Mr. Justice Richardson and Mr. Justice Beachcroft.

Sheikh JAHADALI AND OTHERS—DEFENDANTS—APPELLANTS

versus

Srimati AJIMANNESSA BIBI—PLAINTIFF AND *Sheikh* RAJABALI AND OTHERS—*Pro forma* DEFENDANTS—RESPONDENTS.

Pleader and client—Admission of fact by Pleader, whether binding on client—Appeal—Appellate Court, failure of, to consider admission—Remand.

An admission of fact by the Pleader of a party is binding upon his client and the opposite-party cannot be arbitrarily deprived of the benefit of the admission. [p. 19 col. 1.]

A Munsif made the following statement in the course of his judgment: "The learned Pleader for the plaintiff concedes in his argument that the land in suit is included in the lands mentioned in the sale certificate." In decreeing the appeal from the decision of the Munsif, the Appellate Court entirely ignored this admission or concession of the Pleader made in his argument in the Trial Court:

Held, that as the Appellate Court did not appreciate or realise the legal effect of the admission by the Pleader, the case must be remanded to that Court in order that the appeal thereto might be re-heard, on the footing that the admission in question was in fact made in the Trial Court. [p. 19, col. 1.]

Appeal against the decree of the Subordinate Judge, Hooghly, dated the 3rd May 1915, reversing a decision of the Munsif, 3rd Court, at Arambagh, dated the 12th February 1914.

Babus *Mohendra Nath Roy* and *Jyotis Chandra Hajra*, for the Appellants.

Babu *Dwarkanath Chakrabuty* and Babu *Phanindra Nath Das* for Babu *Nisith Nath Ghatak*, for the Respondents.

JUDGMENT.

RICHARDSON, J.—This appeal turns upon a short point. The contest relates to certain property. The plaintiff in the suit Srimati Ajimannessa Bibi makes a title to the property under a *hiba-bil-ewaz* dated the 28th *Chaitra* 1316 B. S. (April 1910) executed in her favour by her deceased husband Kebad Ali. The principal defendant, defendant No. 3, on the other hand claims to have purchased the property in the year 1901 at a Court sale held in execution of a decree obtained against Kebad Ali. One of the questions which arose was, whether the property claimed by the plaintiff was identical with the lands specified in the sale-certificate issued to defendant No. 3. On this point the learned Munsif in the Trial Court makes the following statement in the course of his judgment: "The learned Pleader for the plaintiff concedes in his argument that the land in suit is included in the lands mentioned in the sale-certificate." Now the learned Munsif is plainly speaking of an admission made by the plaintiff's Pleader of the identity of the land claimed in the suit with the land mentioned in the sale-certificate. In the Court of Appeal below, however, the learned Subordinate Judge entirely gave the go-by to this admission. He seems to have treated the admission or concession as an admission made for the purpose of the argument.

That is clearly not the nature of the admission and it is impossible on the face of the record, regard being had to the whole tenour of the Munsif's judgment, to accept the learned Judge's view of what took place in the Trial Court. Having disregarded the admission the learned Subordinate Judge has found that the property in question is not identical with the property mentioned in the sale-certificate and so finding, he took what may be termed a short cut to the decision of the appeal. I am of opinion that he was not entitled to deal with the case in that way. An admission of fact by a learned Pleader is binding on his client and the opposing party cannot be arbitrarily deprived of the benefit of the admission. If any authority is required, reference may by made to the case of *Sreemutty Dossee* v. *Pitambur Pundah* (1). It is evident that the learned Subordinate Judge did not appreciate or realize the legal effect of the admission as an admission by a Pleader on behalf of his client.

I may add that if there was any mistake on the Munsif's part, it seems extraordinary that no steps were taken in his Court by way of review to correct the plain and clear statement in his judgment. The point again was not taken in the grounds of appeal filed in the lower Appellate Court and it is impossible to suppose that if the admission had not in fact been made, that point would have been omitted. In the circumstances, I am of opinion that the judgment and decree of the lower Appellate Court must be set aside and the case must be remanded to that Court in order that the appeal thereto may be re-heard on the footing that the admission in question was in fact made in the Trial Court. The costs of the appeal will abide the result.

BEACHCROFT, J.—I agree.

Case remanded.

(1) 21 W. R. 332.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 205 OF 1917.

January 18, 1918.

Present:—Justice Sir Ali Imam, KT.

MAHABIR SAHU AND OTHERS—DEFENDANTS —APPELLANTS

versus

RAM SARAN SAHU AND OTHERS— PLAINTIFFS—RESPONDENTS.

Riparian rights—Upper and lower owners, rights of—Natural right to use water of stream for irrigation—Prescriptive right to exclusive use of water, acquisition of.

Riparian owners have a natural right to use the water of a natural streamlet for purposes of irrigation so long as that use is reasonable. [p. 21, col. 1.]

Where, however, a lower riparian owner has acquired a prescriptive right to the exclusive use of the water of a rivulet for irrigation purposes, a higher owner cannot use the water of the streamlet so as to interfere with the rights of the lower owner. [p. 21, col. 2.]

Appeal from a decision of the Subordinate Judge, Ranchi, dated the 22nd November 1916

FACTS.—In the District of Palamau, a streamlet called Dhaura takes its rise in the Ulgarah hills and falls into the river Amanat. On its eastern bank there are situated two villages, Taliderih and Nuru. Taliderih is situated higher up the streamlet and Nuru a little lower down it. The plaintiffs, who were owners of the village Nuru, constructed a *pucca* dam across the streamlet in front of the village forty years ago and thereby diverted the water to irrigate 100 *bighas* of their land. Defendants recently constructed a *kacha* dam in front of their village Taliderih to irrigate 5 *bighas* of their land. The plaintiffs brought the present suit for removal of the *kacha* dam constructed by the defendants and for an injunction preventing them from at all using the water for irrigation purposes. The Munsif ordered the removal of the dam constructed by the defendants but declared that they as upper riparian owners had a natural right to use the water for the purposes of irrigation to a reasonable extent, notwithstanding the prescriptive right of the plaintiffs to dam up the streamlet and divert its water for irrigating their land. On appeal the District Judge found that the plaintiffs had acquired a prescriptive right to dam the rivulet and use its water for irrigation and that the defendants had proved no such right in their favour. He gave the plaintiffs a declaration

that the defendants had no right to use the water for irrigation purposes at all.

The defendants appealed to the High Court.

Mr. *Parmeshwar Dayal*, for the Appellants.—The terms of the injunction granted by the Court below were too wide. According to the ordinary law each riparian owner has a right to use the water for irrigating his land abutting on a natural stream, provided that he does not thereby cause material injury to other like owners. The defendant being a higher riparian owner has a natural right to use the water for the purposes of irrigation. *Dinkar* v. *Narayan* (1), *Sheo Narain Singh* v. *Chandrabhal* (2), *Balbhadra Persad Singh* v. *Najiban* (3); Halsbury's Laws of England, Volume XXVIII, page 426.

India is an agricultural country, irrigation is one of the common objects for which the water of a natural stream may be utilized. Illustration (*g*) to section 7 of the Easements Act, V of 1882, lays down the same principle. English Law also goes very much on the same lines. Lord Halsbury in his Laws of England, Volume XXVIII, at page 426 says that a riparian owner may use the water for the irrigation of his land if he returns it into the river opposite his land with no other diminution than that caused by absorption or evaporation attendant on the irrigation. Thus it is clear that according to the English and Indian Law a riparian owner has a natural right to use the water of a streamlet for the purpose of irrigation to a reasonable extent. He further relied on *Secretary of State* v. *Ambalavana Pandara Sannidhi* (4), *Dinkar* v. *Narayan* (1), *Sheo Narain Singh* v. *Chandrabhal* (2) and *Balbhadra Persad Singh* v. *Najiban* (3).

The prescriptive rights acquired by the plaintiffs to divert the water of the streamlet as it reaches the village Nuru has got a double effect:

(1) It deprives the lower riparian owners of their right to receive the water of the streamlet undiminished by the act of the plaintiffs. As they have allowed the plaintiffs to divert the water by erecting the dam for forty years, they cannot now compel the plaintiffs to remove the *bund* and let the water flow down undiminished to their lands.

2. As against the higher riparian owners it has secured for the plaintiffs a right to make the water flow back in times of plenty so as to inundate their lands.

An upper riparian owner cannot complain of the inundation thus caused by the dam on his land.

As against the defendants who are higher riparian owners, the plaintiff has acquired no right to the exclusive user of the water of the streamlet. The plaintiff is not entitled to prevent the higher riparian owners from using the water in the exercise of their natural rights. He cannot say that he has, by virtue of his dam, acquired a vested right in the entire volume of water running down the stream from Ulgarah hills. He has no right to compel the higher owners to send to him the whole body of water without using a drop of it. Goddard on Easement, page 347.

[IMAM, J.—But the defendants have not been using the water for a long time. They have begun to use it only recently.]

The effect of non user is not to extinguish their natural rights. A riparian owner is not bound to use the rights that his riparian ownership gives him, but he may begin to do so whenever he likes and he can maintain an action against any other riparian owner for any act which may infringe his rights though he has never used them. Haslbury's Laws of England, Volume XXVIII, page 426.

Mr. *Kulwant Sahai*, for the Respondents.—The rivulet is a small stream. It hardly carries water sufficient to irrigate 100 *bighas* of plaintiffs' land. Under such circumstances, the defendant has got no right to use its water for irrigation.

Mr. *Parmeshwar Dayal* replied.

JUDGMENT.—The appellants are aggrieved by an order of the learned Subordinate Judge of Ranchi, who has reversed the order of the Munsif of Daltongunge. The plaintiffs' suit was for declaration that they have acquired by right of easement an absolute right to the entire water of a certain rivulet, that the principal defendants in the case have no right to take any water from this rivulet to irrigate their lands and that the plaintiffs should be awarded Rs. 200 as

(1) 29 B. 357; 7 Bom. L. R. 265.
(2) 10 Ind. Cas. 481.
(3) 4 C. L. J. 370; 11 C. W. N. 85.
(4) 18 Ind. Cas. 294; 37 M. 369 *note*.

damages and that there should be a perpetual injunction against the defendants prohibiting them from putting up a *bund* across the said rivulet.

It appears that a small stream rises from the Ulgarah hills and falls into the river Amanat. The defendants' village Taliderih and the plaintiffs' village Nuru are contiguous standing on the right bank of this rivulet. Taliderih is the higher village and Nuru is the lower one. The learned Subordinate Judge has come to the distinct finding that the plaintiffs who are the proprietors of Nuru have for more than forty years erected a *pucca* dam across this rivulet and that thereby they have been irrigating about 100 *bighas* of their lands situated in Nuru. It has also been held that this use that they have made of the water by putting up a *bund* has been an uninterrupted one. The learned Subordinate Judge has also come to the distinct finding that the defendants who were the proprietors of Taliderih have failed to prove that they have any right whatsoever to put a *bund* across this rivulet.

The principal point taken up in argument by the learned Vakil appearing on behalf of the appellants is that even if these findings are against the defendants, the judgment of the learned Subordinate Judge contains one declaration which is in excess of these findings and that he ought not to have allowed this additional burden to be placed upon the shoulders of the defendants. The passage in question in the judgment of the learned Subordinate Judge runs as follows: "It is further declared that defendants have no right to use the water of this streamlet for the purpose of irrigation." It is contended on behalf of the appellants that this order trenches upon their rights as riparian owners to make use of the water of this rivulet for the purpose of irrigation so long as that use is reasonable and natural. My attention is drawn to various authorities on the point and it may be conceded that so far as the proposition goes in relation to the rights of one riparian owner with reference to the rights of another riparian owner it is a sound one, but the case before me stands on a different footing altogether. The proprietors of Nuru are the plaintiffs in this case. Their right is not only of riparian owners, but as a matter of fact they have got a higher right in respect of the water of this rivulet by their having constructed the *pucca* dam across the stream so long as forty years ago and by their making use of the water all these years without any interruption. The learned Subordinate Judge has also come to the distinct finding that this streamlet as a matter of fact has a small supply of water and this is so little that the water of this streamlet is barely sufficient for the purposes of irrigating the plaintiffs' lands. It is evident, therefore that there is no such abundance of water coming through this streamlet as to irrigate the lands of the defendants without the lands of the plaintiffs suffering from want of water and as the right of the plaintiffs is established by prescription to the exclusive use of this water for the purpose of irrigating their 100 *bighas of* land, the ordinary incidents of riparian rights cannot be applied to their case.

In the circumstances the appeal is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1710 OF 1915 and 3818 OF 1914.

January 17, 1918.

Present:—Mr. Justice Richardson and Mr. Justice Beachcroft.

JOGENDRA KUMAR GHOSE AND OTHERS —APPELLANTS

versus

ANANDA CHANDRA MOZUMDAR AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VII, rr. 14, 18—Document not filed with plaint nor within time fixed by Court, admissibility of.

The plaintiff brought a suit for enhancement of rent on the basis of a *kabuliyat* which was not filed with the plaint as required by Order VII, rule 14, Civil Procedure Code, but was filed in Court after the time within which parties were directed by the Court to file their documents, and was therefore not received in evidence at the hearing of the suit:

Held, that as there was no doubt that the document was in existence at the date of the institution

of the suit, and also having regard to the proceedings which had taken place in the suit, the rejection of the document by the Courts below was not a proper or judicial exercise of the discretion conferred by Order VII, rule 18. [p. 23, col. 1.]

Mewa Lal Sahu v. *Kumerji Jha*, 2 Ind. Cas. 946; 13 C. W. N. 797; 10 C. L. J. 33, *Devidas Jagjivan* v. *Pirjada Begam*, 8 B. 377; 4 Ind. Dec. (N. S.) 625, followed.

Appeals against the decrees of the District Judge, Noakhali, dated the 21st March 1914, confirming those of the Munsif at Lakhipur, dated the 22nd April 1913

FACTS of the case appear from the judgment.

Babu *Probodh Kumar Das*, for the Appellants.—In refusing to admit the *kabuliyat* into evidence the Courts below did not properly exercise their discretion under Order VII, rule 18, Civil Procedure Code. No doubt the *kabuliyat* was not filed in proper time. When it was filed in Court it was ordered to be kept on the record. Then there was a local enquiry by an *Amin* to find out whether the defendants were in possession of land exceeding that for which rent had been previously paid. The *Amin* gave his report in favour of the plaintiff. At the hearing of the suit the *kabuliyat* was not admitted into evidence, and the suit so far as it related to the claim for increase of rent for excess area was dismissed. Having regard to the circumstances of the case and to the fact that the *kabuliyat* was in existence at the date of the suit the Courts below were wrong in rejecting the document. See *Mewa Lal Sahu* v. *Kumerji Jha* (1) and *Devidas Jagjivan* v. *Pirjada Begam* (2).

Babu *Surendra Nath Das Gupta*, for the Respondents.—The *kabuliyat* being the basis of the suit the Courts below were right in holding that it should not be admitted into evidence, and there is no sufficient reason for interfering with the discretion exercised by them.

Order VII, rule 14, of the Code of 1908 makes it incumbent upon the plaintiff to file with the plaint any document upon which he sues, if that document remains in his possession or power. Here the *kabuliyat* was in the possession of the plaintiff at the date of the suit, and he not having filed it in proper time the discretion under Order VII, rule 18, has been rightly and properly exercised by the Courts below.

Babu *Probodh Kumar Das* shortly replied.

(1) 2 Ind. Cas. 946; 13 C. W. N. 797; 10 C. L. J. 33.

(2) 8 B. 377; 4 Ind. Dec. (N. S.) 625.

JUDGMENT.

IN S. A. No. 1710 OF 1916.

This is an appeal by the plaintiff from the judgment and decree of the District Judge of Noakhali, dated the 21st March 1914, confirming the decree of the Munsif of Lakhipur, dated the 27th April 1913. The suit is a suit for rent at an enhanced rate on the footing that the tenants, the defendants, are in possession of an area in excess of that for which rent had previously been paid. The suit was instituted on the 15th April 1912. The first date for hearing was the 3rd July 1912. But thereafter there were a number of adjournments and on the 10th August 1912 the parties were directed to file their documents within seven days and the *kabuliyat* to which this appeal relates was in fact filed by the plaintiff on the 9th September 1912. The order then made was that the documents should be kept on the record. Further proceedings followed, including a local enquiry by an *Amin*. The case did not come on for hearing till the 21st April 1913. Then in the course of the examination of one of the witnesses the *kabuliyat* to which I have referred was tendered in evidence on behalf of the plaintiffs. The learned Munsif refused to admit it on the ground that it had been filed out of time. He decreed the suit for rent at the previous rate but dismissed it in so far as it related to the claim for increase of rent. The learned District Judge agreed with the Munsif that the *kabuliyat* was filed out of time and dismissed the plaintiff's appeal preferred in his Court. It appears that the Courts below refused to accept this *kabuliyat* in evidence on the ground that being a document on which the suit was in part based it was not filed along with the plaint under rule 14 of Order VII. In such cases rule 18 of the same Order gives these Courts a discretion to accept a document not filed with the plaint. The rule says that a document which ought to have been produced in Court by the plaintiff when the plaint was presented and was not so produced "shall not without the leave

of the Court be received in evidence at the hearing of the suit." Now the cases of *Devidas Jagiivan* v. *Pirjada Begam* (2) and *Mewa Lal Sahu* v. *Kumerji Jha* (1) illustrate the principle applicable to the exercise of the discretion thus conferred. The *kabuliyat* in question appears to have been exhibited in a previous suit and no doubt is suggested that the document was in existence at the date of the institution of the present suit. Having regard, moreover, to the proceedings which had taken place and the expense which had been incurred in connection with the local enquiry by the *amin*, we find ourselves unable to say that the rejection of this document by the Courts below was a proper or judicial exercise of the discretion which rule 18 confers.

The result is that the decrees of both the lower Courts must be set aside and the suit remitted to the first Court in order that it may be re-tried on the evidence on the record and such other evidence as the parties may produce. The costs of this appeal will abide the result.

This judgment will govern the analogous appeal (Second Appeal No. 3818 of 1914.)

Suits remanded.

PUNJAB CHIEF COURT.

MISCELLANEOUS CIVIL APPLICATION No. 217 OF 1917.

(CIVIL APPEAL No. 2348 OF 1913.)

November 26, 1917.

Present:—Mr. Justice Shadi Lal.

Musammat DALIP KOER AND OTHERS—PETITIONERS

versus

JAGIR SINGH, MINOR, THROUGH MUKAND SINGH—RESPONDENT.

Civil Procedure Code (Act V of 1908), O XLI, r 10—Application for security for costs, when to be made.

Applications for security for costs must be made promptly, not only on the ground that the respondent should apply for security for costs before he incurs them but also on the ground that it is unreasonable that security should not be applied for till the appellant has incurred costs of the appeal. [p. 24, col. 1.]

Pooley's Trustee v. *Whetham*, (1886) 33 Ch. D. 76; 56 L. J. Ch. 41; 55 L. T. 462, *Bhobonath Lahiri* v. *Radhaprosad Lahiri*, 5 C. W. N. 119, *Srinivasa Sastrial* v. *Subramania Aiyar*, 17 M. L. J. 583, *Farkhandatunnissa* v. *Collector of Meerut*, A. W. N. (1889) 147, followed.

Where, therefore, an appeal was preferred on the 17th July 1913 and was admitted on 11th October 1913 and the application for security for costs was not made till the 29th March 1917, when the appellant had incurred all the costs of printing the paper-book and engaging Counsel and the appeal had even been fixed for hearing for no fewer than four times and had been actually heard on the 3rd January 1917, when the Court decided that the appeal in *forma pauperis* could not be entertained and directed the appellant to pay the Court-fee leviable on the memorandum of appeal, which order was also complied with on the 26th February 1917, more than a month before the application was made:

Held, that the application was a belated one and could not be entertained. [p. 23, col. 2.]

Petition under Order XLI, rule 10 of the Civil Procedure Code, for having the security furnished by the respondent for the costs of the appeal case noted above before the date fixed for its hearing.

Mr. *Abdul Ghani*, for the Petitioners.

Bakhshi *Tek Chand*, for the Respondent.

ORDER.—This application for security made under Order XLI, rule 10, Civil Procedure Code, must fail on the ground that it was not made promptly and that the law requires that such applications should be made without unreasonable delay, at any rate before the applicant has incurred the costs of the appeal. It appears that the appeal was preferred on the 17th July 1913, and was admitted on the 11th October 1913. The application was, however, not made until the 29th March 1917, more than three years after the date of the admission of the appeal. In the meanwhile the paper-book had been printed, and the appellant had incurred all the costs of printing the paper book and engaging Counsel. Even the respondents had engaged Counsel, and the appeal had been fixed for hearing for no fewer than four times. On the last occasion it came up for hearing on the 3rd January 1917, when the Division Bench after hearing arguments on both sides decided that the appeal in *forma pauperis* could not be entertained and directed the appellant to pay the Court-fee leviable on the memorandum of appeal. Even this order was complied with on the 26th February 1917, more than a month before the application in question was made.

On these facts there can be no doubt that the application is a belated one and should not be entertained. The rule followed by

the English Courts has always been that applications for security for costs must be made promptly, not only on the ground that the respondent should apply for security for costs before he incurs them, but also on the ground that it is unreasonable that security should not be applied for till the applicant has incurred costs of the appeal, *vide*, *Pooley's Trustee* v. *Whetham* (1). This rule has been followed by the different High Courts in India, *vide*, *Bholonath Lahiri* v. *Radhaprosad Lahiri* (2), *Srinivasa Sastrial* v. *Subramania Aiyar* (3) and *Farkhandatunnissa* v. *Collector of Meerut* (4).

For the aforesaid reasons I dismiss the application with costs.

Application dismissed.

(1) (1886) 33 Ch. D. 76; 56 L. J. Ch. 41; 55 L. T. 462.
(2) 5 C. W. N. 119.
(3) 17 M. L. J. 583.
(4) A. W. N. (1889) 147.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1910 OF 1915.

January 10, 1918.

Present:—Mr. Justice Richardson and Mr. Justice Beachcroft.

MANJANALI DEBI—PLAINTIFF—APPELLANT

versus

KAILASH NATH MITRA, ON HIS DEATH HIS HEIR AND LEGAL REPRESENTATIVE GOUR SUNDAR MITRA AND OTHERS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), s 52—Landlord and tenant—Landlord, whether can claim additional rent for excess area within boundaries specified in pattah.

Where rent is fixed for the whole area within the boundaries specified in a *pattah*, the landlord is not entitled to additional rent on account of excess area merely because the area within the boundaries specified in the *pattah* is considerably more than the area stated therein, although he may claim additional rent for excess lands outside the boundaries,

Appeal against the decree of the District Judge, Birbhum, dated the 7th May 1915,

confirming that of the Munsif at Suri, dated the 9th March 1914.

Babus *Dwarka Nath Chakrabarty*, *Hemendra Nath Sen* and *Dhirendra Nath Sen*, for the Appellant.

Babu *Samatul Chandra Dutt* and Babu *Biraj Mohan Mazumdar*, for the Deputy Registrar.

JUDGMENT.—This appeal arises out of a suit brought by the original plaintiff (the appellant before us) for enhancement of rent of a certain holding. It appears that the tenancy was created by a *pattah* marked Exhibit A. According to that *pattah* it would seem that rent was fixed for the whole area within the boundaries specified, though that area may have been estimated at 40 *bighas*. If that is so, the plaintiff is not entitled to additional rent on account of excess area merely because the area within the boundaries is proved to be more or considerably more than 40 *bighas*. The question whether any land in respect of which additional rent is claimed lies outside the boundaries specified in the *pattah* has apparently not been considered in the Courts below. If any part of the lands is outside the boundaries, the judgment leaves it open to the plaintiff in any future proceedings he may be advised to take to claim additional rent in respect thereof. With these observations the appeal is dismissed with costs.

We ought to add that this appeal only relates to the 3-annas 4-pies portion of the holding and does not affect the judgment of the Court below in respect of the 8 annas share of the holding, to which that judgment refers.

Appeal dismissed.

ALLAHABAD HIGH COURT.

EXECUTION SECOND APPEAL NO. 596 OF 1917.

January 2, 1918.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice P. C. Banerji, KT.

JURAWAN AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

MAHABIR DUBE AND ANOTHER—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 48, O. XX.,

JURAWAN v. MAHABIR DUBE.

v. 11—*"Subsequent order", meaning of—Scope of* s. 48 *—Limitation Act (IX of* 1908), s. 15, *applicability of, to* s. 48 *of Civil Procedure Code—"Prescribed", scope of —Order granting time to judgment-debtor, whether order staying execution.*

"A subsequent order directing payment of money", in section 48 (*b*) of the Civil Procedure Code, means a subsequent order made by the Court which made the decree and acting as that Court, and not an order of a Court executing a decree. In all probability the section contemplates orders made under Order XX, rule 11, of the Code. [p. 26, col. 1.]

An order of an executing Court granting time to the judgment-debtor is not a "subsequent order directing payment of money" within the meaning of section 48 of the Civil Procedure Code and does not operate to extend the period of limitation for the execution of the decree. [p. 26, col. 1.]

Section 48 of the Civil Procedure Code does not in a strict sense provide a period of limitation. It is an enactment which forbids an order for execution upon a decree which is more than twelve years old. [p. 26, col. 1 & 2.]

An order granting time to the judgment-debtor is not an order staying execution of the decree within the meaning of section 15 of the Limitation Act. [p. 26, col. 1.]

The word "prescribed" in section 15 of the Limitation Act refers to periods prescribed by that Act, and has no application to the provisions of section 48 of the Civil Procedure Code. [p. 26, col. 1.]

Execution second appeal from a decree of the Additional District Judge, Gorakhpore.

Mr. *Peary Lal Banerji*, for the Appellants.

Mr. *Radha Kant Malaviya*, for the Respondents.

JUDGMENT.—This appeal arises out of execution proceedings. The decree was dated as far back as the 28th of June 1904. In March 1915, an application was made for execution by attachment of certain property of the judgment-debtor. On that application (the 23rd of September 1915), two months' time was granted to the judgment-debtor to pay the balance of the decretal amount, he having paid Rs. 22 on account. No further step appears to have been taken on this application and it was struck off. On the 6th of September 1916, the present application was made. It sought execution in a different way. The application of the 31st of March 1915 was for execution by attachment of property. In the application of the 6th of September 1916, execution was sought by the arrest of the judgment-debtor. The judgment debtor raised an objection that having regard to the provisions of section 48 of the Code of Civil Procedure the decree being now more than twelve years' old, an order for execution could not be made. The First Court allowed the objection. The learned District Judge upon appeal held, *first*, that the application was within time holding, that the twelve years mentioned in section 48 ran from 1915 and *secondly*, that the application was within time under Article 179, clause 4, of the Limitation Act. The judgment-debtor has appealed. The learned Vakil, for the decree-holder, admits that Article 179, clause 4, of the Limitation Act does not apply, but he contends that the order of the 23rd of September 1915, when the judgment-debtor was allowed two months to pay the decree, was a "subsequent order", within the meaning of that expression in section 48, clause (*b*), of the Code of Civil Procedure, and secondly, that in calculating the period of twelve years mentioned in section 48 of the Code of Civil Procedure the two months, which were given to the judgment-debtor by the order of the 23rd of September 1915, should be excluded having regard to the provisions of section 15 of the Limitation Act. Amongst the authorities cited by each side were *Ram Nath Tewari* v. *Chatterpalman Tewari* (1), *Jogobundhoo Dass* v. *Hori Rawoot* (2), *Balchand* v. *Raghunath Das* (3), *Raghunath Prosad* v. *Kashi Prosad* (4), *Tata Charlu* v. *Konadala Ramachandara* (5) and *Perumal Naickar* v. *Davood Rowther* (6).

Section 48 of the Civil Procedure Code is as follows:—"Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from (*a*) the date of the decree sought to be executed, or (*b*) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of default in making the

(1) 30 Ind. Cas. 521; 37 A. 638; 13 A. L. J. 826.
(2) 16 C. 16; 8 Ind. Dec. (N. S.) 11.
(3) 4 A. 155; A. W. N. (1881) 168; 2 Ind. Dec (N. S.) 766.
(4) 13 Ind. Cas. 88; 15 C. L. J. 678.
(5) 7 M. 152; 2 Ind. Dec. (N. S.) 691.
(6) 34 Ind. Cas. 393.

payment or delivery in respect of which the applicant seeks to execute the decree."

As already mentioned, it is contended that the order of the 23rd of September 1915, giving the judgment-debtor two months' time, is a subsequent order directing the payment of the balance of the money. It must be remembered that this order was made by the *Court executing the decree.* It may perhaps have so happened in this case that it was the same Court which granted the decree of the 28th of June 1904, that was executing the decree. But if the argument put forward by the decree-holder is good, it would equally apply to a case where the decree had been merely transferred to another Court for execution. It would almost seem to follow that even an adjournment of an application for execution would give a fresh period of twelve years from the expiry of the period of adjournment. After consideration we have come to the conclusion that a subsequent order directing payment of money in section 48, clause (*b*), means a subsequent order made by the Court which made the decree and acting as that Court, and not an order of a Court executing a decree. In all probability the section contemplates orders made under Order XX, rule 11. We may say in passing that the order of the 23rd of September 1915 was not made under Order XX, rule 11. As to the argument put forward grounded on the provisions of section 15 of the Limitation Act, this section runs as follows:—"In computing the period of limitation prescribed for any suit or application for the execution of a decree, the institution or execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded."

In the first place, the order of the 23rd of September was not strictly an order staying the execution of the decree. Furthermore, the Limitation Act itself prescribes periods of limitation for bringing suits and periods of limitation for the execution of decrees, and it seems pretty clear that the word "prescribed" in this section refers to periods prescribed by the Limitation Act. Section 48 of the Code of Civil Procedure does not in a strict sense provide a "period" of limitation. It is an enactment which forbids an order for execution upon a decree which is more than twelve years old. We must allow the appeal, set aside the order of the Court below and restore the order of the Court of first instance with costs in all Courts.

Order set aside.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 577 OF 1915.

November 27, 1917.

Present:—Sir Charles Chitty, KT., and Mr. Justice Smither,

Raja JAGADISH CHANDRA DEO DHABEL DEB—DEFENDANT No. 1—APPELLANT

versus

SRIDAM MAHATA—PLAINTIFF AND DURGA PRASAD PRAMANIK AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Decree against heirs of original tenant, whether binds unregistered transferee—Transfer of Property Act (IV of 1882), s. 26.

A *mourasi mokurari jote* was held by *P.*, who bequeathed it to the plaintiff. The plaintiff's name not having been registered in the landlord's books, the landlord, though aware of the bequest in plaintiff's favour, sued the heirs of *P.* for rent, got a collusive decree and in execution thereof sold away the *jote:*

Held, that the plaintiff's right to the *jote* was not extinguished by the sale in execution of the landlord's decree for rent against the heirs of *P.* [p. 27, col. 2.]

Appeal from the decree of the Additional District Judge, Midnapur, in Title Appeal No. 530 of 1913.

Sir *Rash Behari Ghose* and Babus *Bepin Behari Ghose II* and *Siresh Chander Das*, for the Appellant.

Babus *Siba Prasanna Bhattachariya* and *Pasupati Nath Sastri*, for the Respondents.

JUDGMENT.—In this case the plaintiff Sridam Mahata sued to recover possession of 137 *bighas* odd in *Mouza* Dakhina, on the ground that he had a *mourasi mokurari jote mondali* right under the defendant No. 1. The plaintiff pleaded dispossession on 29th July 1898 and he filed his suit on 22nd June 1910, just within 12 years. The point of limitation was taken both in

Courts below and in this Court but has not been seriously pressed before us, as it appears that the suit of the plaintiff which was first filed in the 4th Munsif's Court was presented by him in that Court with due diligence and was only returned to be presented before the higher Court when it was found that the value of the land exceeded the amount of the Munsif's jurisdiction.

The point of law relied upon by the defendant No. 1, who is the appellant in this Court, is that the title of the plaintiff was extinguished by the sale by the landlord, defendant No. 1, in pursuance of the decree in the suit of 1894 which the predecessor of the defendant No. 1, Ishwar Chandra Deb, brought against Gangadhar Mahata, the defendant No. 4, one of the heirs of Pahal Singh—the original owner of the property. It was argued that the defendant 1 had the right to ignore the present plaintiff as he was not registered as the tenant of this property. It is not disputed that the land in question originally belonged to Pahal Singh—the father-in-law of the present plaintiff—who by his Will dated 13th December 1880 left it to the plaintiff. That Will was duly proved in 1883 after the death of Pahal Singh, and it appears that the plaintiff was in possession from 1883 to 1887 and again from the date of his decree at the end of 1894 until he was dispossessed in 1898. The Subordinate Judge in the Trial Court has found that the suit brought by Iswar Chandra against Gangadhar in 1894 was collusive and in fraud of the plaintiff. The plaintiff had during the pendency of that suit been suing the heirs of Pahal Singh and also Iswar Chandra. That suit was decreed against the heirs of Pahal Singh and the plaintiff's right to this property was duly decreed. The suit was dismissed formally against Iswar Chandra, because he was not a party to the dispossession of the plaintiff at that time. But the decree was passed in his presence and it is clear that he knew perfectly well that the plaintiff Sridam Mahata was the transferee of the property and that the defendant No. 4 against whom he brought the suit for rent had no right whatever to it. Reliance was placed by the defendant on the Full Bench ruling in the case of *Sham Chand Koondoo v. Brojonath Pal Choudhry* (1). In that case it was held that it was intended that the *zemindar* should be at liberty to treat as the holder of the tenure, and as the person whom he might sue for the arrears of rent, the person who was registered in his books as the owner, unless any one could show that there had been a transfer, and that there was sufficient cause for its non registration. That exception is very important in this case, because undoubtedly here there was a transfer in favour of the present plaintiff and equally without doubt the defendant No. 1 knew all about it, having been a party to that suit. Instead of doing as he ought to have done under section 26 of the Transfer of Property Act, namely, admitting the plaintiff's transfer to registry, he brought the fraudulent and collusive suit against defendant No. 4, carried that decree to execution and brought about what was an equally fraudulent and improper sale of the property with the express view of ousting the present plantiff. It appears to us that that creates an exception in this case from the general rule and that it would be impossible for the Court to give relief on the bare statement of the law to a man who has thus behaved.

Another point was intimated by the learned Pleader for the appellant which affects the respondent more materially than the defendant-appellant, and that is that the decree in the case is incapable of execution inasmuch as, while the Courts have declared that the plaintiff is entitled to *khas* possession of the 137 *bighas* odd in Mouza Dakhina, they have not specified to which 13 *bighas* they refer. We think, for the further security of the plaintiff-respondent, that the learned District Judge should be asked to specify by boundaries, after such enquiry as he may find necessary, the 137 *bighas* 7 *cottahs* 9 *chataks* in respect of which the decree was passed. On his reporting to this Court, the decree in this appeal will be drawn up. The learned District Judge should be asked to correct the decree in this particular within a month from the receipt of the record by him.

The plaintiff-respondent must have his costs of this appeal from the defendant-appellant.

Let the record be sent down without delay.

Record sent down.

(1) 21 W. R. 94; 12 B. L R 484.

BISHESHAR NATH *v.* EMPEROR.

ALLAHABAD HIGH COURT.
CIVIL REVISION No. 178 OF 1917.
December 19, 1917.
Present:—Mr. Justice Walsh.
BISHESHAR NATH—APPLICANT
versus
EMPEROR—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. VI, r. 14 —Plaint signed by prisoner in contravention of Jail Regulations, validity of—Legal Practitioner and Court, differences between—Professional etiquette, breach of—Matter calling for disciplinary powers—Court, duty of.

A plaint signed or a suit authorised by a man in jail is just as good as any other suit or plaint, although the plaintiff in signing the plaint or authorising the suit contravenes some of the provisions of the Jail Manual. [p. 29, col. 1.]

Where a Court has reason to think that there has been any breach of professional etiquette or any matter calling for the exercise of disciplinary powers in the conduct of a Pleader or Advocate in a case, the proper course is to decide the merits and reserve any such question for further consideration after the disposal of the suit. [p. 30, col. 2]

Civil revision against the order of the Munsif, Ghaziabad, dated the 14th July 1917.

The Hon'ble Mr. *Motilal Nehru*, the Hon'ble Dr. *Tej Bahadur Sapru* Messrs. *S. C. Mukerji* and *Gulzari Lal*, for the Applicant.

Mr. *A. E. Ryves*, for the Opposite Party.

JUDGMENT.—These are two applications by Bisheshar Nath, High Court Vakil, practising at Ghaziabad, against an order of the Munsif of Ghaziabad, which was really a judgment in a civil suit, (*a*) directing him to show cause why he should not be committed to the Criminal Court under section 476 of the Criminal Procedure Code and also (*b*) directing him to show cause why proceedings should not be taken against him under section 14 of the Legal Practitioners Act.

The circumstances of the case are unusual, and it is to be hoped exceptional. I have had the advantage of reading an English translation of the entire pleadings, order-sheet, and evidence. A suit was brought in the Court of the Munsif by one Chajju Mal against Jasram upon a promissory note alleged to have been given by the defendant on the 31st of December 1913 for Rs. 150 with interest at Re. 1-4-0 per cent. per mensem. The claim was for Rs. 216-14-0 only. The plaint was filed about the 22nd December 1916, and the claim would, therefore, have been barred in a few days.

Paragraph 2 of the written statement alleged that the plaintiff was in jail, that the suit had not been presented on his behalf and that the permission of the jail authorities had not been given to the plaintiff's signature.

The following issue was framed:—

1. Whether the suit was properly and duly filed on behalf of the plaintiff and is maintainable or not.

The Munsif describes it as the most..... important issue in the case.

Bakhtawar Singh, brother in-law of the plaintiff, was called and swore that he was asked by the plaintiff's wife, in consequence of a letter written by the plaintiff from jail, to file the suit, and he accordingly instructed the applicant, Bisheshar Nath. Hardwari Lal, the plaintiff's *munim* called by the defendant, attempted to identify the plaintiff's signature but he was not certain about it. A jailor was called by the defendant who contradicted the statement of Bakhtawar Singh that the plaint was signed by the plaintiff in the presence of the jail authorities, though he stated that, about the date in question, two or three people called to see Chajjoo Ram who was at work outside the jail, and the signature might have been obtained in the jailor's absence. The learned Munsif is incorrect in saying that the jailor swore no person had any interview with the plaintiff in the month of December.

These witnesses, whose evidence was recorded on the 14th February and the 13th April, are the only relevant ones upon the point as to the manner in which the plaintiff's signature was obtained.

On the 19th April the plaintiff himself was put into the box and was asked the question, "who signed the plaint in this case?" After a highly technical discussion about the onus of proof, which I confess is beyond my comprehension, the question was disallowed. So that issue No. 1 was decided after the deliberate refusal to hear the evidence of the principal person concerned who was in a position to speak to it. To talk of forgery under such circumstances is of course out of the question.

I will assume that the plaintiff's signature was appended so as to constitute a breach of the jail regulations. I will assume further, though it is by no means proved, that he did not write it himself, although he had authorized the suit, and that although he

might have authorised some one to sign his own name, he was prepared, or badly advised, under a mistaken fear of the consequences of telling the truth, to commit perjury by swearing that a signature written by some one for him was written by himself. There is not, so far as I can see, in the absence of a repudiation of his signature by the plaintiff himself, a scrap of evidence of forgery, and not a shadow of a suggestion in the evidence that the present applicant knew it was forged.

The learned Munsif appears to have felt the difficulty himself. He says the signatures of the plaintiff to the plaint and *vakalatnama* were "most probably forged." He further concludes that the applicant was guilty of gross negligence in not concluding that there had been a breach of the jail regulations. It is impossible to reconcile this finding with the ultimate conclusion that the applicant produced two documents in Court which he either knew or had reason to believe were forged. Without considering whether the Munsif had jurisdiction to deal with any disciplinary question under the Legal Practitioners Act, or whether the occasion was one in which, in any event, he ought to have exercised the power given by section 476 of the Criminal Procedure Code, I hold that on the evidence before him the course which the Munsif took with the Vakil, the present applicant, had no foundation in fact and was an unwarrantable abuse of his power, and an irregular exercise of jurisdiction.

As, however, the judgment in this case raises several points of practical importance and the whole proceedings evidence a lamentable waste of judicial time, and a fruitless expenditure of costs, all of which apparently will fall upon one or another of these two unfortunate litigants, I think it desirable to deal with the other points raised.

The Munsif has entered into a learned and exhaustive examination of the Jail Manual and Regulations. These are wholly irrelevant. He says they have the force of law. This does not mean that they alter the general law. A plaint signed, or a suit authorised, by a man in jail is just as good as any other plaint or suit, however many jail regulations are broken. The breach of regulations, whether by the prisoner his friends or Pleader, are matters for the jail authorities or the Local Government or whoever has the duty of enforcing them or punishing their breach. They no doubt have the force of law but they cannot destroy a cause of action, or invalidate a plaint. The second part of the second plea in the written statement which raised this point ought to have been struck out and no issue should have been framed thereon.

Order VI, rule 14, which requires a pleading to be signed by a party is merely a matter of procedure. It is the business of the Court to see that this provision is carried out. It is also the business of the Court to see that a suit is authorized by the plaintiff. Of course if it is not, the suit ought to be dismissed, and the persons responsible for it made to answer for their conduct. The authority for the bringing of a suit is a question of principle. But where a suit is duly authorised, the proper signing of the plaint is a matter of practice only and if a mistake or omission has been made it may be amended at any time. Sections 151 and 153, which the Courts below seem too often to ignore, were plainly intended for such cases. And the latter part of Order VI rule 14, enabling a person duly authorised by the party, when the party is unable to sign the pleading himself, to sign for him, makes this clear. In the present case I see no reason why Bakhtawar Singh could not have signed for the plaintiff. I delivered a judgment recently myself upon this very point where I endeavoured to make it clear. But there is abundant authority if any were required for such an obvious proposition. *Basdeo* v. *John Smidt* (1) decided it in this Court many years ago.

But the most unfortunate incident of the whole case is the proceeding of the 19th April when the plaintiff presented himself in the box, and the Munsif disallowed a most obvious, necessary and proper question. Why the Munsif did not then realise the position, and put an end to further waste of time and invite the plaintiff to sign the plaint and *vakalatnama* then and there, I am at a loss to understand. The fact that a fresh suit would probably be barred by limitation would seem an additional reason for doing so.

(1) 22 A. 55; A. W. N. (1899) 172; 9 Ind. Dec. (N. S.) 1068.

BISHESHAR NATH *v.* EMPEROR.

I have not thought it necessary to discuss the high technicalities about the attestation of the *vakalatnama*. All defects might and ought to have been cured by the exercise of a little common sense, and may, in my opinion, still be cured if the suit is remanded or the Court which hears the suit in appeal does what the Munsif might and ought to have done [*vide Rajit Ram* v. *Katesar Nath* (2)].

It cannot be impressed too often upon the inferior Courts that as Bowen, L. J., said in *Cropper* v. *Smith* (3):

"The object of Courts is to decide the rights of parties, and not to punish them for mistakes which they make in the conduct of their cases, by deciding otherwise than in accordance with their rights. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy."

Of course where it is sught to abuse the process of the Court, or to overreach the other party by some fraud, it is another matter.

I have thought it necessary to refer to some of the broader questions raised by this case, and to reiterate these time-honoured principles, because in my short experience I have found from time to time a good deal of misconception and confussion of thought with regard to these matters in the procedure of inferior Courts. They cannot be impressed too strongly upon Courts of Justice. The suit is not before me and is, I understand, under appeal before the District Judge of Meerut, who has postponed the hearing pending these applications. It is to be observed, however, that although according to the Munsif's judgment the defendant admitted his signature to the note so that the onus was upon him, the plaintiff gave evidence and the defendant did nothing but rely upon a discharged servant of the plaintiff. The Munsif dismissed the suit on the merits. If he was right in so doing there was the less reason for this elaborate expenditure of time and money over a trivial matter of Rs. 200.

The appellant alleges that there have been private and personal differences between himself and the Judge. Except that his judgment is under review, the Munsif is not before me. I have not heard what he has to say and I will merely content myself by saying that if there has been any thing of the kind, the Munsif and the Vakil should lose no time in healing the sore and making friends. Both are members of the same profession, and where ill-feeling prevails work is certain to suffer. The Government Advocate is probably right in saying that the parties have, for some reason best known to themselves, expended a great deal of unnecessary heat over this little suit. The defendant and his representatives are partly to blame for this unfortunate miscarriage by having raised the question in their plea, apparently because the plaintiff, who was a former employer of the defandant, had been sent to jail. If there was a good defence to the suit, it was superfluous. If there was no defence, it was irrelevant to any question unless the suit had not been authorised by the plaintiff. This, which is the sole question of importance, has not been decided at all.

I will merely add that it would in my opinion be better, as a general rule, where the Court has reason to think that there has been any breach of professional etiquette or any matter calling for the exercise of disciplinary powers, in the conduct of the Pleader or Advocate in the case, to decide the merits, and reserve any such question for further consideration after the disposal of the suit. If there were no other reason for this course, and there are several in my judgment, it is in any case not a matter which concerns the parties or one in respect of which they ought to be penalised either by prolonging the suit or increasing the costs. This case seems to have occupied the time of the Court on six days, including the framing of the issues and the delivery of judgment, and lasted for more than six months. I direct the order of the Munsif so far as it affects the applicant, to be cancelled.

Order cancelled.

(2) 18 A. 396; A. W. N. (1896) 102; 8 Ind. Dec. (N. S.) 971.

(3) (1884) 26 Ch. D. 710; 53 L. J. Ch. 891; 51 L. T. 733; 33 W. R. 60.

HARNAM SINGH *v.* MAKHAN SINGH.

PUNJAB CHIEF COURT.
FIRST CIVIL APPEAL No. 2838 OF 1914.
December 26, 1917.
Present:—Mr. Justice Chevis and
Mr. Justice Shadi Lal.
HARNAM SINGH AND OTHERS—DEFENDANTS —APPELLANTS
versus
MAKHAN SINGH AND OTHERS —PLAINTIFFS—RESPONDENTS.

Shamilat deh *recorded as* shamilat tarf—*Declaration, suit for—Admission, effect of—Appropriation of compensation money, effect of—Limitation, commencement of—Fresh invasion—Limitation Act* (*IX of* 1908), *s.* 23.

In a suit for a declaration to the effect that the plaintiffs were the owners of a certain share of the village *shamilat* land, it appeared that the land in suit was entered as *shamilat deh* in the Settlements of 1856, 1868 and 1891-92. But in 1893 the entry was changed and the land was shown as *shamilat* of *taraf Bedi*—one of the 3 *tarafs* in the village, the plaintiffs' *taraf* being known as *taraf Vedi*—in consequence, as was urged on behalf of the *Bedi* defendants, of an admission made by the plaintiffs or their ancestors in that year. It appeared further that portions of the land having been acquired by the Government in 1906 and again in 1911 the compensation money was taken by the *Bedis* on the last occasion:

Held, (1) that the old entries being all in plaintiffs' favour the admissions of the *Vedis* meant nothing more than that the *Bedis* should continue to manage the land taking whatever income might accrue and incurring whatever expense might occur; [p. 31, col. 2.]

(2) that the action of the *Bedis* in 1911 in taking all the compensation money was a fresh invasion of the plaintiffs' rights and the suit was, therefore, within time. [p. 32, col. 1]

First appeal from the decree of the Senior Subordinate Judge, Gujranwala, dated the 1st October 1914, decreeing the claim.

The Hon'ble Pandit *Sheo Narain*, R. B., and Mr. *Taj-ud-Din*, for the Appellants.

The Hon'ble Mr. *Muhammad Shafi*, K. B., for the Respondents.

JUDGMENT.—The facts are as follows. In village Santpura there are three *tarafs*, one *tarf Bedi*, one *tarf Vedi*, and one *tarf* of other tribes. The *Bedis* are decendants of the original founder Nand Rup, who brought in the *Vedis* and the other tribes seem to have drifted in by degrees.

The land in dispute was entered a *shamilat deh* in the Settlements of 1856 and 1868. The same entry was repeated in 1891-92. But in 1893 the entry was changed and the land was shown as *shamilat* of *tarf Bedi*. And in 1906 and again in 1911 the *Bedis* took the money allowed by Government when some of the land was compulsorily acquired.

The plaintiffs, *Vedi* proprietors, sue for a declaration that the land is *shamilat deh*, and the lower Court having given them a decree the *Bedis* appeal.

It is urged on behalf of the *Bedis* that the present plaintiffs or their ancestors are nearly all identical with the parties who in 1893 admitted that the land was *shamilat tarf Bedi*.

We see that according to the record Tara Singh, Gopal Singh, Gurdit Singh and Harnam Singh *Vedis* in 1893 stated before the Deputy Superintendent that the *Vedis* had no concern with the *shamilat*, except that they were entitled to graze their cattle there free of grazing dues. But Gurdit Singh said the former entries were correct, he said the income of the *shamilat* went towards the expenses, and the *Vedis* had never taken any share of the income.

Two Brahmins and a Jogi disowned all claim to the *shamilat*.

Then the land was entered as *shamilat tarf Bedi*. Where this enquiry was held and whether the usual proclamation in the village was made are matters on which we have not been enlightened. The whole affair seems to us suspicious and we are not at all satisfied that the *Vedis* realised fully what their statements as recorded amounted to. What we think very probable is that the *Bedis* as the leading tribe managed the *shamilat*, taking whatever income might accrue and incurring any expense which might occur, and we think that the *Vedis* possibly meant nothing more than that the *Bedis* should continue to manage the land. Gurdit Singh's statement is clear that the former entries as to ownership were correct, and we think it probable that he was the only *Vedi* who understood matters fully and was aware of the effects of the proposed change in the entries.

As to the compensation money taken by the *Bedis* in 1906 and again in 1911, we have not been told how much this was. The *Vedis* may not have thought it worthwhile to dispute about in 1906 especially if, as Sher Singh, plaintiff, says (see page 42), the money was spent on the *samadh* of Nand Rup.

As to grazing dues plaintiffs deny that any income has ever been realised. We note that except a general statement that the *Bedis* had collected *tirni* there is no proof that any such dues have ever been collected.

The old entries are all in plaintiffs' favour and we are not satisfied, in spite of the recorded admissions of certain *Vedis* in 1893, that those *Vedis* fully understood the real state of affairs or that the old entries are incorrect. Nor are we greatly impressed by the failure of the *Vedis* to claim a share of the compensation in 1906. It was apparently their failure to get a share in 1911 which led to this suit.

The action of the *Bedis* in 1911 in taking all the compensation money was a fresh invasion of plaintiffs' right and we hold this suit to be within time.

We uphold the lower Court's decree and dismiss this appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1881 OF 1915.

January 10, 1918.

Present:—Mr. Justice Richardson and Mr. Justice Beachcroft.

BARANASHIBASI MUKERJEE AND OTHERS—DEFENDANTS—APPELLANTS

versus

HARI KRISHNA SHAHA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Cess Act (IX B. C. of 1880), ss. 54, 56—Plaintiff, whether can recover road-cess on basis of re-valuation without notice under s. 54.

Plaintiff brought a suit to recover arrears of road cess due and payable under the re-valuation of 1907 in respect of certain rent-free lands held by the defendants within the plaintiff's tenure:

Held, that under the terms of section 56 of the Cess Act the notice required by section 54 not having been published by the plaintiff the defendants were not bound to pay cesses upon the basis of the re-valuation of 1907.

Appeal against the decree of the Subordinate Judge, First Court, Burdwan, dated the 20th of February 1915, affirming that of the Munsif, Additional Court, Katwa, dated the 30th of March 1914.

Babu *Mohendra Nath Roy* and *Brojolal Chakrabarty*, for the Appellants.

Babu *Haraprosad Chatterjee*, for Babu *Hemendra Nath Sen*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit to recover arrrears of road cess in respect of certain rent free land held by the defendants within the plaintiffs' tenure. The defendants are the appellants. The only point with which we are now concerned is the plea taken by the defendants that the notice required by section 54 of the Cess Act (Bengal Act IX of 1880) has not been published by the plaintiffs. In the Court of Appeal below the learned Subordinate Judge has found that as a matter of fact the notice in question has not been published. He has, however, come to the conclusion that the defendants are concluded on the ground of *res judicata* by the decree made in Suit No. 370 of 1908, which was also a suit for arrears of road cess between the same parties. In that suit, however, cesses were recovered in respect of the period from 1311 to 1314. Now the present claim is made under a re-valuation, which the learned Subordinate Judge says took place in the year 1907. It is difficult, therefore, to see how in the previous suit the defendants could have taken the defence which they now put forward and on which they rely in the present suit. There appears to be nothing on the record to show that the cesses claimed in the previous suit were cesses due and payable under the re-valuation of 1907. In the circumstances we are unable to accept the view of the learned Subordinate Judge that the defendants are concluded by the decree in the previous suit. That decree being out of the way, it is clear, and it is not disputed, that under the terms of section 56 of the Act, the notice required by section 54 not having been published by the plaintiff, the defendants are not bound to pay cesses upon the basis of the re-valuation of 1907.

The result, therefore, is that this appeal is allowed, the decree of the Court below is set aside and the suit dismissed with costs throughout.

Appeal allowed.

FOUZDAR RAI *v.* EMPEROR.

PATNA HIGH COURT.

CRIMINAL APPEAL No. 255 OF 1917.

December 17, 1917.

Present:—Mr. Justice Roe and Justice Sir Ali Imam, KT.

FOUZDAR RAI AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 97, 99, 141—Right of private defence, extent of—Unlawful assembly—Rioting—Evidence Act (I of 1872), s. 154—Hostile witness—Prosecution witness making admission in favour of defence, whether hostile.

The right of private defence extends to section 141 and subsequent sections of the Penal Code just as much as it extends to any other offence punishable under the Penal Code. Where a person in possession of property sees an actual invasion of his rights to that property, if that invasion amounts to an offence under the Code, he is entitled to resist it by force and to collect for that purpose such numbers and such arms as may be absolutely necessary for this purpose, provided only that there is no time to have recourse to the protection of the Police authorities. [p. 34, col. 1.]

A witness is not necessarily hostile because in an absent-minded moment he lets out the truth. It must be shown before a witness can be declared hostile that there is good ground for believing that the statement he has made in favour of the defence is due to enmity to the prosecution. It may be an unfriendly act to let out the truth, but it is not necessarily a hostile act. [p. 33, col. 2.]

Appeal from the decision of the Sessions Judge, Monghyr, dated the 10th November 1917.

Mr. *Gour Chandra Pal*, for the Appellants.

The Government Pleader, for the Crown.

JUDGMENT.

ROE, J.—In this case the appellants have been convicted on a charge of rioting. The story told for the prosecution was that while the complainant's party was peacefully cutting crops which they had themselves grown without opposition, Fouzdar Rai mounted on a horse and carrying a *garasa* attacked the complainant's party with an overwhelming force, with the result that two of the complainant's party were beaten with sticks and one was struck in the stomach with a sharp cutting weapon causing an injury which resulted in his death.

The learned Sessions Judge agreeing with the Assessors is satisfied that the story of the complainant's possession is untrue. The learned Government Pleader contests this finding. His contention is correct that the burden of proof lies on the accused to show that the crops cut belonged to them. The learned Judge based his finding on this point on the discrepancies in the story told by the other party as to various crops sown on the land and various other matters which must have been within their knowledge if they had in fact been in possession and on direct admissions made by two of the complainant's witnesses. It is contended on behalf of the Crown that these two witnesses were hostile witnesses. There is much misconception in the minds of Public Prosecutors in the Courts below as to what constitutes a hostile witness. A witness is not necessarily hostile because in an absent-minded moment he lets out the truth. It must be shown before a witness can be declared hostile that there is good ground for believing that the statement he has made in favour of the defence is due to enmity to the prosecution. It may be an unfriendly act to let out the truth, but it is not necessarily a hostile act. In this case there is nothing to show any hostility in the witnesses who have made these damaging admissions. I am satisfied that the learned Judge was correct in holding that the crop, which was being cut by the complainant's party, had been grown by the accused.

There seeme to be also much misconception as to the real meaning of the decisions in *Kabiruddin* v. *Emperor* (1), *Maniruddin* v. *Emperor* (2). In *Kabiruddin* v. *Emperor* (1) the learned Sessions Judge had summed up the law to the Jury as follows:—"There can be no right of private defence, either on one side or on the other, where both parties are evidently aware of what is likely to happen and turn out in force. The right of private defence cannot be pleaded by persons who expecting to be attacked go out of their way to court an attack. When the parties of the complainant and accused are prepared to fight, it is immaterial who was the first to attack, unless it be shown that the accused were acting in the exercise of the right of private defence". The sole question before the High Court was, therefore, whether the Sessions Court had in thus stating the law misdirected the Jury. The finding of the High Court

(1) 35 C. 368; 7 C. L. J. 359; 12 C. W. N. 384; 7 Cr. L. J. 256; 3 M. L. T. 385.

(2) 35 C. 384; 12 C. W. N. 579; 7 Cr. L. J. 374.

was that this was a correct statement of the law. The facts in *Maniruddin* v. *Emperor* (2) were not dissimilar. There had been a partition of certain land of which the disputed plot formed a part. There was a dispute as to the share to which the disputed plot had fallen on partition. Maniruddin collected a large number of *lathials* before being attacked by the other side. He took these *lathials* armed with deadly weapons to the land and on the way called out to his adversary "come out, *haramjada*, you and your sons. I am going to the field". In the circumstances of these two cases there was an obvious point which deprived the accused of the right of private defence. They had in the one case courted and in the other provoked an attack by the other side. But because of these decisions it seems to be the opinion of many Courts below and of all Police Officers that there can be no right of private defence if there has been a riot. This is not the law. The right of private defence extends to section 141 and subsequent sections, just as much as it extends to any other offence punishable under the Indian Penal Code. Where a person in possession of property sees an actual invasion of his right to that property, if that invasion amounts to an offence under the Code, he is entitled to resist it by force and to collect for that purpose such numbers and such arms as may be absolutely necessary for this purpose, provided only that there is no time to have recourse to the protection of the Police authorities. In the case before us there is nothing to suggest that the accused courted or provoked attack or knew that an attack was imminent. Had they gone to the *thana* to make a complaint after the attack had begun, their crops would have been removed long before the Police could arrive on the scene. I cannot hold that the accused were at any time members of an unlawful assembly. They cannot, therefore, be convicted of rioting.

That the right of private defence was exceeded by some members of this body of rioters is obvious. The right of private defence of property does not extend to striking a man in the stomach with a sharp cutting instrument. But, as the learned Judge has found, the charge that Fauzdar Rai himself caused this wound is obviously untrue, and since there was no unlawful assembly, the accused cannot be punished under section 149.

I would acquit all the accused and direct that they be discharged from their bail.

IMAM, J.—I am in entire agreement with the views expressed by my learned brother on the points raised by the learned Vakil on behalf of the appellants. It is quite clear on the evidence that the private prosecutor Munshi Kumar brought a number of men exceeding five to the land in possession of the appellant Fauzdar Rai and started cutting crops that were undoubtedly raised by the accused. There was resistance by the accused, which resulted in injuries on both sides. It may be that the breach of the peace was the direct result of this encounter, but we have to consider which of these two parties was in the wrong. The accused Fauzdar Rai must have the sympathy of the Court inasmuch as he was in possession and the crops were raised by him. The private prosecutor was undoubtedly an aggressor and was trying by force to cut and remove crops belonging to the accused. In the circumstances it is evident that at one point of time or another the right of private defence accrued to the accused. The question then is, when did this right begin? There being absolutely no evidence on the record to show or suggest that the appellants had any previous information of the intended visit of the private prosecutor with his men to the field, it cannot be held that the accused had notice of the trespass contemplated by Munshi Kumar. In this case the moment the trespass was committed the right in the appellants to resist that trespass and to save the crop commenced. That right was the right of private defence of property. After this the appellant Fauzdar Rai gathered together a number of his friends and adherents and went to his land to stop the aggression and resist the cutting of his crops. It cannot be said that the view of the law taken in *Kalimuddin* v. *Emperor* (1) would be applicable to the present case. I feel no hesitation in holding that in this case there was the right of private defence in the appellants and that in the exercise of that right when they came to the field they were not members of an unlawful assembly. The assembly not being an unlawful one the charge of rioting under sections 148

and 147, Indian Penal Code, as against the appellants must necessarily fail.

The conviction and sentence in this case must, therefore, be set aside.

Conviction set aside.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 837 OF 1917 AND CRIMINAL REFERENCE No. 752 OF 1917.

November 8, 1917.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

IN CR. REV. NO. 837 OF 1917

LALA—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

IN CR. REF. NO. 752 OF 1917

CHHOTE LAL—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 441, 443, 456, 509—Lurking house trespass by night—Evidence—Intention—Presumption.

Where the evidence shows that a man has been found lurking at night inside the house of another person, a perfect stranger to him, or a person in whose house he has no apparent business, the prosecution is entitled to ask the Court to infer from these facts that there was a guilty intention on the part of the accused sufficient to bring his action within the purview of section 441 of the Penal Code. [p. 36, col. 2.]

In dealing with cases of this sort Magistrates should not overlook the existence of section 509 of the Penal Code, when they are considering the allegation on the part of the prosecution that the entry by the accused into the premises in question must presumably have been with intent to commit some offence. [p. 36, col. 2.]

Per *Walsh, J.*—Where in a case of house-trespass the accused alleges that he went to the house to carry on an intrigue with a woman who was the inmate of the house, then if there was an invitation or complicity by the woman, combined with an intention to preserve strict secrecy, it is difficult to say that there was any intention to annoy a third person; but if that third person had expressly prohibited the accused, then his act becomes a direct defiance to an express order, and it is impossible to say that an intention to annoy the author of the order cannot be inferred from it [p. 37, col. 2.]

IN CR. REV. NO. 837 OF 1917.

Criminal revision against the order of the Sessions Judge, Cawnpore, dated the 6th September 1917.

Messrs. *S. Mushran* and *K. N. Katju*, for the Applicant.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

IN CR REF. NO. 752 OF 1917.

Criminal reference by the District Magistrate, Banda, dated the 31st August 1917.

JUDGMENT.

IN CR. REV. NO. 837 OF 1917.

This is a case in which a conviction of lurking house-trespass by night (section 456 of the Indian Penal Code) has been recorded by the trying Magistrate and has been confirmed by the Sessions Judge on appeal. The case has come before us in revision, substantially upon the pleading that on the view of the facts taken by the learned Sessions Judge the latter ought to have held that no offence had been proved. One difficulty we must necessarily feel in dealing with the case on these lines is that the learned Sessions Judge has not definitely found the facts to lie in accordance with the argument addressed to us in support of this application. The facts in question were not alleged by the accused himself, but certain circumstances suggesting the possibility of their existence were deposed to by some of the witnesses called for the defence. The learned Sessions Judge has in effect said that even supposing the facts to be as now suggested on behalf of the accused, the conviction must be upheld. In substance the case before us is really governed by the decision of this Court in the case of *Mulla* v. *Emperor* (1) and might well have been affirmed on those grounds. Apart from this, we have just been considering in connection with Criminal Reference No. 752 of 1917 the question of law which has been discussed in connection with the present application, and we need only say that we think the conviction in the present case could be justified along the line of argument followed by the learned Sessions Judge. In saying this we are by no means admitting the facts to be as suggested on behalf of the accused. It would be unfair to do so in the face of the express denial of those facts by *Musammat* Bhagia (the young woman principally

(1) 29 Ind. Cas. 67; 37 A. 395; 13 A. L. J. 625; 16 Cr. L. J 435.

concerned) in the evidence given by her before the Court. We dismiss the application and confirm the conviction and sentence passed by the Magistrate. The accused must surrender to his bail to undergo the unexpired portion of his sentence,

IN CR. REF. NO. 752 OF 1917.

PIGGOTT, J.—This is a reference by the District Magistrate of Banda in a case in which one Chhote Lal was tried summarily by a First Class Magistrate of that district. The offence alleged was that of lurking house-trespass by night, and it is clear from the record that the prosecution led evidence to prove, not merely that the house of the complainant was entered by Chhote Lal under circumstances covered by the definition in section 443 of the Indian Penal Code, but also that the lurking house-trespass in question was committed with intent to commit theft. The accused in his defence admitted having been caught at night inside the house of the complainant Badri under the circumstances deposed to by the prosecution witness. He suggested that those witnesses were not speaking the truth with regard to his having stolen or attempted to steal any of Badri's property. He pleaded that his intention in effecting a secret entry into Badri's house had been to carry on an intrigue with the widowed mother of the said Badri. He pleaded further that he had entered the house at the express invitation of this woman. The trying Magistrate refused to inquire fully into the facts. He has left it uncertain whether there was any truth in the defence above set out. He says that, even on the accused's own statement of the facts, an offence, namely, the offence of lurking house-trespass by night, punishable under section 456 of the Indian Penal Code was established. He convicted and sentenced Chhote Lal accordingly. The District Magistrate, in referring the case, has relied upon the reported decision of a Judge of this Court in the case of *Gaya Bhar* v. *Emperor* (2). It has been suggested that this decision is inconsistent with that of another Judge of this Court in the case of *Mulla* v. *Emperor* (1). In our opinion the two decisions are not inconsistent and we agree substantially with both of them. When the evidence shows that a man has been found lurking at night inside the house of another person, a perfect stranger to him, or a person in whose house he has no apparent business, the prosecution will be entitled to ask the Court to infer from these facts that there was a guilty intention on the part of the accused sufficient to bring his action within the purview of section 441 of the Indian Penal Code. This was clearly laid down in the case of *Balmakand Ram* v. *Ghansamram* (3) and also in the case of *Premanundo Shaha* v. *Brindabun Chung* (4). And in dealing with cases of this sort we may remark that Magistrates should not overlook the existence of section 509 of the Indian Penal Code, when they are considering the allegation on the part of the prosecution that the entry by the accused into the premises in question must presumably have been with intent to commit some offence. Difficulties are only likely to arise when the accused himself pleads in his defence and establishes, either by direct evidence or by way of reasonable inference from proved facts, that he had some specific intention in entering the house and that the intention in question was neither to commit an offence nor to intimidate, insult or annoy any person in possession of the house. The provisions of section 106 of the Indian Evidence Act (I of 1872) may also be referred to in this connection. In the case now before us the accused alleged two things; *firstly*, that he had entered the house at the request of one of its inmates and, *secondly*, that he had no intention of insulting or annoying the complainant Badri. Presumably it might be suggested in his defence that the latter plea was sufficiently established by the precautions taken by him to conceal from Badri the fact of his presence in the house. At any rate it was clearly no part of the case for the prosecution that Badri knew of the existence of any intrigue between the accused Chhote Lal and his mother, or had ever forbidden Chhote Lal access to his house on the ground of his knowing or suspecting the existence of such intrigue. We make these remarks because we think

(2) 35 Ind. Cas. 979; 38 A. 517; 14 A. L. J. 719; 17 Cr. L. J. 419.

(3) 22 C. 391; 11 Ind Dec. (N. S.) 262.
(4) 22 C. 994; 11 Ind. Dec. (N. S.) 660.

it possible that the decision of the learned Judge of this Court in the case of *Gaya Bhar* v. *Emperor* (2) may possibly be interpreted too widely and may be held to apply to cases in which an accused person has forcibly or clandestinely entered a house which he knew to have been definitely closed and barred against him by the owner thereof. In such cases it might not be a sufficient answer to a charge of criminal trespass for the accused to say that he personally hoped that the owner would remain in ignorance of the fact of his entry. The Court may find on the facts that the intention to insult or annoy under such circumstances was so clearly inherent in the acts of the accused as to form an essential part of the purpose with which entry into the house was effected. On this point the remarks of the learned Judges of the Bombay High Court in the case of *Emperor* v. *Lakshman Raghunath* (5) are certainly pertinent. In our opinion there should have been a further enquiry into this case before the accused was either convicted or acquitted. He was anxious himself to summon the complainant's mother as his witness, and the trying Magistrate has given no valid reasons for refusing that request. It may be that this woman's evidence would have entirely satisfied the Magistrate as to the facts of the case, and the Magistrate may come to the conclusion that the allegations made by the accused in his defence are wholly false and that he has aggravated his position by putting forward these allegations and dragging a respectable woman into Court on the strength of them. On the other hand, if the Magistrate finds the facts to be as alleged by the accused, the case should be decided on the principles of law laid down in the rulings to which we have referred, including the decision of this Court in the case of *Gaya Bhar* v. *Emperor* (2) from which, if the principles laid down are properly limited and understood, we see no reason to dissent, we set aside the conviction and sentence in this case, but we do not acquit the accused Chhote Lal of the offence charged. On the contrary we direct the Magistrate to proceed with the trial, to enquire into the truth or otherwise of the defence set up and to pass such orders in the case as appear to him correct and appropriate.

(5) 26 B. 558; 4 Bom. L. R. 280.

WALSH, J.—I agree. What I propose to say on the question of law referred to us covers this case and also Criminal Revision No. 837 of 1917 before us for orders. I think it is a question of fact in each case. As Lord Justice Bower says in *Edgington* v. *Fitzmaurice* (6), "the state of a man's intention is as much a question of fact as the state of his digestion," and the real question of law is whether when there has been a conviction, there is any evidence of intention justifying the conviction. I think there is no conflict between the reported cases at all and I venture to sum up the result of them in this way. I think they come to this that if there is an invitation, or complicity by the woman, combined with an intention to preserve strict secrecy, then it is difficult to say that there is any intention to annoy a third person, but if that third person has expressly prohibited the accused then his act becomes a direct defiance to an express order, and it is impossible to say that you cannot infer from it an intention to annoy the author of the order. I think this is what has already been established by the decided cases. I agree with the decision of Mr. Justice Knox in *Mulla* v. *Emperor* (1) that a man found inside the complainant's house who makes no statement of reasons for being there or gives an explanation which is demonstrably false, is clearly liable to be convicted on the ground that the burden of proof lies upon him and he has not discharged it. I do not understand that Mr. Justice Sunder Lal differed from that decision. On the contrary he seems to have agreed with it. Mr. Justice Sunder Lal held in *Gaya Bhar* v. *Emperor* (2) that mere knowledge on the part of the accused that he is likely to cause annoyance is not sufficient, and in coming to that conclusion he merely followed the case of *Queen-Empress* v. *Rayapadayachi* (7), where it was held that although a man may know his act is likely to cause annoyance, it does not necessarily follow that he does the act with intent to

(6) (1885) 29 Ch. D. 459 at p 483. 55 L. J. Ch. 650; 53 L. T. 369; 33 W. R. 911; 50 J. P. 52.

(7) 19 M. 240; 1 Weir 537; 6 Ind. Dec. (N. S.) 872.

annoy. And so far I think Mr. Justice Sunder Lal and the Madras High Court were really giving effect to the absence from this section (section 441) of the words found in a cognate section, namely, section 297, where the knowlege that the feelings of a person are likely to be wounded is one of the ingredients of the offence. This view is borne out by the decision in *Emperor* v. *Lakshman Raghunath* (5), to which my brother Piggott has already referred. In that case there was a distinct prohibition. The accused only wanted to get at their judgment-debtor and trespassed upon the complainant's house in order to do it. Some people might be annoyed by that while some people might not mind it, and an enemy of the judgment-debtor certainly would not But in the particular case the complainant forbade them to do it and it was held—and I agree with the decision—that, in the face of his order directly forbidding them, an offence was committed within this section. There is a passage in that judgment which I adopt: "When it is uncertain whether a particular result will follow (as in the Madras case in which the accused hoped to keep his conduct secret) there may be no intent to cause that result even though it may be known that the result is likely. But it seems impossible to contend when an act is done with a knowledge amounting to practical certainty that a result will follow that it is not intended to cause that result." Regard must obviously be had to all the circumstances of the case. It may sometimes happen, I suppose in this country as in others, that a man who is making love with another man's wife is doing it not merely with the tacit approval of the husband, but as the result of a conspiracy, if I may use the word, between the husband and the wife to enable the wife to get away from the husband and find a protector. Such cases are not unknown. In such a case the man might not know that his visits were approved by the husband and might think that he was successfully carrying on a secret intrigue, the truth being that the husband was assisting the wife all the time. I take it that no Court ought to find, if those facts were established and although the man complained against himself might have thought that his conduct was likely to annoy, that he had any intention of annoying the husband. I agree with the view taken by the learned Sessions Judge of Cawnpore in the case which is before us, Revision No. 837 of 1917, that if the accused knew that he had been expressly prohibited from entering the house by the uncle it is legitimate to infer that he intended to annoy by persisting. Another example is that of a son in disgrace who persists in entering his father's house after a direct prohibition. I think this feature of the case in Reference No. 837 of 1917 just marks the dividing line between the two cases. I entirely agree with the order proposed in the case before us. The facts must be ascertained before the final decision can be arrived at.

Order accordingly.

PATNA HIGH COURT.

CRIMINAL REVISION NO. 386 OF 1917.

December 5, 1917.

Present:—Mr. Justice Jwala Prasad.

KHETRABASI SAHU AND OTHERS—ACCUSED—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 107, 125—Petition under s. 125—Right of petitioner to be heard—Applicability of s 07—Breach of peace, apprehension of.

A District Magistrate dealing with an application under section 125 of the Code of Criminal Procedure is exercising neither appellate nor revisional jurisdiction and it is not incumbent upon him to hear the Mukhtear of the petitioner before disposing of the application. [p. 39, col. 2.]

Where acts committed by an accused person are of such a nature that the continuity of these acts or the commission of similar acts by the accused is apprehended to be tending to a breach of the peace, section 107 of the Code of Criminal Procedure is applicable notwithstanding that the acts already committed by the accused constitute specific offences under the Penal Code. [p. 40, col. 1.]

Criminal revision from an order of the Magistrate, Cuttack.

Mr. *G. C. Pal*, for the Petitioners.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—The petitioners have been ordered by the Magistrate of Cuttack each to execute a bond of Rs. 100 with two sureties in a

like amount each to keep the peace for one year or in default to undergo simple imprisonment for the same period unless the required security is sooner furnished. The order is made under section 118 read with section 107 of the Code of Criminal Procedure.

Against this order the petitioners moved the District Magistrate of Cuttack under section 125 of the Code. The District Magistrate rejected their petition summarily, saying that he had perused the grounds of motion and the judgment of the Magistrate and that he saw no reason whatever to cancel the bonds executed by the petitioners. Against this order of the District Magistrate the petitioners have now come to this Court.

The main contention of the petitioners has been that their petition to the District Magistrate under section 125 was not legally disposed of, inasmuch as no opportunity was given to them or their Mukhtear to place their case before the District Magistrate. This ground has not been specifically taken in the petition presented to this Court but a letter, dated 2nd October 1917, purported to have been written to the learned Vakil for the petitioners by their Mukhtear who appeared for them before the District Magistrate has been filed. In this letter it is stated that the Mukhtear presented a petition, upon which the District Magistrate directed him to file a supplementary petition as the one filed was argumentative in nature. The amended petition was filed the next day when the District Magistrate had not come to Court, and it was sent to his house along with the first petition which set forth all the arguments on behalf of the petitioners. The District Magistrate in his order says that he perused the petition and also considered the judgment of the first Court and then rejected the petition summarily.

The petition under section 125 of the Code could not be treated as an appeal, for there is no appeal from an order under section 118 of the Code of Criminal Procedure. As there is a special section 125, that petition could not be treated as a petition under section 435 and, therefore, the Magistrate was not exercising either appellate or revisional jurisdiction in dealing with the petition in question. Section 125 of the Code gives power to the Magistrate to cancel any bond directed to be executed by order of any Court subordinate to him for reasons to be recorded in writing I do not think that it was incumbent upon the District Magistrate to hear the Mukhtear for the petitioners before disposing of the application under section 125. Section 440 of the Code says that no party has any right to be heard either personally or by Pleader before any Court in the exercise of its revisional power subject to the limitation of section 439, sub-clause 2, which specially provides for giving an opportunity to the accused to be heard in revision before any order is passed to his prejudice. So that unless the petition in question was an appeal or a revision which, as shown, it was not, the party had no right to be heard. The contention of the learned Vakil for the petitioners should be overruled. But I have heard the learned Vakil at length on the merits of the case and I have carefully gone through the judgment written by the Magistrate who tried the case. The proceedings before the Magistrate are not challenged as being in any way affected by illegality or any irregularity in the proceedings. It is, however, contended that there is no sufficient evidence of overt acts against the accused persons which would justify an inference that there was a likelihood of a breach of the peace to be committed by them. The Magistrate has addressed at length on this point. He has come to the conclusion that all the seven accused belong to a different faction in the village headed by accused No. 1. Khetrabasi and that the opposite party belong to the opposite faction and that the two parties are fighting for sometime; that the party of the accused is strong and overwhelming in numbers and are threatening with violence and harassing the opposite party in various ways. The Magistrate says that it has been satisfactorily proved that the accused persons threatened to beat Daitari Sahu and Uchhab Sahu, the opposite party, and harassed them in other ways and that there is every likelihood of a breach of the peace by them. The Magistrate has given specific instances when these violent acts of aggravation were committed by the accused under the orders of Khetrabasi. One instance is that the accused Daitari Sahu once threatened to beat him at the *zemindar's kacheri* This is said as having been corroborated by the *zemi dar* himself.

The accused persons are said to have gone to the house of Daitari Sahu and abused him

filthily for his having deposed before the Inspector of Police in connection with the case. This is said to have been supported by the evidence of Lochan Sahu (P. W. No. 9). Daffadar (P. W. No. 11) says that the accused persons once threw brickbats into the house of Daitari Sahu. The *chaukidar* had to be directed to keep strict watch over the accused persons so that no breach of the peace might be committed. On the evidence the Magistrate has held that the accused and some other persons of their party held sittings at Khetra's house at intervals of 2 or 3 days at about midnight and that the people of the locality are all afraid of them.

It is contended by the learned Vakil for the petitioners that the overt acts alleged in this case were specific offences themselves and should have been dealt with under the Indian Penal Code instead of under section 107 of the Code of Criminal Procedure. The argument appears to be inconsistent with the earlier part of the learned Vakil's argument where he said no overt act was proved. For an inference that there would be a likelihood of a breach of the peace it is necessary to show overt acts, but each overt act from which a breach of the peace could be inferred would be in itself an offence punishable under the Indian Penal Code. I cannot conceive an act from which an imminent danger of the breach of the peace could be gathered without that act being penal in itself. This is not a real distinction, but the distinction is that where the acts committed by the accused are of such a nature that the continuity of these acts, or the commission of similar acts by the accused is apprehended to be tending to breach of the peace, section 107 would be applicable notwithstanding that the acts already committed by the accused constituted specific offences under the Indian Penal Code.

It was also contended that the acts in this case specified by the Magistrate were past acts of long standing and that there was no immediate apprehension of the breach of the peace.

From the summary of the findings of the learned Magistrate on the point that I have given above, it is apparent that these persons are in conspiracy to annoy and to harass the opposite party and that at intervals of 2 or 3 days meetings are held at the house of accused No. 1 and further that the opposite party is so much horrified that they remain confined. The opposite party consists of only two persons who are compelled to confine themselves in their houses and are prevented from carrying on their ordinary avocation. I could not imagine a stronger case for an action under section 107, where the people of the whole village on the side of the accused have combined against two helpless persons.

The finding of the Magistrate if correct certainly justifies action under section 107. The learned Vakil does not challenge the finding upon the ground that it is not based upon evidence, and as a matter of fact the evidence that has been placed before him goes to show that the findings are justified by the facts on the record.

I, therefore, do not find any ground for interfering in this case. I reject the petition.

Petition dismissed.

MADRAS HIGH COURT.

CRIMINAL REVISION No. 270 OF 1917.

CRIMINAL REVISION CASE No. 216 OF 1917.

November 15, 1917.

Present:—Mr. Justice Kumaraswami Sastri.

PENUMETSA THIRUMALRAJU AND OTHERS—ACCUSED—PETITIONERS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 96, 97, 141, 447—Trespass, resistance to—Private defence, right of, exercise of—Persons exceeding right, whether constitute 'unlawful assembly'—Joint trial—Evidence, discussion of, as against each accused—Court, duty of.

The right of private defence against an act of trespass on one's property is not lost by reason of the omission to send word to a Police Station which is at some distance from the place of occurrence. [p. 41, col. 1]

Persons who exercise their right of resisting an unlawful trespass on their property do not become members of an unlawful assembly by repelling attacks made on them or by exceeding their right of private defence. [p. 41, col. 1.]

Where several persons are charged with an offence, the judgment of the Court should contain a discussion of the evidence as against each accused. [p. 41, col 2.]

Petition under sections 435 and 439 of the Code of Criminal Procedure, praying the

High Court to revise the judgment of the Court of Session, Kistna Division, in Criminal Appeal No. 57 of 1916, preferred against that of the Sub-Divisional Magistrate, Bhemavaram, in Calendar Case No. 6 of 1916.

Mr. *G. Venkataramiah*, for the Petitioners.

Mr. *C. Narasimhachariar*, for the Public Prosecutor, for the Crown.

ORDER.—The evidence shows that the Bodi was irrigating the lands of 1st accused and that at least from 1901 the lands of the opposite party were not irrigated by it. The Sessions Judge finds that the spout was only capable of irrigating two acres, which is the extent of field No. 418 belonging to 1st accused. The Deputy Magistrate in the counter-case finds that the Kapus went to the field of the accused in the present case with a spear and sticks to enforce their right and repair the Bodi and ready to repel by force any obstruction to their interfering with the Bodi.

I have little doubt that the accused had the right to prevent the Kapus from entering upon their fields and interfering with the Bodi on it. It is difficult to see how they lost the right of private defence because they did not send word to the Police Station six miles off. By the time a person could have gone there and returned with Police help, the Kapus would have trespassed on the land of the 1st accused and gained all they would. The 1st accused and those on the land were justified in getting help and resisting the trespass attempted by the Kapus.

The only question is whether the accused or any of them exceeded their right of private defence. In this connection I may point out that persons exercising their right are not members of an unlawful assembly by repelling attacks made on them or by exceeding the right of private defence. See *Knnja Bhuniya* v. *Emperor* (1). If any person exceeds his right of private defence he will be individually liable for any injury caused.

So far as the accused Nos. 1 to 3 are concerned, the Deputy Magistrate finds that they did not cause hurt to anybody and the Sessions Judge did not differ from him. They were clearly within their right in resisting the attempt of the Kapus to trespass on their land and, as they have not exceeded their right of private defence, it is difficult to see how they can be convicted of any offence. The learned Public Prosecutor is unable to support the conviction so far as they are concerned. As regards the other accused there is the finding that they exceeded the right of private defence. It would have been more satisfactory if the Sessions Judge had discussed the evidence as against each accused, as he was bound to do: *In re Ramasamy Naidu* (2), but I think no useful purpose will be served by sending the case back.

I set aside the conviction and sentence against accused Nos. 1 to 3 and confirm the conviction as against the other accused. The security bond executed by accused Nos. 1 to 3 will be cancelled.

Conviction against accused Nos. 1 to 3 set aside.

M. C. P.

(1) 15 Ind. Cas. 481; 39 C. 896; 16 C. W. N. 1053; 13 Cr. L. J. 481.

(2) 31 Ind. Cas. 825; 16 Cr. L. J. 809.

PATNA HIGH COURT.

CRIMINAL REVISION No. 283 OF 1917.

August 7, 1917.

Present:—Mr. Justice Mullick and Mr. Justice Jwala Prasad.

MEWA LAL AND OTHERS—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 145, proceedings under—Receiver, appointment of, validity of—Penal Code (Act XLV of 1860), s. 448—Criminal trespass Bona fide *claimant guarding property—Offence—Criminal trial—Procedure—Accused, right of, to make defence—Irregularity.*

Under section 145 of the Code of Criminal Procedure a Magistrate has in cases of emergency the power to attach the subject in dispute, but he has no power at that stage to appoint a Receiver. [p. 43, col. 1: p. 45, col 2.]

Where a Magistrate takes proceedings under section 145 of the Criminal Procedure Code the object of the law is that he shall confirm the party in actual possession He is not competent to dispossess such a party by appointing a Receiver and the order of

attachment which the law empowers him to make has no greater force than any Civil Court attachment the effect of which is generally to restrain alienations. [p. 43, col. 1.]

A Receiver can be appointed only where the Magistrate is unable to decide which of the parties is in possession and has a right to remain in possession, and considers it necessary that the property should vest in some person appointed by the Court under section 146 of the Code of Criminal Procedure. [p. 45, col. 2.]

The essence of an offence under section 448 of the Penal Code is that there should be an intention to insult, annoy or intimidate the owner of the property or such person as is acting on behalf of the owner. [p. 43, col. 2; p 44, cols. 1 & 2.]

Where a person who is a rival claimant to some property comes on the premises in good faith with the intention of guarding the property, he is not guilty of Criminal trespass, [p. 43, col. 2; p. 45, col. 1.]

A Magistrate exercises his jurisdiction with material irregularity if he holds a trial at a place where the accused is totally incapable of making a proper defence. [p. 44, col. 1]

Criminal revision from an order of the Sessions Judge, Mozufferpore, dated the 9th July 1917.

Messrs. *Manuk* and *Jaigovind Singh*, for the Petitioners.

Mr. *Fakhruddin*, for the Crown.

JUDGMENT.

MULLICK, J.—On the 14th of June last a lady named Dulhin Jagat Rup Kuer died in *Mouza* Lowahi.

It appears that an application was made to the Sub-Divisional Magistrate of Sitamarhi by *Musammat* Gulab Kuer claiming the house and the moveable and immoveable properties of the lady. In consequence of that application the Sub-Divisional Magistrate went to Lowahi and recorded proceedings under section 145 of the Criminal Procedure Code calling upon *Musammat* Genda Kuer, first party, *Musammat* Gulab Kuer, second party, and four other persons described as the third party, to appear before him on the 1st July to support their respective claims to the immoveable properties. At the same time the learned Sub-Divisional Magistrate attached the house under the provisions of section 145 and appointed a gentleman, named Mr. Everett, who was the Manager of *Musammat* Dulhin Jagat Rup Kuer, as Receiver. On the 16th of June, Mr. Everett appears to have sent a telegram to the Sub-Divisional Magistrate making certain complaints against the servants of *Musammat* Dulhin Genda Kuer, the first party. That telegram is not on the record, but it is alleged that the complaint was that the servants of *Musammat* Dulhin Genda Kuer were attempting to loot the properties of the deceased lady. Thereupon the Sub-Divisional Magistrate passed the following order on the Sub-Inspector of Police:—

"Mr. Everett informs me that peon and *amlas* have been sent to Lawahi by Babu Sarjug Prasad. Go to Lawahi and turn them out and report their names to me. You will obtain Mr. Everett's signature on this paper in token of this having been done to his satisfaction and return this paper to me by to-morrow."

On the 18th of June the Sub-Inspector of Police proceeded to Lawahi and was unsuccessful in inducing the servants of *Musammat* Dulhin Genda Kuer to leave the premises and he submitted the following report to the Sub-Divisional Magistrate:—"Sir, I proceeded to Lawahi immediately on receipt of the order with the constables available in the Police Station. Babu Brijbihari Singh, who was present here with his peons, did not obey the orders and wrote down a note of disobedience which I herewith attach. I recommend for their prosecution under section 188, Indian Penal Code, and submit a separate report."

The note of disobedience is to the following effect:—

"The Magistrate's order to withdraw has been read over to me to day the 18th June, 1917, at 10-30 A. M. at Lawahi, which I refuse to obey till the proper attachment of the property is done and list prepared."

On the Sub-Inspector's report the Sub-Divisional Magistrate himself proceeded to the house of *Musammat* Dulhin Jagat Rup Kuer on the 19th of June, 1917, and finding the seven petitioners, who appear to be servants of *Musammat* Dulhin Genda Kuer, on the premises he arrested them of his own motion and took proceedings for their prosecution under section 448 of the Indian Penal Code. He held a summary trial on the spot and after examining three witnesses for the prosecution convicted the petitioners under section 448, Indian Penal Code, and sentenced them to rigorous imprisonment for one month each.

An application was made to the Sessions Judge against these convictions and sen-

tences but without success. The petitioners have accordingly come to this Court.

Now the first question that arises is whether the appointment of the Receiver was a legal appointment in this case. Under section 145, Criminal Procedure Code, as amended, a Magistrate has in cases of emergency the power to attach the subject in dispute, but it does not appear that he has any power at that stage to appoint a Receiver. There is authority for the proposition that he cannot appoint a Receiver except under section 146, *Srinivasa Pillay* v. *Sathayappa Pillay* (1), and the reason for this is quite clear. Where the Magistrate finds that nobody is in possession or that the evidence is so conflicting that it is impossible to find who is in possession, the Magistrate is empowered to attach and to appoint a Receiver, who will take physical possession of the property; but that state of affairs does not exist before the enquiry has been made. When a Magistrate takes proceeedings under section 145 the object of the law is that he shall confirm the party in actual possession. He is certainly not competent to dispossess such a party by appointing a Receiver, and the order of attachment which the law empowers him to make has no greater force than any Civil Court attachment, the effect of which is generally to restrain alienations. The allegation is that *Musammat* Dulhin Genda Kuer had immediately after the death of *Musammat* Dulhin Jagat Rup Kuer proceeded to the house and performed the *sradh* ceremony, but of this we have no evidence before us. It is an undisputed fact, however, that her servants were in possession of at least one outhouse at the time when the Magistrate made his order of attachment and that Mr. Everett was not competent at that stage of the proceedings to eject them. Therefore, unless they committed any Criminal act after that date, it does not appear that there was any ground for proceeding against them. The Magistrate in his explanation suggests that there was a fear that the petitioners would loot the house. It does not appear from Mr. Everett's evidence or indeed from any other evidence on the record that this was the case. When the Sub-Inspector of Police appeared on the scene on th 18th of June, the conduct of Brijbihari Singh was no doubt contumacious, but I am unable to say upon the evidence before us that either he or his subordinates were guilty of any Criminal offence. He stated that he would not vacate the outhouse until a proper attachment had been made and until a list of the property had been prepared.

Now the essence of an offence under section 448 is that there should be an intention to insult, annoy or intimidate the owner of the property or such person as was acting on behalf of the owner. Even assuming that Mr. Everett had been duly appointed to act on behalf of the owner, it does not appear from the conduct of the petitioners that they in any way interfered with his possession or with due performance of his duties. It is stated by the Sub-Inspector of Police in the enclosure to his report of the 18th of June that the petitioners were armed with *lathis*, but it appears from Mr. Everett's evidence that the *lathis* were in the *kutchery* and that the petitioners did not show any intention of using them. On the contrary the conduct of the petitioners was, in my opinion, quite consistent with the plea that they acted in good faith and with the sole object of preventing rival claimants from carrying away any moveable property from the house. From Mr. Everett's evidence it is clear that the house was not securely locked and it is in evidence that the learned Sub-Divisional Magistrate on the 18th of June found a sum of Rs. 20,000 in cash which he carried away to the local treasury.

In these circumstances I think that the plea of *bona fides* has been made out and that as the petitioners were there merely for the purpose of guarding the property or assisting Mr. Everett in guarding the property, no offence under section 448 has been made out.

Then as regards procedure, I agree that the trial was irregular. The learned Sub-Divisional Magistrate, inspite of the protests of the accused, tried the case at the house of the deceased lady without giving the petitioners the opportunity of being represented by legal practitioners or calling defence witnesses. The learned

(1) 14 Ind. Cas. 759; 13 Cr. L. J. 295.

Sub-Divisional Magistrate was certainly competent to arrest the accused and to put them on their trial. But in my opinion he exercised his jurisdiction with material irregularity in holding the trial at a place where the accused were totally incapable of making a proper defence. It does not appear that there was any particular reason why the accused could not either have been taken forthwith to the learned Sub-Divisional Magistrate's headquarters or enlarged on bail and tried in accordance with law after being accorded the assistance which they required.

An objection has been taken by Mr. Manuk as to the jurisdiction of the learned Magistrate to try the case himself. It is urged that he acted under section 190 (c) of the Code of Criminal Procedure and that he was not competent to hold the trial himself.

Now although the Magistrate's reason for going to the place of occurrence on the 19th of June was in the first instance prompted by the telegram received from Mr. Everett on the 16th June, I think the report of the Sub-Inspector of Police of the 18th June may be taken to be a report stating facts which constitute the offence of Criminal house-trespass. It is true that the Sub-Inspector of Police himself asked for a prosecution under section 188, Indian Penal Code, only, but the learned Magistrate was competent on the perusal of the report to put the accused on trial for an offence under section 448, Indian Penal Code, if that offence was disclosed upon the facts alleged in the report. Therefore, so far as this ground of objection is concerned, I do not think the learned Counsel for the petitioners has made out his case, but upon the substantial part of his case I agree with him and hold that the convictions and sentences were illegal and should be set aside. The petitioners will be discharged from their bail.

JWALA PRASAD, J.—I agree to the order proposed by my learned brother that the convictions in this case should be set aside. The petitioners cannot possibly be said to be guilty under section 448, for the simple reason that it has not been shown from the evidence on the record that there was any intention on their part to intimidate, insult or annoy any person in possession of the property. This is an essential ingredient for an offence under section 448. The whole case against the petitioners is due to their refusal to obey the order of the Sub-Divisional Magistrate conveyed to them by the Sub-Inspector of Police on the 18th of June 1917. Babu Brij Bihari Singh, the Manager of *Musammat* Dulhin Genda Kuer, who is said to have been acting as the head of the petitioners at that time, refused to obey the order upon the ground that he would remain upon the premises "till the proper attachment of the property had been done and a list prepared." This shows the intention of Babu Brij Bihari Singh and his men. The house in question belonged to *Musammat* Dulhin Jagat Rup Kuer who died on the 14th of June, that is, only four days before the order of the Sub-Divisional Magistrate was passed upon the petitioners to leave the premises. She was possessed of large property, moveable and immoveable, as the proceeding under section 145 shows. The house itself is said to have contained very valuable property, so much so that when the list was made by the Court of Wards a large sum of money was found in the house, which was removed to the Sitamarhi Sub-Treasury. *Musammat* Dulhin Genda Kuer, on whose behalf Babu Brij Behari Singh and the petitioners were acting, treated this property as belonging to her adopted son. On the 15th of June when the Sub-Divisional Magistrate arrived on the spot the only thing that was done was to put some seals here and there, but the proper inventory of the properties was not made and the custody of all moveable property in the house was not taken. The decision of the learned District Judge under the Curators Act (Act XIX of 1841) disposing of the claim of the contending parties to the properties of *Musammat* Dulhin Jagat Rup Kuer shows that the adopted boy of *Musammat* Genda Kuer was held to be the rightful owner of the estate left by the deceased lady, and that he was in rightful possession of the property. This subsequent event I have mentioned only with a view to show what must have been the intention of the petitioners at the time when they refused to obey the order of the Sub-Divisional Magistrate. The petitioners refused clearly and boldly,

what the Sub-Inspector says sternly, to obey the order of the Sub Divisional Magistrate, because Brij Bihari Singh was at that time conscious of his possession and was fully aware of the danger of leaving the property as it was; and because in the interest of his mistress and the rightful owner of the property he thought he was entitled to remain on the premises and to guard the properties from being removed by the rival claimants or by strangers or from any charge of misappropriation. The petitioners were also interested in a proper list being made of the properties so that no possible charge of theft or misappropriation be brought against them, for just two or three days before the petitioners with their mistress had been in the house after the death of the *Musammat* Dulhin Jagat Rup Kuer. All that has been proved in the evidence in this case is that the petitioners were in an outhouse of the premises and that they had some *lathis* in that room. This is consistent with the conduct of persons intent on guarding the properties supposed to belong to them. There is no charge made against them by any of the witnesses, even by Mr. Everett, that the petitioners ever attempted to use violence or ever attempted to force themselves into the house or to remove or touch any of the properties in the house. If we are to judge the intentions of the petitioners by their overt acts, there is only one inference, that the petitioners believed themselves and were acting *bona fide* in order to guard the properties. This is sufficient to dispose of the present application of the petitioners. Section 448 is not at all applicable to this case. I have no doubt in my mind as to the impropriety of the order passed by the Magistrate under section 145 at that stage, still more uncalled-for was the order of attachment and the appointment of the Receiver at that stage. If the Magistrate thought, and I think that he had reason to think, that there was likelihood of a breach of the peace among the rival claimants to the property of *Musummat* Dulhin Jagat Rup Kuer, the proper and effective action was under section 144 of the Criminal Procedure Code made to give the Magistrate time to take necessary measures under section 107 or 145 of the Criminal Procedure Code. The order under section 144 would have all the desired effect of preventing a breach of the peace and of preventing the property being interfered with or removed by any of the rival claimants. Mr. Everett, as has been clearly shown by my learned brother, was not the properly constituted Receiver under that Act. He had no right to dispossess or to turn out a person who was in possession of the house. In the present case some of the servants of *Musammat* Dulhin Genda Kuer were in one of the outhouses before the proceedings under section 145 were instituted. What would have been the effect of the order under section 145 passed on the spot attaching the property and appointing a Receiver thereof if *Musummat* Dulhin Genda Kuer had herself been on the premises? Probably the Receiver armed with that order would have, as he had done in this case, attempted to turn out the lady from the premises. This is to illustrate how premature was the action of the Sub-Divisional Magistrate in appointing a Receiver at that stage. A Receiver is appointed only when the Magistrate is unable to decide which of the parties is in possession and has a right to remain in possession, and considers it necessary that the property should vest in some person appointed by the Court under section 146. During the pendency of section 145 proceedings the Magistrate can attach the property the subject-matter of dispute, but there is no provision in section 145 for the appointment of a Receiver consequent upon attachment, as in section 146. As said by my learned brother, an attachment under section 145 may have the same effect as an attachment under the Civil Procedure Code. It may possibly amount to something more than that, that is to say, after attachment the Magistrate may take steps for proper care and custody of the property and prevent the removal of the property by any of the rival claimants or strangers. In the present case the petitioners were not trying to remove, or in any way interfere with, the properties attached but were simply guarding them.

For all these reasons I agree that the convictions and sentences should be set aside and the petitioners discharged from their bail.

Convictions and sentences set aside.

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 601 OF 1917.

November 24, 1917.

Present:—Mr. Justice Shah Din.

SHAHAB-UD-DIN—CONVICT—PETITIONER

versus

EMPEROR THROUGH MUNICIPAL COMMITTEE, HOSHIARPUR—COMPLAINANT—RESPONDENT.

Punjab Municipal Act III of 1911), *ss.* 13 (a), 175, 219—*Street—Removal of obstruction, when justified—Private property.*

Section 175 of the Punjab Municipal Act does not authorise a Municipal Committee to call upon anybody to remove a projection or an obstruction, unless it is proved by the Committee that the site on which the projection or obstruction stands is part of a "street" within the meaning of section 13 (*a*) of the Act. [p. 46, col. 2]

Where, therefore, the petitioner was convicted under section 219 of the Punjab Municipal Act and ordered to demolish a latrine situated in a street close to his house and it appeared that the latrine had been in existence for 65 years, during which time the Municipal Committee treated it as private property:

Held, that the conviction could not stand. [p. 47, col. 1.]

Petition for revision, under section 439 of the Criminal Procedure Code, from the order of the District Magistrate, Hoshiarpur, dated the 6th January 1917, confirming that of the Magistrate of the Second Class, Hoshiarpur, dated the 30th June 1916, convicting the petitioner.

The Hon'ble Mr. *Fazl-i-Husain*, for the Petitioner.

JUDGMENT.—In this case the petitioner Shahab-ud-Din has been convicted by Lala Banwari Lal, Tahsildar and Magistrate of the Second Class, Hoshiarpur, under section 219 of the Punjab Municipal Act, III of 1911, and ordered to pay a fine of Rs. 10 and to demolish within one week a latrine situate in a street close to his house. The sole question for decision in this revision is whether the site of the latrine in question is part of a street or not; for it is not disputed that if it is not part of a street within the meaning of the Municipal Act, section 175 of the Act, under which a notice was issued to the petitioner by the Municipal Committee of Hoshiarpur requiring him to remove the latrine, would be inapplicable to the case and the conviction under section 219 would not be justified. The District Magistrate, to whom an appeal was preferred by the petitioner from the Magistrate's order convicting him under section 219 of the Municipal Act, has only incidentally observed in his judgment that the piece of the land on which the latrine stands forms part of a street; but the ground on which he has maintained the order of the Magistrate is that since the latrine is right up against the wall of one Lala Basant Rai's house and other people have also to pass the corner in which it is situated, the Municipal Committee is justified in ordering its demolition. It is clear to my mind that the ground on which the District Magistrate has based his order is absolutely untenable; for unless it is proved by the Municipal Committee that the site on which the latrine stands is part of a "street" within the meaning of section 13 (*a*) of the Municipal Act, section 175 of the Act will not justify the Municipal Committee in requiring the petitioner to remove the latrine. A reference to the record of the case decided in 1871, *Kamal Din* v. *Basant Rai*, shows that the latrine in question had been in existence for a long time before 1871 and belonged to one Dulo *Kunjra*. It stood on the site which was clearly not part of a street, as is shown by the decision of Munshi Muhammad Said-ud-Din Khan, Extra Assistant Commissioner, dated the 5th October 1871. The inference drawn by the Magistrate in the present case from the report of Munshi Hissam-ud-Din, Tahsildar, in the 1871 case and from the plan which is on the record of that case (a copy of which, Exhibit G, is on the present record) is based upon an obvious misconception as to the decision given by Munshi Muhammad Said-ud Din Khan. The latrine, together with its site, has since 1871 formed the subject of several alienations; and the Tahsildar Magistrate admits that the latrine in question has been in existence for the last 65 years. Upon the material on the record there can be no doubt whatever that the petitioner Shahab-ud-Din is owner of the latrine in question; and it is also proved that the Municipal Committee treated it as private property and not part of a street and gave permission to Ganga Ram in 1897 and to the petitioner in 1908 and 1910 to add to it and to roof it over, thereby admitting the right of the owners of it to its user as a latrine and as part of the petitioner's private property.

I hold that the order of the Magistrate

convicting the petitioner under section 219 of the Municipal Act was not justified; and I accordingly accept this revision and set aside the Magistrate's order. The fine, if realized, will be refunded to the petitioner.

Petition allowed.

PATNA HIGH COURT.

MISCELLANEOUS CRIMINAL REVISION No. 67 OF 1917.

January 10, 1918.

Present:—Mr. Justice Atkinson.

SITAL PRASAD—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 234, 235—Distinct offences committed within 12 months—Joint trial, how far permissible.

Where an accused person commits more than three offences of the same kind within 12 months by distinct, separate and wholly unconnected acts, he may be tried in batches of three at each trial under separate charges. [p. 48, col. 2.]

Where the motive or object which actuates an accused in the commission of several distinct offences of the same kind is the same, the offences do not necessarily constitute one and the same transaction within the meaning of section 235 of the Criminal Procedure Code. [p. 48, col. 2.]

Miscellaneous Criminal revision against an order of the Deputy Magistrate, Darbhanga.

Mr. *Rajender Prasad*, for the Petitioner.

Mr. *Fakhruddin*, Government Pleader, for the Crown.

JUDGMENT.—The accused Sital Prasad was a servant in the Rayan Sugar Factory and he was charged by the General Manager of the factory with having on the 12th of March 1917 issued two false receipts to tenants who came to the factory with the object of selling and delivering sugarcane to the factory, the substance of the offence being that the accused Sital Prasad issued receipts for sugarcane which never was delivered in fact and thus enabled tenants to obtain money from the factory for sugarcane which had never been supplied.

The accused apparently in the month of March 1917 resorted to this form of deception in a series of transactions. A charge was, however, preferred against the accused by Mr. Hoskins, the General Manager of the factory, in respect of two false receipts alleged to have been issued by the accused on the 12th of March 1917 and the accused was charged under sections 468 and 477 (*a*) of the Indian Penal Code—the charge under section 468 being for forgery with intent to cheat and the charge under section 477 (*a*) being in respect of the falsifications of accounts with intent to defraud. These two transactions by no means formed the entire of the accused's defalcations or wrong-doing, because on the 4th and the 8th of March he also issued two other false receipts to two other tenants who came to deliver sugarcane to the factory for sugarcane which was not in fact supplied. The charge that has been preferred by Mr. Hoskins under sections 468 and 477 (*a*) of the Indian Penal Code has been committed to the Court of Session for trial.

A servant of the factory has, since the former case was committed for trial, preferred another charge against the accused under section 420 of the Indian Penal Code in respect of the false receipts issued by him on the 4th and 8th of March 1917. Apparently from the dates it would appear that these offences, more than three in number, were committed within a space of twelve months from the time the first to the last of these offences were committed.

It is contended before me by Mr. Rajender Prasad who appears on behalf of the accused that inasmuch as the charges which have been now made or preferred against the accused are of the same kind as those with which he is being tried in the Sessions Court and exceed three in number, that, therefore, under the provisions of section 234 of the Code of Criminal Procedure the accused cannot be tried for any such offences in excess of the first batch of three. The learned Judges who granted this Rule seem to indicate that to try the accused for more than three charges if the offences took place within the period of twelve months, would be contrary to the spirit of section 234 of the Criminal Procedure Code. I myself cannot follow that line of reasoning, which is unsupported by any authority and which is inconsistent with the only authority which has been cited before me, namely, the case reported as *Empress* v.

Dononjoy Baraj (1). The provision contained in section 234 of the Code of Criminal Procedure is merely this; that you shall not, at one trial, try an accused for more than three offences of the same kind committed within the space of twelve months from the first to the last. But I do not see any reason for the suggestion that if a person commits 50 different offences within 12 months of the same kind, you can only try him for three and must necessarily abandon the trial of all charges in respect of the remaining 47 offences. In the case referred to as *Empress* v. *Dononjoy Baraj* (1), the learned Judges, considering section 453 of the old Code of Criminal Procedure which is almost word for word the same as section 234 of the present Code, say: "Section 453 of the Criminal Procedure Code modifies section 452, which requires a separate charge and a separate trial for every distinct offence, by allowing three charges of three distinct offences of the same kind and committed within one year of each other to be tried at the same time; but this does not mean that, if at one time or within one year a man commits fifty distinct offences of the same kind, he shall not in one day be prosecuted for more than three such offences." This decision seems to be directly in point and to be the correct interpretation and construction to be put upon section 234 of the existing Criminal Procedure Code.

In the alternative it is contended that under the provisions of section 235 the facts out of which the several offences arose formed one and the same transaction and that thus they constituted one offence for which the accused may be charged and tried at one trial as for one offence. The only ground on which it is suggested that these offences formed one and the same transaction is that the motive or object underlying the commission of all these offences was the same, namely, to cheat the factory. It is admitted that the offences were committed on different dates, namely, on the 4th of March, 8th of March and the 12th of March; but it is contended that inasmuch as the motive or object which actuated the accused in the commission of all the offences was the same, that, therefore, the offences constituted one and the same transaction. Clearly this cannot be the meaning of "one and the same transaction" contemplated by section 235 of the Code of Criminal Procedure. That section expresses in its own phraseology what constitutes one and the same transaction and provides that if a series of acts are so connected and more offences than one are committed by the same person he may be charged with and tried at one trial for such offences as one offence.

In my opinion in this case the acts were distinct and separate and wholly unconnected, and the accused is thus liable to be tried separately for each one of such offences or, as more than three offences of the same kind were committed within 12 months, then in batches of three at each trial under separate charges. The argument which has been addressed to me that the case which has been instituted against the accused under section 420 of the Indian Penal Code is illegal must therefore, fail and this application must be disallowed.

Mr. Rajender Prasad has made a very strong appeal to me on the question of punishment. He says it is undesirable that the cases preferred against the accused being *ejusdem generis* should be tried by different Courts, because such a course might result in punishment being piled up against the accused by different tribunals, one having no knowledge of the punishment awarded by a different Court in a different case. This argument appeals to me and I consider it right and proper that one Court should have seisin of both cases. I would, therefore, suggest to the learned Deputy Magistrate who has now seisin of the charge under section 420 of the Indian Penal Code that as soon as the case is ready it would be right and proper to commit it to the Court of Session for trial with the analogous case pending against the accused under sections 468 and 477 (*a*) of the Indian Penal Code.

Application rejected.

(1) 3 C. 540; 1 C. L. R. 478; 1 Ind. Dec. (N. S.) 927.

MAFEDUL SHA FAKIR *v.* MAHARUDDIN.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1401 OF 1915.

November 28, 1917.

Present:—Justice Sir Charles Chitty, Kt., and Mr. Justice Smither.

MAFEDUL SHA FAKIR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MAHARUDDIN—DEFENDANT—RESPONDENT.

Bengal Tenancy Act (VIII B C. of 1885), s. 49—Notice to quit by several joint landlords signed by one only, validity of.

A notice under section 49 of the Bengal Tenancy Act purporting to emanate from three landlords but in fact signed by one of them is a proper notice to quit.

There is no necessity that the notice should be signed by the landlord at all. It is sufficient if the notice is at the instance of the landlord calling upon the under-*raiyat* to quit the land.

Mohendra Nath Sarkar v. *Biswa Nath Haldar*, 6 C. W. N. 183; 29 C. 231, followed.

Appeal against the decree of the District Judge, Rungpur, dated the 18th March 1915, reversing that of the Munsif, 1st Court at Gaibandha, dated the 8th April 1914.

FACTS appear from the judgment.

Babu *Girija Prosanna Sanyal* for Babu *Atul Chundra Gupta*, for the Appellants.—The plaintiffs are the appellants, and the appeal arises out of a suit for ejectment of an under-*raiyat*. The question is whether the notice to quit given under section 49 of the Bengal Tenancy Act was a sufficient and valid notice. There are several landlords and the notice, although it purported to have been given by all, was not signed by all the landlords. The lower Appellate Court was wrong in holding that the notice was not in conformity with the provisions of law. The signature of the landlords is not necessary. It is sufficient if the tenant can have knowledge from the notice that he has been required by his landlord to quit the land. A notice given at the instance of the landlord calling upon the under-*raiyat* to quit the land is a good and valid notice. See *Mohendra Nath Sarkar* v. *Biswa Nath Haldar* (1).

Babu *D. N. Bagchi*, for the Respondent.—Although the notice need not be signed by all the landlords, yet from the notice it must appear that the under-*raiyat* was required by all the joint landlords to quit the land. The notice served upon the under-*raiyat* does not show that the tenant was called upon by all the landlords to quit the land. Therefore, the notice was bad in law and the suit should fail on that account.

Babu *Girija Prosanna Sanyal* in reply.

JUDGMENT.

CHITTY, J.—In this case the plaintiffs sued in ejectment after notice under section 49 of the Bengal Tenancy Act. The notice purports, as the District Judge has found, to have emanated from all the three plaintiffs, but it was in fact signed by plaintiff No. 1 only. On that ground, without enquiring further into the facts, the District Judge has thrown out the plaintiffs' case. It is clear that this decision is erroneous. The first Court found on the first issue that the notice was duly served and that it was valid and sufficient. The learned District Judge reversed the Munsif's decision on this point alone. His decision is against a decision of this Court in the case of *Mohendra Nath Sarkar* v. *Biswa Nath Haldar* (1). There the Court held, and I may say I entirely agree, that "there is no necessity that the notice should be signed by the landlord at all. It is sufficient if the notice is at the instance of the landlord calling upon the under *raiyat* to quit the land." The learned Judges there remarked: "It is quite immaterial whether the notice is actually given by the landlord himself, or at his instance, provided that the notice signifies to the under *raiyat* that the landlord has called upon him to quit the land." Here, as the Judge says, the notice purports to emanate from the three plaintiffs. The tenant ought certainly to have regarded it as so emanating, and, no doubt, he did so. The plaintiffs also regarded it as a proper notice to quit, on which they have filed the suit.

The decree of the learned District Judge must be set aside and the case remanded to him to be decided on the other points arising for determination. The plaintiffs-appellants must have their costs of this appeal from the defendant-respondent.

SMITHER, J.—I agree.

Decree set aside; Case remanded.

(1) 6 C. W. N. 183; 29 C. 231.

ROWLINS *v.* LACHMI NARAIN JHA.

PATNA HIGH COURT.
FIRST CIVIL APPEAL No. 104 OF 1916.
May 5, 1916.
Present:—Mr. Justice Roe.
T. K. ROWLINS—APPELLANT
versus
LACHMI NARAIN JHA AND OTHERS—RESPONDENTS.

Court Fees Act (VII of 1870), ss. 12, 17, Sch. I, Art. 1—Mortgage suit—Appeal or cross-objection—Costs, appeal in respect of—Court-fee payable—Taxing Judge, power of—Procedure.

In the case of appeals or cross-objections in suits for redemption or foreclosure in all cases whether a decree for interest has been made in them or not, in which the Court-fee declared by the Court to be due at the date of the decree can be ascertained by reference to the judgment and the decree, it is that amount at which the appeal or cross-objection should be valued and future interest should not be taken into account—*i.e.*, in all original appeals the Court-fee should be levied on the sum due at the date of the original decree and in all second appeals it should be levied on the sum due at the date of the decree of the lower Appellate Court. [p. 51, col. 1.]

When an appeal against costs is distinct and separate from the other parts of the appeal, Court-fee must be paid *ad valorem* on the costs decreed. [p. 51, col. 1.]

When it is the appellant who failed to pay sufficient Court-fees in the Court below, his appeal will not be heard till the deficiency has been made good. [p. 51, col. 2.]

Where it was the respondent who was in default, no decree shall be executed in his favour until the deficiency has been made good. [p. 51, col. 2.]

The decision of the Taxing Officer in the matter of Court-fees is final. The Court-fee fixed by him must be paid. [p. 51, col. 1.]

Stamp Reference.

FACTS.—Several appeals, including the one noted above, falling in one or the other of the following two types of cases cropped up in the High Court:—

(1) In a suit brought upon a mortgage-deed for recovery of mortgage money (principal and interest) by sale of the mortgaged property, the lower Court decreed the suit and allowed interest at a certain rate from the date of the suit to the date of grace fixed by it in the preliminary decree for sale. The defendant appealed to the High Court. He valued his appeal at the amount claimed by the plaintiff at the date of the suit and paid *ad valorem* Court-fees on that amount. The stamp reporter relying on *Raghbir Prosad* v. *Shanker Bux Singh* (1) submitted that the value of the appeal was the amount declared due at the date of the decree, which included interest from the date of the suit till the date of decree. The appeal was, therefore, undervalued and understamped.

2. In a suit for partition and for mesne profits, the Court awarded decree with costs. Some of the defendants appealed to the High Court. The subject-matter in dispute in appeal was not only the question of partition and mesne profits but also the amount of costs taxed against the appellant in the decree of the Court below. The appellant sought a distinct relief in respect of costs awarded by the decree appealed against. The stamp reporter submitted that the appellant should have paid *ad valorem* Court-fees in respect of costs, which he questioned in the appeal. He relied on *Makki, In re* (2), *Debendra Mohan Rai* v. *Sona Kunwar* (3) and *Krishnaji* v. *Babaji* (4).

All the cases falling under the above two types of cases were referred to the Taxing Officer under section 5 of the Court Fees Act. The Taxing Officer agreed with the stamp reporter, but thinking that the questions involved in the cases were of general importance referred them to the Taxing Judge under the same section for orders.

Mr. *Naresh Chandra Sinha*, for the Appellants.

ORDER.—Three questions have been referred to me.

1. On what principle should fees be levied in appeals in mortgage suits in which a decree for interest has been made?

2. What is the correct Court-fee when relief is sought with regard to costs independently of the result of the main contest between the parties?

3. What are the Taxing Officer's powers under section 12 of the Court Fees Act?

An application has also been made to me in Court to either refer the matter to a Division Bench, or pass an order that will be open to appeal under the Letters Patent.

The attention of the Bar may be drawn to the case reported as *Khachera* v.

(1) 21 Ind. Cas. 723; 11 A. L. J. 1016; 36 A. 40.

(2) 19 M. 350; 6 Ind. Dec. (N. S.) 950.
(3) A. W. N. (1901) 21; 26 A. 291; 1 A. L. J. 5.
(4) B. H. C. Unrep. P. J. (1892-1894), 52.

Kharag Singh (5). A Division Bench has no power to deal with a stamp reference even when made by the Taxing Judge. Nor in my view will it avail the Bar to refuse to pay the Court-fees fixed by the Taxing Officer, and then apply to the Division Bench, before whom the case is laid for orders, to revise the order of the Taxing Officer, *Koer Karan Singh* v. *Gopal Rai* (6).

The decision of the Taxing Officer is final. The Court-fee fixed by him must be paid.

My decision on the points submitted after hearing the points fully argued is:—

1. In the case of appeals or cross-objections in suits for redemption or foreclosure, in all cases in which the amount declared by the Court to be due at the date of the decree can be ascertained by reference to the judgment and the decree, it is that amount at which the appeal or cross-objection should be valued and future interest should not be taken into account. See *Raghbir Prosad* v. *Shanker Bux Singh* (1) and compare *Vithal Hari Athavle* v. *Govind Vasudeo Thosur* (7) with *Reference under Court Fees Act*, 1870 (8).

The effect of this will be that in all original appeals the Court-fee will be levied on the sum due at the date of the original decree. In all second appeals the Court-fee will be levied on the sum due at the date of the decree of the lower Appellate Court.

2. This case falls under section 17.

When the appeal against costs is distinct and separate from other parts of the appeal, Court-fees must be paid *ad valorem* on the costs decreed.

3. The position of the Court in these cases is clearly defined in *Narain Singh* v. *Chaturbhuj Singh* (9)

When it was the appellant who failed to pay sufficient fees in the Courts below, his appeal will not be heard till the deficiency has been made good.

Where it was the respondent who was in fault, no decree shall be executed in his favour, until the deficiency has been made good.

Order accordingly.

(5) 7 Ind. Cas. 315; 7 A. L. J. 842; 33 A. 20.
(6) 4 Ind. Cas. 123; 32 A. 59; 6 A. L. J. 972.
(7) 17 B. 41; 9 Ind. Dec. (N. S.) 27.
(8) 29 M. 367; 16 M. L. J. 287.
(9) 20 A. 362; A. W. N. (1898) 72; 9 Ind. Dec. (N. S.) 592.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 49 OF 1917.

January 11, 1918.

Present:—Sir Henry Drake-Brockman, KT., J. C.

RAO VINAYAK AND OTHERS—DEFENDANTS—APPELLANTS

versus

LAXMAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Relinquishment by one co-parcener of his share in favour of some of other members of co-parcenary body, effect of—Alienation by co-parcener of joint family property without consent of other co-parceners, validity of—Civil Procedure Code (Act V of 1908), O. XLI, r. 33, scope of.

A relinquishment of his share by one member of the co-parcenary body in a joint Hindu family in favour of some members of the body does not enure to the benefit of those members only but enures to that of the entire co-parcenary body. [p. 54, col. 2; p. 55, col. 1.]

Peddayya v. *Ramalingam*, 11 M. 406; 4 Ind. Dec. (N. S.) 283, *Thangavelu Pillai* v. *Doraisami Pillai*, 26 Ind. Cas. 211; 27 M. L. J. 272; 16 M. L. T. 393, distinguished.

Anandrao v. *Vasantrao*, 9 Bom. L. R. 595; 5 C. L. J. 338; 11 C. W. N. 478; 2 M. L. T. 151; 17 M. L. J. 184; 34 M. 262*n*., *Chandar Kishore* v. *Dampat Kishore*, 16 A. 369; A. W. N. (1894) 117; 8 Ind. Dec. (N. S.) 240, relied upon.

Under the Law of the Mitakshara joint family property owned by all the members of the family as co-parceners cannot be the subject of a gift, sale or mortgage by one co-parcener except with the consent, express or implied, of all other co-parceners. Any deed of gift, sale or mortgage granted by one

co-parcener on his own account of or over the joint family property is invalid and the estate is wholly unaffected by it and in its entirety stands free of it. [p. 54, col. 2.]

Sahu Ram Chandra v. *Bhup Singh*, 39 Ind. Cas. 280; 39 A. 437 at p 442; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.); *Sobharam Teli* v. *Makdu*, 12 C. P. L. R. 63, relied upon.

Obiter.—A share taken by a mother on a partition of the family property between her sons will not be her *stridhan*. It will devolve after her death upon all the heirs of her husband. [p. 55, col. 2.]

Debi Mangal Prosad Singh v. *Mahadeo Prasad Singh*, 14 Ind. Cas. 1000; 34 A. 234; 16 C. W. N. 409; (1912) M. W. N. 324; 9 A. L. J. 263; 14 Bom. L. R. 220; 15 C. L J. 344; 22 M. L. J. 462; 39 I. A. 121; 11 M. L. T. 217 (P. C.), relied upon.

Order XLI, rule 33, of the Civil Procedure Code gives to an Appellate Court power to pass any decree and make any order which ought to have been passed or made, the object of the rule being manifestly to enable the Court to do complete justice between the parties to the appeal; but the provision is not intended to enable a defendant to obtain for a plaintiff, not a party to the appeal, a relief which the latter never asked for. [p. 55, col. 2.]

Appeal from the decree of the Court of the District Judge, Saugor, dated the 26th January 1917, in Civil Suit No. 4 of 1916.

FACTS appear from the judgment.

Mr. *M. B. Kinkhede* (with him Mr. *D. T. Mangalmoorti*), for the Appellants.—The only question is about the effect of the release, whether it operates for the benefit of plaintiffs Nos. 1 and 3 only or of them and defendants Nos. 6 to 8 also. The law on this point is discussed by Trevelyan in his Hindu Law on page 223 and 329 and by Mayne on page 488 of his Treatise on Hindu Law. *Peddayya* v. *Ramalingam* (1) relied on by the lower Court is not applicable to the facts of the present case. The circumstances of that case were peculiar. There two sons had sued for partition and in the plaint relinquished their share in the moveables, saying it was their father's wish that their share should go to one of the other sons. The decision as to the effect of the relinquishment rested on the father's wish. It does not appear if the moveables were ancestral.

One co-parcener can relinquish in favour of another. See *Sobharam Teli* v. *Makdu* (2) and *Mukund Ram Sukal* v. *Ram Ratan* (3). A father may separate his sons at his pleasure, see Colebrook's Mitakshara, Chapter I, section II, 2. Sons have to respect their father's wish. In *Peddayya* v. *Ramalingam* (1) there had been separation of two brothers in 1882, so the family was no longer undivided. See *Chandar Kishore* v. *Dampat Kishore* (4) and *Shivajirao* v. *Vasantrao* (5), referring to *Anandrao* v. *Vasantrao* (6), Privy Council judgment in which will be found as a note on pages 262 and 263 of 34 Madras. See *Wasantrao* v. *Anandrao* (7).

Mr. *G. L. Subhedar*, for Respondents Nos. 1 and 3.—*Peddayya* v. *Ramaligam* (1) is on all fours with the present case. There as well as here a co-parcenary consisted of many persons and two of the members relinquished in favour of one specified person by means of an entry in the plaint. Here one relinquishes by formal deed in favour of two.

There is nothing in the Madras case to show that property was not ancestral. Motive of the relinquishment is immaterial. *Chandar Kishore* v. *Dampat Kishore* (4) gives no reasons and takes an extreme view. See Ramakrishna's Hindu Law, Volume II, page 10, see also Mayne, page 659.

Mr. *M. B. Kinkhede*, in reply.—A mother is not a co-parcener and no relinquishment can be regarded as enuring for her benefit.

A gift of an undivided share is invalid. See *Sahu Ram Chandra* v. *Bhup Singh* (8). As to *Peddayya* v. *Ramalingam* (1) the very

(1) 11 M. 496; 4 Ind. Dec. (N. S.) 283.

(2) 12 C. P. L. R. 63.

(3) 2 N. L. R. 52.

(4) 16 A. 369; A. W. N. (1894) 117; 8 Ind. Dec. (N. S.) 240.

(5) 2 Ind. Cas. 249; 33 B. 267; 10 Bom. L. R. 778.

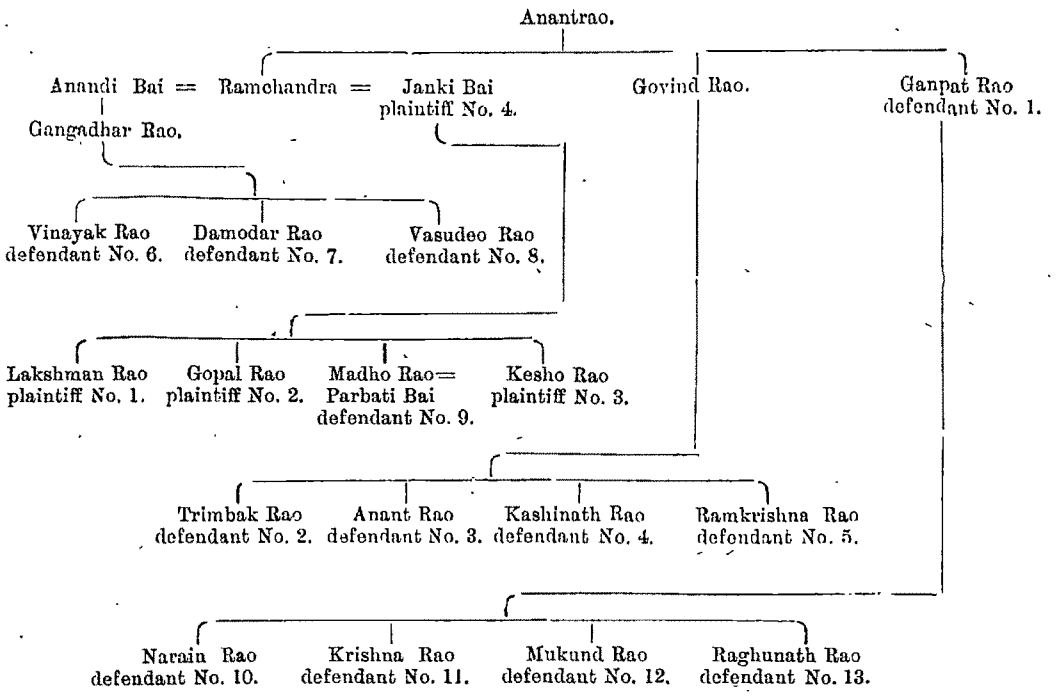
(6) 9 Bom. L. R. 595; 5 C. L. J. 338; 11 C. W. N. 478; 2 M. L. T. 151; 17 M. L. J. 184; 34 M. 262 *note*.

(7) 6 Bom. L. R. 925.

(8) 39 Ind. Cas 280; 39 A. 437 at p. 442; 21 C. W. N 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 123 (P. C.).

filing of the suit in 1882 disrupted the family. See *Girja Bai* v. *Sadashiv Dhundiraj* (9).

JUDGMENT.—The family tree of the parties to the suit out of which this appeal arises is as follows:


Anantrao.
Anandi Bai = Ramchandra = Janki Bai plaintiff No. 4.
Govind Rao.
Ganpat Rao defendant No. 1.
Gangadhar Rao.
Vinayak Rao defendant No. 6.
Damodar Rao defendant No. 7.
Vasudeo Rao defendant No. 8.
Lakshman Rao plaintiff No. 1.
Gopal Rao plaintiff No. 2.
Madho Rao= Parbati Bai defendant No. 9.
Kesho Rao plaintiff No. 3.
Trimbak Rao defendant No. 2.
Anant Rao defendant No. 3.
Kashinath Rao defendant No. 4.
Ramkrishna Rao defendant No. 5.
Narain Rao defendant No. 10.
Krishna Rao defendant No. 11.
Mukund Rao defendant No. 12.
Raghunath Rao defendant No. 13.

Anant Rao, Ramchandra Rao, Govind Rao, Anandi Bai, Gangadhar Rao and Madho Rao are all dead. The plaintiffs' claim is for partition of the joint family estate and they have obtained a preliminary decree which declares them entitled to 4/15ths of the property, the rest of the $\frac{1}{3}$rd share to which Ramchandra Rao's branch is entitled going to the 6th, 7th and 8th defendants. The plaintiff Janki Bai was declared entitled to the share 1/5 *into* $\frac{1}{3}$=1/15, which her husband would have taken had he survived.

The only question with which we are concerned in this appeal, relates to a deed of release (Exhibits 6—8D,-1) executed on the 22nd December 1913 by the plaintiff Gopal Rao in favour of his brothers Lakshman Rao and Kesho Rao. By this document Gopal Rao, who was about to become a Pleader, gave up his share in the money-lending business of the family to his surviving brothers. That share is described as 1/12th, the allotment of a share to Janki Bai not being then in contemplation: the correct figure 1/15th is not now disputed. It is also common ground that the relinquishment cannot benefit any member of the family outside Ramchandra Rao's branch.

In their written statement the 6th, 7th and 8th defendants, who are the appellants here, pleaded that they should participate in the benefit of Gopal Rao's relinquishment. This plea gave rise to the seventh issue which runs thus:—

What is the effect of the release made by the plaintiff No. 2 on the 22nd December 1913? Whether it enures for the benefit of defendants Nos. 6 to 8 also?

The lower Court has held on the authority of *Feddayya* v. *Ramalingam* (1) and *Than-*

(9) 87 Ind. Cas. 321; 12 N. L. R. 113; 20 C. W. N. 1085; 14 A. L. J. 822; 20 M. L. T. 78; (1916) 2 M. W. N. 65; 18 Bom. L. R. 621; 4 L. W. 114; 24 C. L. J. 207; 31 M. L. J. 455; 43 C. 1031; 43 I. A. 151 (P. C.).

gavelu Pillai v. *Doraisami Pillai* (10) that the relinquishment must benefit those co-parceners only in whose favour it was made and included the following clause in the preliminary decree for partition:

"(6) That the share of the money-lending business of the joint family to which plaintiff No. 2 would be entitled and which is specified in the deed of release dated 22nd December 913 will be allotted to the plaintiffs Nos. 1 and 3."

That the clause just quoted is misleading and should be amended is admitted by the 1st, 2nd and 3rd plaintiffs who are the sole respondents. As already remarked, the deed of relinquishment describes Gopal Rao's share in the money-lending as 1/12th, whereas the lower Court's decision puts it at 1/15th only. In any event the clause should be modified by deleting the words " and which is specified in the deed of release dated the 22nd December 1913", and this will be done. That one co-parcener may relinquish his share appears from the text of Manu and Yajnavalkya. Thus in Manu IX, 207, Sacred Books of the East, Volume XXV, page 375, we read:—

"But if one of the brothers, being able (to maintain himself) by his own occupation, does not derive (a share of the family) property, he may be made separate (by the other) receiving a trifle out of his share to live upon."

And in Yajnavalkya II, 116 quoted in the Mitakshara, Chapter I, section II, 11:—

"The separation of one, who is able to support himself and is not desirous of participation, may be completed by giving him some trifle."

The next following placitum of the Mitakshara explains the reason for requiring a trifle to be given by a desire to prevent futile disputes.

In *Peddayya* v. *Ramalingam* (1), the earlier of the two cases relied upon by the lower Court, the circumstances were peculiar. Two out of four brothers relinquished their one-half share in the family moveables in favour of the 3rd in order to give effect to a wish expressed by their deceased father and the decision appears to proceed upon the strength of a natural obligation to carry out the father's wish. In the later case the co-parcenary consisted of two members only, a father and his son, and a relinquishment of his undivided half share by the father to the son was upheld. Neither case can, therefore, be said to be quite in point. The earlier one, however, contains the following passage:—

"According to the Smritis, then, the renunciation operates as alienation of one co-parcener's interest in favour of the others. If he can alienate in favour of the other co-parceners as a body, there is no reason why he should not do so in favour of one of them, who alone may need such help."

With all respect to the learned Judges I venture to doubt whether the Smritis treated the renouncement as equivalent to an alienation. In *Sahu Ram Chandra* v. *Bhup Singh* (8) it is laid down by their Lordships of the Privy Council that under the Law of the Mitakshara the joint family property owned by all the members of the family as co-parceners cannot be the subject of a gift, sale or mortgage by one co-parcener except with the consent, express or implied, of all the other co-parceners. Any deed of gift, sale or mortgage granted by one co-parcener on his own account of or over the joint family property is invalid; the estate is wholly unaffected by it and in its entirety stands free of it. The same view as to a gift had already been held by this Court in *Sobharam Teli* v. *Makdu* (2) and in *Mukund Ram Sukal* v. *Ram Ratan* (3). If the relinquishment in the present case is to be treated as a gift then it is invalid. On the other hand, if it is merely a renunciation its effect would be similar to that of the renouncing co-parcener's death.

In *Chandar Kishore* v. *Dampat Kishore* (4) it was held that one member of a joint Hindu family cannot transfer his undivided share in the joint family property to another member of the family without the consent of the rest of the co-sharers and that if the alienation be regarded as a surrender of the interest of the person making the alienation, it is a surrender to the whole of the co-parcenary body and cannot enure to the peculiar benefit of one of them. This view appears to me to accord with the general principles laid down by the Privy Council in the passage above quoted from *Sahu Ram Chandra* v. *Bhup Singh* (8)

(10) 26 Ind. Cas. 211; 27 M. L. J. 272; 16 M. L. T. 393.

It is no doubt true that the Allahabad High Court follows the strict doctrine of the Mitakshara which has been departed from in Bombay, Madras and the Central Provinces, on the ground of an equity favouring purchases for value, but we are concerned here not with a transfer for value but with a voluntary one as to the inefficacy of which there is no dispute.

In *Shivajirao* v. *Vasantrao* (5) will be found a recital of the facts of a case which is reported as *Wasantrao* v *Anandrao* (7). The decision of the Privy Council in the latter case appears as *Anandrao* v. *Vasantrao* (6) and will be found printed in a note at pages 262 and 263 of 34 Madras. In *Wasantrao* v. *Anandrao* (7) the joint family consisted of one Kashinath, his two sons Ganpatrao and Madhavrao, Ganpatrao's six sons and Madhavrao's only son Vasantrao. Madhavrao being heavily involved in debt executed a deed of release in his father's favour in return for having his debts paid. It was held in appeal by Jenkins, C. J., and Batchelor, J., that the release should be treated not as for the benefit of Kashinath alone but for that of the whole co-parcenary, the shares on partition being determined as though Madhavrao was dead. The decision as a whole was confirmed by their Lordships of the Privy Council, who remarked that the principles governing the case had been rightly applied in the appellate judgment: it was also expressly stated that the release did not operate to deprive Madhavrao's son of his right as a co-parcener.

Differing from the lower Court I hold that the relinquishment of December 1913 must be treated as benefiting the appellants no less than the plaintiffs Laxshman Rao and Keshorao in whose favour it was executed; clause (*b*) of the preliminary decree will, therefore, be modified not only by omitting the words "and which is specified in the deed of release dated the 22nd December 1913" but by adding at the end the words and figures "and the defendants Nos. 6, 7 and 8." The 1st and 3rd plaintiffs will take two-thirds of Gopal Rao's 1/15th share, the defendants Nos. 6 to 8 taking the remaining $\frac{1}{3}$rd.

I am asked by the respondents' learned Counsel to modify the lower Court's decree so that the plaintiff Janki Bai also may participate in the plaintiff [Gopal Rao's share in the money-lending business. The result of so doing would be to diminish the respondents' share from $\frac{2}{3}$rds to one half of Gopal Rao's portion and it is difficult to understand why such a request should be made on the respondents' behalf. According to the decision of the Privy Council in *Debi Mangal Prosad Singh* v. *Mahadeo Prasad Singh* (11), any share that may be taken by Janki Bai will not be her *stridhan* but devolve at her death upon all the heirs of her husband so that the appellants will inherit along with the respondents. Janki Bai is not even a party to this appeal and in the plaint made no claim to participate in Gopal Rao's share of the money-lending business to which the plaintiffs Lakshman Rao and Kesho Rao were alleged to be exclusively entitled. Rule 33, Order XLI, First Schedule to the Civil Procedure Code, gives the Appellate Court power to pass any decree and make any order which ought to have been passed or made. But I cannot think that this provision was intended to enable a defendant to obtain for a plaintiff, not a party to the appeal, a relief which the latter never asked for. In *Rangamlal* v. *Jhandu* (12) it was held by a Bench of three Judges that the object of the rule is manifestly to enable the Court to do complete justice between the parties to the appeal.

The costs of this appeal will be paid by the respondents. The costs of the parties in the lower Court will be dealt with by that Court's final decree as already ordered by it.

Appeal accepted.

(11) 14 Ind. Cas. 1000; 34 A. 234; 16 C. W. N. 409; (1912) M. W. N. 324; 9 A. L. J. 263; 14 Bom. L. R. 220; 15 C. L. J. 344; 22 M. L. J. 462; 39 I. A. 121; 11 M. L. T. 217 (P. C.).

(12) 11 Ind. Cas. 640; 34 A. 32; 8 A. L. J. 1111 (F. B.).

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 243 OF 1917.

November 22, 1917.

Present:—Mr. Justice Kumaraswami Sastri.

KRISHNAPUR MUTT BY VIDYAPURNA THIRTHASWAMI —PLAINTIFF—PETITIONER

versus

THE VICAR OF SURATKAL CHURCH—DEFENDANT No. 2—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 94, O. XXXIX, r 2, scope of—Injunction, disobedience of—Prohibitory orders, enforcement of.

Orders passed under rule 2 of Order XXXIX, Civil Procedure Code, are not orders enforcing the injunction, but are really orders punishing a party for past disobedience. [p 56, col. 2.]

Ottapurakkal Thazath Suppi v. *Alabi Mashur Koyanna Koya Kunhi Koya*, 34 Ind. Cas. 588; 39 M. 907; 3 L. W. 430; 30 M. L. J. 523; 19 M. L. T. 314; (.916) 1 M. W. N. 328, followed.

Clause 3 of rule 2 of Order XXXIX applies to injunctions prohibiting the doing of or restraining from doing certain acts. [p. 56, cols. 1 & 2.]

Clause 3 is independent of and is not controlled by the provisions of rule 4 of the Order. [p. 56, col. 2.]

Order XXXIX must be read with section 94 and the provision for punishment for disobedience applies to cases falling under either. [p. 56, col. 2.]

Petition under section 115 of Act V of 1908, praying the High Court to revise the order of the District Court of South Kanara, in Civil Miscellaneous Appeal No. 25 of 1916, preferred against the decree of the Court of the District Munsif, Mangalore, in I. A. No. 352 of 1916 (in Original Suit No. 23 of 1916.)

Mr. *B. Sitarama Rao*, for the Petitioner.

Mr. *K. P. Lakshmana Rao*, for the Respondent.

JUDGMENT.—I think that, on the facts found by the District Judge, this is not a case where I should commit Father Coelho, 2nd defendant, to jail for contempt. There was an order of a Criminal Court ordering *lac* trees to be returned to his servant. The Judge, no doubt, rightly finds that it was his duty to see that his servant did not remove the tree in disobedience to the Civil Court's injunction, but it is possible that the 2nd defendant was *bona fide* under the belief that he need not interfere as his servant had the permission of the Criminal Court. Though 2nd defendant is technically guilty of contempt, the Court is not bound to commit him to jail. I am of opinion that clause 3 to rule 2 of Order XXXIX of the Code Civil Procedure applies to cases of disobedience, even though the disobedience is of a prohibition to do or abstain from doing a single act. There is no reason to suppose that the Legislature intended to leave such disobedience unpunished. The fact that clause 4 refers to attachment continuing for one year and directing a sale if the disobedience or breach continues, is not conclusive as sub section 3 of rule 2 empowers the Court either to attach his property or to commit the defaulter to prison.

In *Ottapurakkal Thazath Suppi* v. *Alabi Mashur Koyanna Koya Kunhi Koya* (1) it was held by the Full Bench of this Court that the Court can, in its discretion, order either arrest or attachment of property and is not bound in the first instance to attach. As pointed out by Srinivasa Aiyangar, J., at page 913*, such orders are not strictly speaking orders enforcing the order of injunction, but really orders punishing a party for past disobedience. It should also be borne in mind that, in many cases, where a single act or abstention is enjoined, it may be in the power of the defaulting party to purge himself of the consequences of his act by restoring the property or making adequate reparation. In such cases it is difficult to see why the Court should not attach his property in order to compel him to restore the property or to make adequate reparation. I do not think there is anything in the wording of rule 2, clause 3, to prevent the Court from committing a party to jail when he disobeys an injunction which contemplates a single act or abstention.

It has been argued that the provision as to punishment for disobedience only applies to suits of the nature contemplated by rule 2 to Order XXXIX. I am unable to agree with this contention. Section 94, clause (*c*), of the Code is general and empowers the Court to grant a temporary injunction and, in case of disobedience, to commit the person guilty thereof to the civil prison and order that his property be attached and sold: Order XXXIX must be read with section 94. I would be sorry to hold that a person who wilfully disobeys an injunction of Court could escape with impunity, unless there is anything in the Code which compels me to do so. For the reasons already given I do not agree with the

(1) 34 Ind. Cas 588; 39 M. 907; 3 L. W. 430; 30 M. L. J. 523; 19 M. L. T. 314; (1916) 1 M. W. N. 328.

*Page of 39 M.—*Ed.*

District Judge, though I do not think the interest of justice requires that the 2nd defendant ought to be committed to jail. I think he ought to pay the costs of the proceedings in this Court and the lower Courts.

Order accordingly.

M. C. P.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 2348 OF 1913.

December 11, 1917.

Present:—Mr. Justice Chevis and Mr. Justice Shadi Lal.

JAGIR SINGH, MINOR—PLAINTIFF—APPELLANT

versus

Musammat DALIP KAUR AND OTHERS—DEFENDANTS—RESPONDENTS.

Succession—Posthumous son, suit by—Burden of proof—Legitimacy, proof of.

In cases of succession to landed property of a large value as well as to a *jagir*, more than ordinary care should be taken to place the legitimacy of a posthumous son beyond all possible dispute. [p. 58, col 1.]

One *T.*, a *jagirdar* and landowner, having died, his landed property was mutated in the names of his widows and his *jagir* lapsed to the Government. Plaintiff brought a suit for possession basing his claim on the ground that he was the deceased's posthumous son. There was no documentary evidence and the claim rested entirely upon the oral evidence of witnesses, the majority of whom were in some way or other interested in the plaintiff. It appeared that the alleged mother of the plaintiff supported his claim but avoided a medical examination even when called upon by the other widows to do so:

Held, that under the circumstances the plaintiff had failed to prove that he was the son of the deceased proprietor. [p. 58, col 2.]

First appeal from the decree of the District Judge, Jullundur, dated the 3rd July 1913, dismissing the suit.

The Hon'ble Mr. *Muhammad Shafi*, K. B., for the Appellant.

The Hon'ble Mr. *Fazl-i-Husain*, K. B., for the Respondents.

JUDGMENT.—One Thakar Singh, a *jagirdar* and land owner of *Mauza* Baloki, Tahsil Nakodar, District Jullundur, died on the 22nd September 1907, leaving him surviving his mother and three widows. The *jagir* of the deceased lapsed to the Government, and the landed property was, after an exhaustive enquiry into the status of the plaintiff, who claimed to be the deceased's son, mutated on the 26th April 1908 in favour of the widows. The plaintiff Jagir Singh, who was born on the 22nd November 1907 in the village of Ali Sher in the Patiala State, claims to be the son of Thakar Singh by his widow *Musammat* Nihal Kaur and the sole question for consideration is whether she gave birth to the plaintiff.

There is absolutely no documentary evidence in support of the plaintiff's allegation, and the case rests entirely upon oral evidence. The witnesses examined for the plaintiff may be divided broadly into two main classes;—(*a*) those who depose to *Musammat* Nihal Kaur's pregnancy, basing their evidence upon the result of their own observation or upon information imparted to them by the deceased husband; and (*b*) those who testify to the plaintiff's birth at the lady's parent's house at Ali Sher.

Now, we may say at once that the witnesses are not persons of any status and that the majority of them are in some way or other interested in the plaintiff. It will be observed that Thakar Singh was in the enjoyment of an assignment of land revenue and it is only natural that the members of the family and their friends and followers should do their best to preserve the *jagir* in the family. In these circumstances it is not at all unlikely that *Musammat* Nihal Kaur after the death of her husband should give out that she was *enceinte* and the witnesses, who base their evidence upon what they learnt from her, may be perfectly truthful and yet may be deposing to a matter which does not represent the truth. The rest of the evidence as to the pregnancy is very weak, and is contradicted by the evidence adduced by the opposite party to the effect that *Musammat* Nihal Kaur was not pregnant and was indeed performing long journeys even a few days before the alleged delivery.

On the question of the plaintiff's birth at Ali Sher the only direct evidence besides *Musammat* Nihal Kaur's testimony is that given by the midwife, *Musammat* Jai Kaur, who professes to have attended the lady in her confinement. The cross-examination, however, shows that she is related to Nihal

Kaur's brother Sant Singh in the third degree, and her statement does not, therefore, deserve any serious consideration. The other witnesses, *viz.*, Sant Singh and his friends of that village, have no direct knowledge of the affair and their evidence, moreover, appears to be unreliable and interested. *Musammat* Nihal Kaur, no doubt, fully supports the case set up by the plaintiff, but her deposition read with the documentary evidence shows that her allegation as to pregnancy was flatly contradicted by her co-widow *Musammat* Dalip Kaur immediately after the death of their husband, and that despite repeated challenges by the latter the former avoided medical examination and went away to her parents' house. In her application dated the 4th November 1907 addressed to the Deputy Commissioner, Jullundur, *Musammat* Dalip Kaur, after denying *Musammat* Nihal Kaur's pregnancy and referring to the latter's departure for Ali Sher after remaining at Baloki for only a night, states that "she (*Musammat* Nihal Kaur) stated that in Patiala State, it was not difficult to palm off a supposititious child as a son. If she was really pregnant, why did she not remain at Baloki?" To a similar effect is her application of the 12th November 1907. Indeed the plaintiff's own witness Muhammad Hussain makes it clear that even the Patiala authorities called upon *Musammat* Nihal Kaur to appear with her child before a lady doctor for examination, but it appears that she avoided examination by going off to another village.

Now, it is perfectly clear that in a case of this kind involving succession not only to landed property of a large value but also to a *jagir*, more than ordinary care should be taken to place the legitimacy of a posthumous son beyond all possible dispute, and every facility should be afforded to medical examination both prior and subsequent to the alleged birth of the child. Considering that cases of this type are by no means rare and that efforts are sometimes made to foist supposititious children by widows after the death of their husbands, we can safely presume that *Musammat* Nihal Kaur was fully aware of the fact that her assertion relating to the birth of a son would be strenuously denied and it was, therefore, incumbent upon her to take all such measures as would support her theory of the birth of a son. In fact, *Musammat* Dalip Kaur as stated above had actually denied the allegation of pregnancy, and had demanded a medical examination of her co-widow, *Musammat* Nihal Kaur; but the latter, far from adopting the precautions referred to above, made every possible effort to evade examination and adopted the policy of secrecy.

We consider it unnecessary to labour the point, for we are convinced that the evidence produced on behalf of the plaintiff is wholly insufficient to substantiate the allegation that he is the son of *Musammat* Nihal Kaur. The learned District Judge has discussed the question fully, and after reviewing the evidence and considering the arguments advanced by the learned Counsel for the appellant we have no hesitation in concurring in the conclusion reached by the lower Court. As regards the contention that the plaintiff should be given a decree at least for the property in possession of *Musammat* Nihal Kaur who admitted the claim, it is sufficient to say that the admission was purely collusive, and that she can, if so advised, transfer the property to the plaintiff. We do not propose to do anything which might in the least be regarded as lending colour to the allegation that he is in any way connected with the family.

We accordingly affirm the judgment and the decree of the lower Court and dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 572 OF 1914.

November 30, 1917.

Present:—Mr. Justice Teunon and Mr. Justice Newbould.

JAGAT DURLAV MAZUMDAR—
PETITIONER—APPELLANT
versus
INDU BHUSAN MAZUMDAR AND OTHERS
—RESPONDENTS.

Probate and Administration Act (*V of* 1881), s. 98 (1)

BALRAJ KUAR *v.* MAHADEO PAL SINGH.

—Order directing executor to furnish accounts annually, legality of.

An order directing an executor to furnish accounts annually is not in accordance with the provisions of section 98 (1) of the Probate and Administration Act.

Appeal against the order of the District Judge, Nadia, dated the 9th and 13th of June 1914.

FACTS appear from the judgment.

Babu *Bansari Lal Sarkar*, for Babu *Harish Chandra Roy*, for the Appellant:—My submission is that the District Judge ought not to have ordered the petitioner to submit accounts annually and to furnish such an exorbitant amount of security, as he has done by his order of the 9th June modified by an order of the 13th June 1914. So far as the facts and circumstances of this case and the provisions of the Probate and Administration Act are concerned, the order is not maintainable. The petitioner is the executor who obtained the Probate of the Will of his wife, whereby the moveable properties of the testatrix are divided among three persons, the petitioner being one of them, and the immoveable properties are dedicated to an idol whereof the petitioner is appointed a *shebait*. The provisions of the Will clearly indicate the position of the petitioner, which is unlike that of an ordinary executor. So far as his position is concerned, he is in no way liable to render accounts annually under the provisions of the Probate and Administration Act. The rendition of accounts annually and the furnishing of such a large amount of security is in no way justifiable under these circumstances.

JUDGMENT.—No one appears in opposition to this appeal. The appeal is directed against an order of the District Judge of Nadia, namely, the order of the 9th June modified by the order of the 13th June. By the order of the 9th as thus modified, the petitioner who is the executor and has obtained Probate of the Will of his wife has been required to submit an account annually and he has also been required to give a bond with one surety in an amount representing the full value of the moveables dealt with by the Will and three years' income of the immoveable properties disposed of thereby. By the Will the moveable properties are divided between three persons of whom the executor the husband is one, and the immoveable properties are dedicated to an idol of whom the executor is appointed the *shebait*. Having regard to these provisions of the Will we think that the amount of security required is somewhat excessive and we, therefore, fix it in the sum of five thousand rupees. As to the number of sureties the order will remain unmodified. The order, in so far as it directs the petitioner to furnish accounts annually, is clearly not in accordance with the provisions of section 98 (1) of the Probate and Administration Act and is accordingly set aside. We may remark that accounts under the Probate and Administration Act cannot be required from the petitioner as *shebait* but only from the petitioner as executor, and so far as we have been able to appreciate the provisions of the Will, there seems to be no reason why administration should not have been completed long ago and why, if not so completed, it should not be now completed within a very short period of time.

This appeal is accordingly decreed in the terms set out above. We make no order as to costs.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEALS NOS. 101 AND 114 OF 1914.

June 29, 1917.

Present:—Mr. Lindsay, J. C., and Mr. Kanhaiya Lal, A. J. C.

Musammat BALRAJ KUAR—DEFENDANT No. 3—APPELLANT

versus

Babu MAHADEO PAL SINGH AND ANOTHER—PLAINTIFFS, AND BHAWANI BAKHSH SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Oudh Estates Act (I of 1869), ss 15, 22, 23—Estate entered in List II and held under primogeniture sanad *—Bequest in favour of person not* taluqdar *or grantee and outside line of succession—*Sanad, *applicability of —Ordinary law, whether includes terms of* sanad*—Hindu Law—Will, necessary elements of.*

Section 15 of the Oudh Estates Act is a declaratory section, operating both prospectively and retrospectively. [p. 63, cols. 1 & 2.]

BALRAJ KUAR *v.* MAHADEO PAL SINGH.

Where a person whose estate was entered in List II died before the Oudh Estates Act came into force, bequeathing his estate to his son-in-law, who was neither a *taluqdar* nor a grantee, nor a person who would have succeeded to the estate, had the testator died intestate:

Held, per *Lindsay, J. C*, that the effect of section 15 of the Oudh Estates Act was to put the *sanad* out of consideration altogether, and that the succession to the estate on the death of such a legatee would be governed by the rules which would have governed the succession if the legatee had *bought* the estate from a person, not being a *taluqdar* or grantee, or in other words, by the ordinary law, irrespective of the rule of succession contained in the *sanad*. [p. 63, col. 2.]

Per *Kanhaiya Lal, A. J. C.*, that the effect of the section was to relieve such a legatee from the disability imposed by the Oudh Estates Act on *taluqdars* and grantees in the matters of transfer and succession, and not from any rules which might be applicable independently of the Act, and that the succession to such legatee would be governed by the rule of succession laid down in the *sanad* as restricting or qualifying the personal law. [p. 75, col. 2.]

Per *Curiam*, that the rule of succession contained in the *sanad* was inapplicable to a person who got the estate otherwise than by inheritance. [p. 63, col. 1; p. 77, col. 1.]

A document sent by a person, containing the relevant particulars relating to the history of his estate and a declaration as to who is to be his successor, in pursuance of an advertisement appearing in a paper announcing the intention of the advertiser to prepare a compilation showing the family history of the *taluqdars* of Oudh, can for the purposes of Hindu Law be treated as a testamentary declaration by the writer of his intention with respect to his property, which he desires to be carried into effect after his death. [p. 72, col. 2; p. 74, col. 2.]

Appeal against the decree of the Subordinate Judge, Partabgarh, dated the 2nd May 1914.

Messrs. *B. E. O'Conor, G. H. Thomas* and *Ajodhya Das*, for the Appellant.

The Hon'ble Mr. *Wazir Hasan*, Mr. *J. N. Chak*, Syed *Ali Mohammad* and Babu *Ramapat Ram*, for Respondent No. 1.

The Hon'ble Pandit *Gokaran Nath Misra*, for Respondents Nos. 2, 3, 4, 11, 12 and 13.

Mr *Mahabir Prasad* and Babu *Gokul Prasad*, for Respondent No. 2.

The Hon'ble Mr. *Samiullah Beg* and Babu *Avadh Behari Lal*, for Respondent No. 25.

JUDGMENT

LINDSAY, J. C.—These two appeals have sprung out of a suit brought by the plaintiff-respondent, Mahadeo Pal Singh, for recovery of possession of a *taluqa* known as the Dandi Kanch estate, which is situated in the Partabgarh District. The second plaintiff in the suit, Seth Kanhaiya Lal, is a person to whom Mahadeo Pal Singh has sold a portion of his claim for the purpose of raising funds to prosecute the suit. The three principal defendants in the case were Babu Adya Bakhsh Singh (defendant No. 1), *Musammat* Sukhpal Kuar (defendant No 2) and *Musammat* Balraj Kuar (defendant No. 3). The remaining defendants in the case were impleaded as persons who had taken transfers of portions of the estate in suit from the first defendant, Adya Bakhsh Singh. Before proceeding to set out the matters which were in issue at the trial in the Court below, it is advisable to say a few words relating to the history of this property. It is admitted that a grant of this estate was made after the annexation to Babu Sripat Singh, who was a Sombansi Thakur. It is also admitted now, though the fact was in dispute in the Court below, that this grant was made to Babu Sripat Singh under a primogeniture *sanad*. Babu Sripat Singh died in the month of November 1861, long before the Oudh Estates Act (I of 1869) came into force. It is admitted that on the death of Babu Sripat Singh the estate passed into the possession of Babu Dan Bahadur Pal Singh, who was Sripat Singh's son-in-law. Sripat Singh had no son and it is admitted that Dan Bahadur Pal Singh took the estate under a Will executed in his favour by Sripat Singh a few days before his death. Babu Dan Bahadur Pal Singh died on the 14th March 1906. He left a widow *Musammat* Sukhpal Kuar, who is the second defendant in this suit. He also left a daughter *Musammat* Balraj Kuar, who is the defendant No. 3, and a grandson (daughter's son) Adya Bakhsh Singh, the defendant No. 1. Adya Bakhsh Singh is the son of the third defendant, *Musammat* Balraj Kuar. The plaintiff, Mahadeo Pal Singh, is a step-brother of the deceased Dan Bahadur Pal Singh and he based his claim to the estate on the ground of inheritance. In paragraph No. 7 of the plaint it was alleged that at the death of Dan Bahadur Pal Singh the plaintiff Mahadeo Pal Singh became the rightful owner of the estate, (1) in accordance with the conditions of the *sanad* under which the estate had been

granted, and (2) in accordance with the provisions of section 22, clause (5), of the Oudh Estates Act (I of 1869) and the custom prevailing in the family of Dan Bahadur Pal Singh. It was also claimed that if the inheritance to this property were regulated by the Hindu Law, then the first, second and third defendants were excluded from inheritance by virtue of the custom just referred to. In the eighth paragraph of the plaint it was specifically stated that according to the conditions prescribed in the *sanad* and according to the law and custom, neither the defendant No. 1 as daughter's son, nor the second defendant as widow, nor the third defendant as daughter of Dan Bahadur Pal Singh had any right whatever in the estate of the deceased. Attached to the plaint there were exhibited certain lists of property the subject-matter of the claim. List *A* contains the names of villages included in the *taluqa* proper; List *B* sets forth certain items of property which are described as accretions to the *taluqa*; while List *C* contains particulars of certain house property which it was alleged belonged to the *taluqa*. Coupled with this claim for possession there was a claim for mesne profits to the extent of over Rs. 70,000 and in clause (*d*) of paragraph 17 of the plaint (that is, the paragraph in which the relief was sought) it was prayed that if the Court considered that the plaintiff Mahadeo Pal Singh was not entitled to immediate possession, he might be given a decree declaring such rights as the Court considered him to possess with reference to his claim to succeed to the estate in suit. The principal defences to be considered are those made by the first, second and third defendants. Leaving out of account the plea which was taken to the effect that the estate was not held by a primogeniture *sanad* (a matter which is no longer in dispute), the first point to be noticed is that Adya Bakhsh Singh, the first defendant, claimed to be entitled to the property by virtue of a Will alleged to have been executed by Dan Bahadur Pal Singh on the 22nd of November 1899. It was next pleaded that the succession to this estate was not governed by the Oudh Estates Act (I of 1869). By way of alternative it was asserted that even if the Act applied and if it were found that Dan Bahadur Pal Singh died intestate, the defendant No. 1 was still entitled to the property in accordance with the provisions of clause (4) of section 22 of Act I of 1869, inasmuch as he was the daughter's son of Dan Bahadur Pal Singh and had been treated in every way by Dan Bahadur Pal Singh as his own son. The next point taken by way of defence was that in case it were found that the estate was held under a primogeniture *sanad*, the rule of inheritance laid down in the *sanad* did not apply inasmuch as Dan Bahadur Pal Singh was a legatee of Sripat Singh and belonged to a different family. Another plea in this connection was that even according to the *sanad* the defendant Adya Bakhsh Singh would be entitled to take the estate as being the nearest male heir according to the rule of primogeniture. By way of further defence the custom alleged in the plaint was denied and it was asserted that the first and third defendants were not in any way excluded from inheriting the property left by Dan Bahadur Pal Singh. It was also alleged by way of defence that the plaintiff Mahadeo Pal Singh was no heir of Dan Bahadur Pal Singh under the Hindu Law. And lastly the plea was taken that neither the *sanad* nor Act I of 1869 could in any way affect the rule of succession relating to property which did not form part of the estate which wat granted by the British Government to Babu Sripat Singh. The pleas to which I have referred were all raised in the common written statement filed by the first defendant Adya Bakhsh Singh and by his grandmother *Musammat* Sukhpal Kuar. The third defendant Balraj Kuar, who is the mother of Adya Bakhsh Singh, filed a separate written statement but her case as set out in that statement contained no new ground of defence, in fact she made common cause with her son the first defendant, Adya Bakhsh Singh. Before the issues were struck certain admissions were made by the Counsel for the parties; one of these was that the succession to the estate in suit was not governed by section 22 of the Oudh Estates Act (Act I of 1869). This fact is obvious, when it is considered that Dan Bahadur Pal Singh came into possession of the property as a legatee long before the Oudh Estates Act came into force; in other words, Dan Bahadur Pal Singh was not a legatee within the meaning of the Act. With regard to the

custom referred to in the plaint the learned Subordinate Judge thought it proper to call for a statement of the particulars of the custom alleged. It was finally stated by the plaintiff's Counsel that the custom upon which he relied did not exclude from inheritance the widow of Dan Bahadur Pal Singh in case it should be found that the Hindu Law applied. A pedigree of the family to which Dan Bahadur Pal Singh belonged was put in and it was expressly stated that the custom upon which the plaintiff relied was a family custom prevailing in this family, a family descended from one Karan Pal Singh.

Three issues were framed by the Subordinate Judge.

The first issue related to the Will alleged to have been executed by Dan Bahadur Pal Singh on the 22nd of November 1899.

The second issue was split up into four parts (*a*), (*b*), (*c*) and (*d*).

Part (*a*) of the issue related to the question of the terms of the *sanad* under which the estate was held.

Part (*b*) raised the question as to whether the rule of succession to be applied to the property was the rule contained in the *sanad* or the rule to be found in the ordinary Hindu Law.

Part (*c*) of the issue related to the application of the rule of primogeniture. The question was put whether the plaintiff Mahadeo Pal Singh would according to this rule succeed to the property, both *taluqdari* and non-*taluqdari*, in preference to the first defendant, the daughter's son of Dan Bahadur Pal Singh.

Part (*d*) of the issue related to the question of custom and to the right of the plaintiff to obtain a declaration in case any such custom was proved.

The third issue was concerned with the question of mesne profits.

With regard to the first issue relating to the Will, the finding of the Subordinate Judge is that Dan Bahadur Pal Singh actually wrote the document which the first defendant set up as the Will upon which he relied, but it was held that this document did not amount to a testamentary disposition of the estate.

With regard to the second issue it was found on the first part (2 'a') that the estate was held under a primogeniture *sanad*. On the second part of the issue the finding of the Court below was that the rule of succession contained in the *sanad* applied to the case, inasmuch as Dan Bahadur Pal Singh was a "successor" of Sripat Singh in the sense in which that expression is used in the *sanad*. It was also held that the plaintiff Mahadeo Pal Singh was the nearest male heir according to the terms of the *sanad* and it was also ruled that the ordinary Hindu Law did not apply to the case. The Subordinate Judge was further of opinion that both kinds of property specified in the lists attached to the plaint, that is, the *taluqa* proper and its accretions, were governed by the same rule of succession. By his decree, however, he reserved certain houses specified in List *C* for the accommodation of the first three defendants. In view of the findings arrived at upon these issues the Subordinate Judge recorded no finding on the question of custom raised in part (*d*) of issue No. 2.

He found on the third issue that the plaintiff was entitled to mesne profits to the extent of Rs. 67,000 odd and he gave a decree accordingly with directions for the payment of profits accrued subsequent to the date of the suit.

Two appeals have been filed against the lower Court's decree, one by *Musammat* Balraj Kuar the third defendant (First Civil Appeal No. 101 of 1904), and the other by the first defendant Adya Bakhsh Singh (First Civil Appeal No. 114 of 1914); and the following points arise for determination:—

(1) What is the rule of succession applicable to the estate left by Babu Dan Bahadur Pal Singh?

(2) Did Dan Bahadur Pal Singh, as alleged by the first defendant, execute a Will in the latter's favour on the 22nd of November 1899?

(3) Is the plaintiff Mahadeo Pal Singh entitled to a decree for possession of the property which is described in List *B* as being an accretion to the *taluqa*? and

(4) Has the plaintiff Mahadeo Pal Singh succeeded in proving the family custom set up in the Court below by which daughters and their sons are in this family excluded from inheritance?

The only other point raised in the grounds of appeal in these two cases relates to the question of the terms of the *sanad*. That

matter, as I have already observed, is no longer in dispute. It has been admitted before us that the estate was held under a primogeniture *sanad*.

It is, I think, expedient to deal in the first place with the question of the rule of succession which is to be applied for the purpose of discovering who is the person rightfully entitled as heir to the estate left by Dan Bahadur Pal Singh. The estate, it may be mentioned here, is a List II estate. Sripat Singh's name was entered in Lists I and II although, as has already been noticed, he died long before the passing of Act I of 1869. We start with the proposition that the law of succession as laid down in section 22 of the Oudh Estates Act does not apply to the case (there is no question, of course, of the application of section 23). It follows, therefore, that the rule of succession must be sought in the ordinary law which was applicable to property held in the family of Dan Bahadur Pal Singh, and in this connection the question at once arises whether that ordinary law embraces the terms of the *sanad* by which the property was conferred upon Sripat Singh. The Subordinate Judge has held that the terms of the *sanad* govern the succession and acting on these provisions he has found that the plaintiff Mahadeo Pal Singh is entitled to Dan Bahadur Pal Singh's estate. I may say at once that in my opinion this decision of the Subordinate Judge is erroneous. My finding is that the rule of succession laid down in the *sanad* has no application in the present case. This opinion is founded upon the provisions of section 15 of Act 1 of 1869, the terms of which it is now necessary for me to consider. I may mention here that the learned Counsel on either side were not able to refer me to any judgment of their Lordships of the Privy Council containing an exposition of the provisions of this particular section. There is on the other hand at least one ruling of a Bench of this Court in which the terms of this section have been considered and to which I shall presently refer. I think it advisable in the first place to state at once the interpretation which I put upon the language of this section. Section 15 is a declaratory section and operates both retrospectively and prospectively. It purports to lay down the rule which governs the transfer of and succession to an estate or part of an estate which had been transferred or bequeathed before, or which might be transferred or bequeathed after the passing of the Act, to a person who was not a *taluqdar* or grantee and a person who would not have succeeded if the transferor or testator had died without having made the transfer and intestate. The rule laid down in the section is that the transfer of and succession to the property so transferred or bequeathed is to be regulated by the rules which would have governed the transfer and succession to the property, if the transferee or legatee had "*bought*" the same from a person "*not being a taluqdar or grantee.*' Applying this section to the facts of the present case we have it

(1) that Sripat Singh was a *taluqdar*;

(2) that he bequeathed his estate before the passing of the Act to his son-in-law Dan Bahadur Pal Singh;

(3) that Dan Bahadur Pal Singh was neither a *taluqdar* nor grantee;

(4) and was not a person who would have succeeded Sripat Singh if the latter had died without having made the bequest.

It seems to me, therefore, that in accordance with the provisions of this section the question of the succession to this estate, which was taken by Dan Bahadur Pal Singh under the Will made by Sripat Singh, is to be decided on two assumptions, namely, (1) that Dan Bahadur Pal Singh bought the estate from Sripat Singh, and (2) that Sripat Singh was for the purposes of that transaction of transfer to be regarded neither as a *taluqdar* nor as a grantee. This appears to me to be the plain meaning of this section, and if my interpretation is correct it seems to follow necessarily that the terms of the *sanad* cannot be referred to in dealing with the question as to who is to succeed to the estate left by Dan Bahadur Pal Singh, assuming for the moment that Dan Bahadur Pal Singh died intestate. If, for the purpose of this case, we must, as the section says, hold that Sripat Singh was neither a *taluqdar* nor a grantee, then he cannot be treated as having held this estate under any special title, that is

to say, under a *sanad* granted by the British Government. The argument for the plaintiff-respondent, so far as I have been able to understand it, is this. It is said that the only result arising from the enactment of section 15 is that the rule of succession laid down in section 22 of the Act ceases to be applicable to the property transferred or bequeathed in the circumstances mentioned in section 15, and that consequently succession must be determined with reference to the personal law of the holder of the property, a law which, it is argued, would in the case given include the conditions laid down in the *sanad*. This argument is supported by a reference to what was laid down by their Lordships of the Privy Council in the case of *Debi Bakhsh Singh* v. *Chandrabhan Singh* (1). That was a case of succession *ab intestato* and their Lordships were called upon to construe the language of clause 11 of section 22 of Act I of 1869. This clause declares that in default of the persons specified in the preceding ten clauses, succession shall be "to such persons as would have been entitled to succeed to the estate under the ordinary law to which persons of the religion and tribe of such *taluqdar* or grantee heir or legatee, are subject." It was ruled by their Lordships that the ordinary law referred to in this clause would include the declarations and conditions of the *sanad* being part of the original title to the property. Looking at the language of clause 11 just referred to, as also at the similar language which is adopted in section 23, it will appear that the ordinary law which is there referred to is the law applicable to the tribe and religion of the intestate *taluqdar*, grantee, or his heir or legatee within the meaning of the Act. In other words, the property which is to be governed by the rules laid down in clause 11 and section 23 is property which up till the time succession opened belonged to the *taluqdar*, grantee, or his heir or legatee. The case with which we are now dealing is admittedly not one of this kind. Dan Bahadur Pal Singh was neither a *taluqdar* nor a grantee; nor was he the heir or legatee of a *taluqdar* or grantee within the meaning of the Act. On the contrary his position, according to the language of section 15, was that of a person who had bought from another person who was neither a *taluqdar* nor a grantee. In these circumstances it is difficult to conceive how it can be argued that the terms and conditions of the *sanad* are to control in any way the succession to the estate which has been left by Dan Bahadur Pal Singh. On the face of it the *sanad* or any of the declarations or conditions contained in it constituted no part of Dan Bahadur Pal Singh's title to this property, for according to section 15 Dan Bahadur Pal Singh's title was a title by purchase. He "bought the estate" from a person who was neither a *taluqdar* nor a grantee. It has been contended that the words "a person not being a *taluqdar*" in section 15 indicate merely a person whose name is not entered in List I and that for the purposes of this section such a person ought to be deemed to possess all the other attributes of a *taluqdar*, including that of being a holder of property under a special grant or *sanad*; and so, it is said, in spite of the language of section 15 the terms of the *sanad* must be taken into account. I do not think it is possible to argue in this way. Section 15 deals not merely with persons who are styled *taluqdars* or grantees. It deals with such persons in relation to their property (estate), and for the purpose of interpreting section 15 the *taluqdar* cannot be dissociated from the property or *taluqa* from which he derives his title of *taluqdar*. A *taluqdar* must be a person who owns a *taluqa* or estate and no person is to be found in List I who had not a *taluqa* or estate, for every *taluqdar* in List I is mentioned in Lists II, III and IV as the possessor of an estate. When section 15 lays down that the person from whom the property therein referred to has been bought is neither a *taluqdar* nor a grantee, it seems to me to follow necessarily that such a person must be taken to be a person who held under no special title, that being one of the necessary attributes of a *taluqdar* or grantee. My opinion, therefore, is that the ruling in *Debi Bakhsh Singh's case* (1)

(1) 7 Ind. Cas. 724; 32 A. 599 at p. 610; 14 C. W. N. 1010; 12 C. L. J. 303; 12 Bom. L. R. 1015; 8 M. L. T. 273; 13 C. C. 316; 20 M. L. J. 917; 7 A. L. J. 1122; 37 I. A. 168 (P. C.).

does not affect the question now under consideration and does not make the terms and conditions of the *sanad* any part of the ordinary law which governed Dan Bahadur Pal Singh's family. Then again it has been argued that if the interpretation which I place upon the language of section 15 be adopted, it involves the conclusion that Act I of 1869 operates to divest a title already vested. It is said that if the words "neither a *taluqdar* nor a grantee" are to be taken to mean a person without a *sanad*, it follows that the transferee or legatee takes nothing because in that case the testator or transferor mentioned in section 15 had nothing to bequeath or transfer. Obviously this cannot be the effect of section 15, which lays down rules for the transfer of and succession to property which has been transferred or bequeathed. It is assumed that the transferee or legatee has a good title to the property, a title by purchase. It could never have been the intention of the Legislature to render void transfers which were made before the passing of the Act and it is impossible, therefore, to hold that the section lays down that the transferee or legatee has taken no estate at all. My attention has been drawn to a decision of a Bench of this Court which is to be found reported in 18 O. C., at page 188, the Maniarpur case [*Ghulam Abbas Khan* v. *Bibi Ummatul-Fatima* (2)] a decision which I understand is now under appeal before their Lordships of the Privy Council. It is pointed out that at page 211* of the report Mr. Stuart, the First Additional Judicial Commissioner, has adopted an interpretation of the language of section 15 which differs from mine. After referring to the provisions of section 3 of the Crown Grants Act (XV of 1895) Mr. Stuart observes that "if the terms of the primogeniture *sanad* govern succession to the property, succession to property transferred to a person who would not have succeeded according to the provisions of the Act might not be governed by the law that would apply if the transferee or legatee had bought the same property from a person not being a *taluqdar*, but might be governed by the terms of the *sanad*." Mr. Stuart then refers to certain observations which were made by their Lordships of the Privy Council in the Mahewa case [*Sheo Singh* v. *Raghubans Kunwar* (3)]. It appears to me that this argument rests upon the assumption that the *sanad* does apply in cases where the property has been transferred or bequeathed in the circumstances mentioned in section 15. But before we reach that stage it is necessary to determine whether the *sanad* applies at all. My learned colleague in the present case who was a party to the decision just referred to seems also to have been of opinion, and for the same reasons, that the Crown Grants Act operated so as to render it necessary to apply the *sanad* in spite of the provisions of section 15 of Act I of 1869. I regret I am unable to concur in this view. With all possible respect it seems to me that the provisions of the Crown Grants Act do not affect this question. This latter Act was introduced to explain the provisions of the Transfer of Property Act, 1882, in so far as they relate to grants from the Crown and to remove certain doubts as to the power of the Crown in relation to such grants. The preamble declares that the intention of the Act is to remove any doubts which might have arisen as to the power of the Crown to impose limitations and restrictions upon grants and other transfers of land made by it or under its authority. Section 2 of the Act excludes the application of the Transfer of Property Act to Crown Grants and section 3 lays down that all previous restrictions, conditions and limitations over contained in any grant or transfer by the Crown shall be valid and take effect according to their tenor, any rule of law, Statute or enactment of the Legislature to the contrary notwithstanding. I take this third section of the Crown Grants Act to mean that in spite of anything contained in any rule of law, Statute or enactment of the Legislature, it is to be understood that the Crown has full power to make any provisions, restrictions, conditions and limitations over in granting or

(2) 31 Ind. Cas. 74°; 18 O. C. 188; 2 O. L. J. 636.

(3) 8 O. C. 317 at p. 325; 2 C. L. J. 194; 27 A. 634; 9 C. W. N. 1009; 15 M. L. J. 352; 32 I. A. 203; 8 Sar. P. C. J. 781 (P. C.).

*Page of 18 O. C.—*Ed.*

transferring lands and that all such provisions, restrictions, conditions, and limitations over are to be valid and to take effect according to their tenor; but section 15 of Act I of 1869 does not in any way purport to affect or question the power of the Crown to make such provisions, limitations, etc. To my mind it simply declares that in a given set of circumstances property acquired by a person from one who held it by a Crown grant is to be treated as not having been held by a Crown grant at all. The title is to be treated as one by purchase. The property is to be deemed to have been acquired from a person who did not hold as a Crown grantee. This being so, there can in my opinion arise no question of applying the law as laid down in section 3 of the Crown Grants Act, for the simple reason that when section 15 of Act I of 1869 is reached there is no Crown grant to be construed. The Mahewa case cannot, I think, be appealed to as an authority for the view that the Crown Grants Act in any way controls the operation of section 15 of Act I of 1869. The argument which was taken before their Lordships in that case was that in or after 1861, at the time when the *sanad* was granted to Girwar Singh, no executive act of the Government could have created an estate descending by any rule of inheritance other than that laid down by the law—the Hindu Law in the case then under consideration. Their Lordships held that such a contention was not maintainable in view of these provisions of the Crown Grants Act. There is in the present case no question of the power of the Crown to create estates descending by a peculiar law of inheritance. The effect of section 15, in my opinion, is to put the *sanad* out of consideration altogether.

As my learned colleague will probably not agree with the opinion I have expressed regarding the interpretation of section 15 of the Oudh Estates Act (I of 1869), I proceed to consider what the rule of succession would be on the assumption that the terms and conditions of the *sanad* applied to the case now before us. Fortunately on this point my colleague and myself are of the same opinion. We both think that if the terms of the *sanad* are to be taken into consideration, the rule of succession by primogeniture does not apply to the estate which was left by Dan Bahadur Pal Singh. The principal words to be considered in this connection are those contained in the penultimate clause of the primogeniture *sanad*, the form of which is given at page 386, Appendix E, of Sykes' Compendium of the Oudh Talukdari Law. Those words are as follows:—"It is another condition of this grant that in the event of your dying intestate or of any of your successors dying intestate the estate shall descend to the nearest male heir according to the rule of primogeniture, but you and all your successors shall have full power to alienate the estate either in whole or in part by sale, mortgage, gift, bequest or adoption to whomsoever you please." The discussion centres round the meaning of the word "successors" contained in this clause. According to the view taken by the Subordinate Judge, "successor" means a person who takes as an heir on an intestacy or who takes under a Will as a devisee. He came to this opinion on the authority of certain definitions and rulings which were quoted before him and to which he has referred in his judgment. He also relies for his interpretation upon the language which was used in the correspondence between the Chief Commissioner of Oudh and the Government of India, relating to the conditions which should be imposed in the *sanads* which were granted subsequent to the date of Lord Canning's Proclamation. Referring to the language of the clause we have just mentioned the Subordinate Judge was of opinion that it contemplates two classes of transfers, namely, (1) transfers *inter vivos* and (2) transfers to take effect after death. For these reasons he held that the term "successors" must include all who take otherwise than as transferees by a deed executed *inter vivos*. It was contended before him that according to the language of the *sanad* transfers might be made in favour of all sorts and conditions of men and the case was put to him of a bequest made by a *taluqdar* in favour of a village menial. It was asked whether in such a case the descent of the property in the hands of the menial would be regulated by the rule of primogeniture.

The learned Judge was of opinion that the menial in these circumstances would not come within the category of "successors;" though why he should be excluded if he took under a Will is difficult to see, regard being had to the opinion expressed by the Subordinate Judge that "successors" included persons who took otherwise than as transferees by a deed *inter vivos*. The learned Counsel for the plaintiff-respondent has not attempted to support the reasoning given for his opinion by the learned Subordinate Judge. The question of the meaning of this word "successors" has been the subject of discussion in the decision of a Bench of this Court to which a reference has already been made [*Ghulam Abbas Khan* v. *Bibi Ummatul Fatima* (2)]. The two learned Judges who constituted the Bench in that case differed in opinion regarding the meaning of this expression. The Court of first instance had held in that case that the word "successors" meant only heirs, that is, persons who succeeded to the estate *ab intestato*. Mr. Stuart discussed at great length the meaning to be attributed to the word "successors." He went into the history of the events which led up to the grant of the *sanads* and he also read the *sanad* in the light of the phraseology of the English Law of Real Property. In his judgment he admits that the word "successor" is capable of being interpreted in many different senses and that its true meaning ought in all cases to be ascertained by reference to the context. He eventually came to the conclusion that there was nothing in the context of the *sanad* which was repugnant to the sense which he attributed to the word, namely, that of including both an heir and a devisee. He was unable to accept the opinion of the Subordinate Judge that the word "successors" meant only heirs. Mr. Stuart's opinion, therefore, was that the word "successor" means successor on death and excludes only persons who have taken by a transfer *inter vivos*. According to Mr. Stuart's interpretation, therefore, the word "successors" would include the village menial in whose favour a Will had been made by a *taulqdar*. The Second Additional Judicial Commissioner, who is my colleague in the present case, was of a different opinion. After pointing out that the word "heirs" occurs at four places in the *sanad*, he went on to say that in his opinion "successors" means persons successively inheriting the estate under the *sanad*. He too held that the meaning of the word was to be determined in the sense of the context. He laid great stress on the portion of the clause quoted above which is introduced by the words "but you and all your successors." He pointed out that the powers of transfer conferred upon the *taluqdar* by the *sanad* might be exercised by Will, mortgage, gift, bequest or adoption, so that a person who took by devise would be just as much a transferee as a person who has taken by sale. He referred also, as Mr. Stuart had done, to the language of the correspondence between the Chief Commissioner of Oudh and the Government of India for the purpose of interpreting the meaning of this clause, and he was led by this language as well as by the language of the *sanad* to the conclusion that "successors" must mean only persons who take on an intestacy. So far as the language of this correspondence is concerned, there is perhaps a good deal to be said on both sides but viewing it generally it appears to me that it supports the conclusion arrived at by Pandit Kanhaiya Lal rather than the one which found favour with Mr. Stuart.

It can hardly be doubted, both in view of the language of the correspondence just referred to and of the language of the *sanad* itself, that it was the intention of the Government to confer upon the *taluqdars* to whom this *sanad* was given the fullest power of alienation. In the first place we have this power conferred by the words used in the first clause of the *sanad*, "I...confer on you the full proprietary right, title and possession of the estate of..." In the penultimate clause of the *sanad* we have a similar declaration made in the following words—"but you and all your successors shall have full power to alienate the estate either in whole or in part by sale, mortgage, gift, bequest or adoption to whomsoever you please." Particular stress should, I think, be laid upon the word "alienate" in the clause just referred to. In the setting in which it is used the word "alienate" appears to me to point to the disposal of property in favour of an alien or stranger, that is to say, a person outside the family. The preceding words of the clause lay down the rule relating

to succession. The estate is to descend to the nearest male heir according to the rule of primogeniture. Then follow the words I have just quoted, conferring the fullest possible powers of alienation. It appears to me, therefore, that the intention to be gathered from the language of the clause is that the rule of succession by primogeniture is to govern the devolution of the property so long as it continues in the family of the *taluqdar*. But if the *taluqdar* chooses to exercise the ample powers of alienation conferred upon him by the succeeding words, then the rule of succession by primogeniture is to cease to apply, the reason being that the property has passed to a stranger, that is, a person outside the *taluqdar's* family. In this connection I might refer to a passage in a judgment of the Judicial Committee in the case of *Balraj Kunwar* v. *Jagatpal Singh* (4). In the course of their judgment their Lordships made certain observations regarding the interpretation of sections 14 and 15 of the Act. Finally, in dealing with the meaning which ought to be put upon the terms of section 22 of the Act they observe at the bottom of page 405 of the report as follows—"But if the prescribed line of succession is broken by a transfer or bequest of the entailed estate to a person outside the prescribed line, it seems not unreasonable that the fetter of the entail such as it is should no longer apply to the estate." These words appear to me to entirely support the interpretation we place upon the language of the last clause but one of the *sanad*. The learned Counsel for the plaintiff-respondent in his argument regarding the meaning of the word "successors," after contending that the expression referred to one who takes after death and not by transfer *inter vivos*, stated that the rule would apply only where the devisee "takes the place of the *taluqdar*." After referring to the case of a bequest in favour of a village menial, the learned Counsel admitted that the menial would not be treated as a successor because he does not or was not "intended to take the 'estate.'" I find it difficult to follow this argument, because on the terms of the *sanad* what the *taluqdar* is empowered to alienate is his "estate" either in whole or in part. The menial would, I think, under a bequest take the estate or whatever part of it was bequeathed to him by the *taluqdar*. The learned Counsel referred to the cases in which *taluqdars* were called upon to declare their successors and probably the meaning of the argument is that only those persons who take by Will can be deemed to be "successors" within the meaning of the *sanad* in whose cases the *taluqdar* has expressed some intention that they should in some way or other be invested with the status which he enjoyed himself, namely, the status of a *taluqdar*. But status in this sense is the creature of the law and it would not be possible for a *taluqdar* merely by expressing an intention to that effect in a Will to confer upon his devisee a status which the law does not sanction. After a careful consideration of the language of the *sanad* it seems to me to be impossible to arrive at any other conclusion than that the word "successors" must mean persons who take as heirs on intestacy. The distinction drawn is between such persons and other persons who have taken by any of the various forms of transfers referred to in the clause; any other method of division or classification must lead to difficulty. Even if it could be assumed for the sake of argument that "successors" in this clause includes a person who takes under a Will, I fail to see how Dan Bahadur Pal Singh could be a "successor" according to his interpretation, when section 15 of the Act clearly lays down that Dan Bahadur Pal Singh must be taken to have "bought" the estate; in other words, Dan Bahadur Pal Singh is to be deemed to have taken by a transfer made *inter vivos*. I am satisfied, therefore, that the rule of primogeniture cannot be applied for the purpose of ascertaining the person who is entitled to the estate left by Dan Bahadur Pal Singh.

The next matter to be considered is the document which was put forward by the first defendant Adya Bakhsh Singh, as a Will alleged to have been written by Dan Bahadur Pal Singh on the 22nd of November 1899. The story of the first defendant with regard to this part of the case may be summarized as follows. It appears that for some years prior to the

(4) 26 A. 393; 8 C. W. N. 699; 1 A. L. J. 384; 7 O. C. 248; 31 I. A. 132; 8 Sar P. C. J. 639; 11 Bom. L. R. 516.

year 1899, a newspaper used to be published in Lucknow which was called the "*Akhbar Anjuman Hind.*" This paper was edited by a man named Bishun Lal and was under the patronage of the British Indian Association (*Anjuman Hind*), which is recognised as the official body representing the *taluqdars* of Oudh. It is proved that the brother of this man Bishun Lal, one Kishun Lal, was employed in the office of the British Indian Association as a clerk (*sarishtadar*). In the month of November 1899 an advertisement appeared in this paper announcing the intention of Kishun Lal to prepare a compilation showing the family history of the *taluqdars* of Oudh. There had, it seems, been a previous publication of this kind known by the name of Manual of Oudh Titles. Kishun Lal announced that the book he intended to publish was to be an improved edition of this Manual of Oudh Titles and was to contain fuller and more accurate information. It was also announced that this publication was being made with the approval of His Honour the Lieutenant Governor. A copy of the advertisement has been filed in the case and is marked defendant No. 1's Exhibit No. 4. The editor invited the *taluqdars* to supply him with particulars of their family history and also to declare in their narrative the names of the persons who were to succeed them in possession of their estates. It is said that this advertisement having attracted the attention of Dan Bahadur Pal Singh, he gave orders for the preparation of the history of his own *taluqa*. A document containing the relevant particulars was prepared and was sent to Kishun Lal and it is admitted that shortly after this, that is to say about the beginning of the year 1900, the book was prepared and published. A copy of it is on the record and is referred to as Exhibit D3 of defendant No. 1. The story goes that at the time when this narrative was prepared for the purpose of publication a copy of it was made under the direction of Dan Bahadur Pal Singh and was kept along with the other papers in Dan Bahadur Pal Singh's office. It is this copy marked Exhibit D1 which is put forward in proof of the Will relied upon by Adya Bakhsh Singh. The original narrative as supplied to Kishun Lal was called for, but the evidence shows that it was destroyed some time after the book was published in the year 1900. Adya Bakhsh Singh, therefore, relies upon this document, Exhibit D1, as secondary evidence of the document which was supplied for the purpose of publication and we have now to examine the evidence which was put forward on behalf of the first defendant in order to prove that such a document was as a matter of fact prepared at the instance of Dan Bahadur Pal Singh.

[The learned Judicial Commissioner after discussing the evidence held that Exhibit D1 fulfilled the conditions of section 63, clauses 3 and 5 of the Evidence Act—*Ed.*]

The next matter to be dealt with is whether or not this document, which is found to be a genuine document, can be treated as the Will of Dan Bahadur Pal Singh. On this part of the case the learned Subordinate Judge was of opinion that the document could not be treated as a Will. He was led to this conclusion by finding, as he says, that there was no evidence worth the name that Dan Bahadur Pal Singh intended that the document should take effect as a Will. Before commencing my examination of this question it is necessary to refer to certain other evidence in the case, which has to my mind a double bearing. This evidence, the substance of which I shall presently mention, renders probable in the first place the fact that Dan Bahadur Pal did prepare a narrative corresponding to what is to be found in Exhibit D1 and might have been used in support of the conclusion already arrived at touching the genuineness of Exhibit D1. I have not thought it necessary to refer to it in this connection, for the direct evidence which has already been discussed appears to me to be sufficient to justify the opinion which has been formed. The second bearing of the evidence is a matter of serious importance in considering the interpretation which is to be put upon this document. There is a good deal of oral evidence in the case, which establishes beyond all doubt that Dan Bahadur Pal Singh was much attached to the boy Adya Bakhsh Singh and that he

treated him in all respects as his own child. The evidence on this point is not confined to the statements of witnesses who were examined in the interests of the defence. There is abundant evidence in the shape of admissions made by the plaintiff's own witnesses to the effect that Dan Bahadur Pal Singh treated Adya Bakhsh Singh as his own son. It has been conceded by one of the learned Counsel who has argued the case on behalf of the respondents that this evidence relating to treatment must be accepted as correct, although of, course, it is not admitted that the statements of all the witnesses who deposed to this treatment are true. We need not, I think, concern ourselves with the statements of many of the witnesses who deposed to the relations between Dan Bahadur Pal Singh and Adya Bakhsh Singh. It will be sufficient, I think, to mention the evidence of four witnesses, namely, the Hon'ble Mr. Baillie, Mr. R. L. H. Clarke, Mr. E. P. Fawcett and Assistant Surgeon Sarju Kumar Mukerji. From the statements of these witnesses whose testimony cannot be impeached, it is clear that Dan Bahadur Pal Singh used to take Adya Bakhsh Singh about with him, used to introduce him to officials and used to treat him in every way as the person who was marked out as his successor in the possession of the Dandi Kanch *taluqa*. Mr. Baillie (now Sir Duncan Baillie), Mr. Clarke and Mr. Fawcett were all at one time or another employed in the Partabgarh district and they all had opportunities of meeting Dan Bahadur Pal Singh; each of them has given expression to his opinion based upon observation of the relations between Dan Bahadur Pal Singh and the first defendant and they all say that they understood from the treatment of the boy by Dan Bahadur Pal Singh that Dan Bahadur Pal Singh intended Adya Bakhsh Singh to have the estate after his death. The evidence of Assistant Surgeon Sarju Kumar Mukerji is of special importance in this connection, for it is clear that he was on terms of greater intimacy with Dan Bahadur Pal Singh than any of the other witnesses just mentioned. Sarju Kumar swears that he was medical attendant to Dan Bahadur Pal Singh for many years, that he had frequent opportunities of seeing him and that even after he had left the Partabgarh district he was called in on more than one occasion to give Dan Bahadur Pal Singh medical advice. In the course of his deposition Babu Sarju Kumar made the following statement: "He (that is, Dan Bahadur Pal Singh) had the boy Lallan at his house who used to be always with him. I knew him to be his son at first (that is, I supposed him to be his son at first) but subsequently I came to learn that he was his daughter's son and heir-apparent to his *gaddi* and that his name was Adya Bakhsh Singh. He used to be very affectionate to him (Adya Bakhsh Singh) and he frequently in the course of conversation used to tell me that he had no one else but Lallan as his *janashin* (that is successor). On one occasion he also told me that he had sent a communication to the British Indian Association at Lucknow to say that Lallan was his heir and successor to the *taluqa*." Dr. Mukerji's evidence is the strongest possible evidence there could be regarding the treatment which Dan Bahadur Pal Singh exhibited towards Adya Bakhsh Singh, and we think, that the statements regarding the position which Dan Bahadur Pal Singh intended Adya Bakhsh Singh to occupy after his death are admissible in evidence under the provisions of section 8 of the Indian Evidence Act. These statements are statements accompanying and explaining the acts of Dan Bahadur Pal Singh with reference to Adya Bakhsh Singh and they seem, therefore, to fall within the definition of the word "conduct" as used in Explanation I to section 8 of the Indian Evidence Act. If the statements which are proved by the testimony of Dr. Mukerji are, as we think, admissible in evidence, then it might well be argued that the case of Adya Bakhsh Singh was established independently of the document Exhibit D1, but we prefer to rely upon this gentleman's evidence more for the purpose of showing the disposition of Dan Bahadur Pal Singh towards Adya Bakhsh Singh and for the purpose of interpreting in that light the meaning which should be placed upon the language of the document Exhibit D1. We have it then that the Counsel for the respondent is not in a position to explain away all this evidence regarding treatment. But an ingenious attempt

has been made by him to put another complexion upon it. He refers to clause 4 of section 22 of the Oudh Estates Act (I of 1869), a clause which, as is now well known, was introduced into the Act at the express instance of Raja Man Singh, the former *taluqdar* of the Ajudhia Estate. This clause places the daughter's son of a *taluqdar* who has been treated in all respects as own son in a very prominent position in the line of inheritance. It is said that all this treatment which was meted out to Adya Bakhsh Singh by Dan Bahadur Pal Singh was adopted with the express purpose of placing Adya Bakhsh Singh in the line of succession. In other words, it is argued that it was Dan Bhadur Pal Singh's intention that in case he died without issue, Adya Bakhsh Singh was to succeed to the estate under the provisions of clause 4 of section 22 of the Act. It is argued again that for this reason Dan Bahadur Pal Singh never entertained any notion of making a Will in favour of Adya Bakhsh Singh, being in the belief that Adya Bakhsh Singh would succeed him under the provisions of the Act. It is pointed out that as Dan Bahadur Pal Singh himself had succeeded under a Will executed in his favour by his father-in-law Sripat Singh he would have been alive to the importance of executing a formal testamentary document in case he desired Adya Bakhsh Singh to take the estate as his devisee. Dan Bahadur Pal Singh, it is said, did not succeed to the *taluqa* after Sripat Singh's death without a great deal of opposition on the part of Sripat Singh's own relations and so it is argued that he would at least have taken the precaution to execute a formal Will so as to secure the position of Adya Bakhsh Singh.

Of course if Dan Bahadur Pal Singh did entertain the notion that succession to the estate after his death would be governed by the rules laid down in section 22 of Act I of 1869, he was labouring under a mistake of law. Although he had taken as legatee of Babu Sripat Singh, he was not a legatee within the meaning of that expression as defined in section 2 of the Act, for the Will which was executed in his favour had taken effect long before Act I of 1869 came into force. Can it be maintained, therefore, that because Dan Bahadur Pal Singh had this erroneous impression, any declarations of his intention regarding the succession to his estate contained in the document Exhibit D1 are to go for nothing merely because his conception of his own legal status was a wrong one? Is the document Exhibit D1 not to be given effect to merely because it may be said that it was only a step in a course of treatment, the object of which was to secure succession to Adya Bakhsh Singh? We think an argument of this kind cannot be allowed to prevail. We ought to give full legal effect if we can to any expressions of intention to be found in the document. It is well understood that in the case of a testamentary disposition made by a Hindu to which the rules of the ordinary Hindu Law apply, there is no need to establish the execution of any document of a formal nature. It is hardly necessary to refer to the numerous cases which were cited before us in this connection. It has been pointed out to us that a statement made before a revenue official, an unsigned Will, a draft Will, a petition to a Revenue Court, an entry in a *wajib-ul-arz*, a statement contained in a power-of-attorney and other statements of like character have been treated by the Courts as testamentary documents in the case of a Hindu. There has been more than one case from Oudh in which it has been necessary to consider the legal effect of documents containing expressions of the wishes of *taluqdars* in the matter of succession to their estates. I would refer here to a well-known case from Oudh [*Hurpershad* v. *Sheo Dyal* (5)], which was decided by their Lordships of the Privy Council in the year 1876. Their Lordships there, in referring to certain documents which were written by Raja Gauri Shankar, agreed with what was said by the Judicial Commissioner who delivered the judgment of this Court. The following dictum of the Judicial Commissioner was mentioned with approval by their Lordships of the Privy Council of the Judicial Committee:—"In ordinary cases this could hardly be construed as a Will, for there is no

(5) 3 I A. 259: 23 W. R. 55; 3 Sar. P. C J. 611; Bald. 25; 3 Suth. P. C. J. 304; Rafique & Jackson's P. C. No. 41 (P. C.).

direct allusion to the death of the executor nor can it be said that there is a distinct direction as to the devolution of his property after his death. But in Oudh it is a matter of notoriety that the letters to which these documents are answers were expressly intended to elicit and register the wishes of each *taluqdar* as to the descent of his landed estate after his death, and the replies are to this day spoken of by *taluqdars* as their *Will* when no other has been made. Its form is immaterial as it was made prior to the passing of Act I of 1869, and the power of Hindus to make even nuncupatory Wills has been decided in repeated judgments submitted by the Lords of the Privy Council. I find that this document correctly describes the intention of the Raja in respect to the devolution of his *taluqa* after his death and that it is correctly described as a Will."

The Judicial Commissioner was, of course, here referring to the instances in which *taluqdars*, in answer to inquiries which were made by District Officers in Oudh under the direction of the Chief Commissioner, had sent in letters describing the manner in which they desired their estates to descend after their death. There can be no reason founded upon principle for drawing a distinction between such document and the document which we have got to consider in the present instance. Of course it may be justly observed that a letter sent by a *taluqdar* in reply to an official inquiry would be treated as a more solemn and formal document than one sent in response to an invitation such as was held out to Dan Bahadur Pal Singh in the present case. At the same time, we think, it may fairly be argued that there was a certain amount of analogy between the situation in which Dan Bahadur Pal Singh found himself at the end of 1899 and that of *taluqdars* who years before had been invited by the Deputy Commissioners of their districts to declare their intentions as to the succession to their estates. The invitation to Dan Bahadur Pal Singh to give the history of his estate and to mention the name of his successor was contained in what may be described as the official organ of the British Indian Association of which Dan Bahadur Pal Singh as a *taluqdar* was a member. It was also stated in the advertisement containing the invitation that the preparation of this manual of history was being undertaken with the sanction of the Lieutenant Governor of the Provinces. Kishun Lal in his deposition has stated that before the work was undertaken, he had sent a letter to the Lieutenant Governor in the name of his brother Bishun Lal asking for permission to publish a Manual of Titles in Oudh, and that such permission was accorded to him. I have no reason to suppose that this statement of Kishun Lal is in any way contrary to the truth. It may easily be understood then that when Dan Bahadur Pal Singh's attention was drawn to his advertisement, as it undoubtedly was, he was probably under the impression that the declaration which he was being called upon to make was more or less a declaration which was being demanded under official authority and was intended to be given publicity to in a book which was being compiled under the patronage of the official body representing the *taluqdars* of Oudh. It appears to me, therefore, that we may well treat this document as standing on a similar footing to those other documents which have been referred to and which in numerous instances have been treated as Wills. It may be, as argued, that at the time he ordered the preparation of this narrative Dan Bahadur Pal Singh may not have understood that he was making a Will in the strict sense of the term. The fact, however, remains that we have abundant proof of Dan Bahadur Pal Singh's intention that Adya Bakhsh Singh should succeed him in the *taluqa*. The way in which he treated Adya Bakhsh Singh is not susceptible of any other interpretation. When we find, therefore, in this document, prepared in the circumstances just mentioned, that Dan Bahadur Pal Singh declared that his successor was Adya Bakhsh Singh, and that no one but Adya Bakhsh Singh was to take the estate, we must, I think, come to the conclusion that this document can properly be relied on as a legal declaration of Dan Bahadur Pal Singh's intention with respect to his property which he desired to be carried into effect after his death. The document contains a reference to the estate

and the necessary conclusion is that it was this property which Dan Bahadur Pal Singh desired to pass to Adya Bakhsh Singh after his death. My finding, therefore, on this part of the case is that the document Exhibit D 1 is a genuine document and that it constitutes a valid and sufficient proof of the fact that a Will was made by Dan Bahadur Pal Singh, according to which Adya Bakhsh Singh was entitled at his death to the *taluqa* of Dandi Kanch.

[The learned Judicial Commissioner after discussing the evidence on the question of custom found that the custom set up by the plaintiff was not established.—*Ed.*]

The only other matter which it is necessary to deal with is the question of the various items of immoveable property described in Lists *B* and *C* attached to the plaint. These items were alleged by the plaintiff to constitute accretions or accessions to the *taluqa*. The case for the defence was that these properties were non-*taluqdari* property. No evidence was given by either party as to the manner in which these various items of property came to be acquired. As regards List *B* it is to be noted that the claim to item No. 8, a house situated in MacAndrewganj, was abandoned. As regards the other items it is admitted that with one exception (item No. 5) they all consist of small shares or portions of land comprised in villages belonging to the *taluqa*. It may fairly be assumed that the acquisition of these fragments was made with the intention that they should become incorporated in the estate and we think the proper finding is that all the items in List *B*, except item No. 5, are to be deemed a part of the Dandi Kanch *taluqa*. Similarly with regard to the houses mentioned in List *C*; so far as we can ascertain these buildings all appertain to the estate. They are either residential houses or buildings used for purposes of the estate office. We have no doubt that these items also should be deemed to be *taluqdari* property. As regards item No. 5 in List *B* in the absence of any evidence to the contrary we must hold that it does not constitute any part of the estate.

To sum up, therefore, my findings are,—(1) that the succession to the Dandi Kanch *taluqa* is not regulated either by Act I of 1969 or by the terms of the *sanad*, but is regulated by the ordinary Hindu Law; (2) that no custom affecting the rules of the Hindu Law and excluding the daughter and her sons from inheritance has been proved; (3) that Dan Bahadur Pal Singh did make a Will on the 22nd of November 1899 by virtue of which the estate has come to the defendant Adya Bakhsh Singh as devisee; and (4) that the plaintiff is entitled to no relief declaratory or otherwise. On these findings I am of opinion that the appeals should be allowed, the decree of the Subordinate Judge set aside and the suit of the plaintiffs dismissed with one set of costs to the answering defendants in the Court below. The plaintiffs respondents will pay the appellants' costs of both the appeals in this Court.

KANHAIYA LAL, A. J. C.—I generally agree with the conclusions at which my learned colleague has arrived, except in regard to the effect of section 15 of Act I of 1869 on the rule of succession laid down in the *sanad*, about which I entertain some doubt.

The dispute in these appeals relates to the Dandi Kanch estate, which belonged to Sripat Singh, a Sombansi Thakur, whose name was entered at No. 260 in List No. I and at No. 120 in List No. II, appended to Act I of 1869. Sripat Singh died, on the 17th November 1861, before Act I of 1869 was passed. On the 11th November 1861 Sripat Singh made an application in response to a circular issued by the Chief Commissioner of Oudh on the 18th January 1860, stating that as he had till then no son, he desired that if no son was born to him, Dan Bahadur Pal Singh, his son-in-law, should succeed to his estate after his death. Dan Bahadur Pal Singh, accordingly succeeded to his estate on his death and was the proprietor of the estate when Act I of 1869 came into force. His name was not, however, entered in the lists appended to that Act, and he was not, therefore, a *taluqdar* or grantee or the heir or legatee of such a *taluqdar* or grantee within the meaning of section 15 or 22 of Act I of 1869, as it stood before it was amended by U. P. Act III

of 1910. Section 21 of the latter Act gave the amendments made by it in the definitions of the words "heir" and "legatee," contained in Act I of 1869, a retrospective operation, provided such retrospective operation did not have the effect of divesting an estate or part of an estate from a person, in whom it had already vested before the amending Act was passed. As the estate in the present instance had already been vested in Dan Bahadur Pal Singh, and the effect of applying the amended definitions would have been to divest him and his successors, it is common ground that the special rules of succession laid down in Act I of 1869 do not apply to the estate in suit.

Dan Bahadur Pal Singh died on the 14th March 1906, leaving a widow *Musammat* Sukhpal Kuar, a daughter *Musammat* Balraj Kuar, and a step-brother by the same father, Mahadeo Pal Singh, who is the plaintiff in the suit from which these appeals have arisen. *Musammat* Balraj Kuar is married to Sant Bakhsh Singh, by whom she has a son, Adya Bakhsh Singh. Mahadeo Pal Singh claimed the estate to the exclusion of Adya Bakhsh Singh and the widow and daughter of Dan Bahadur Pal Singh. Adya Bakhsh Singh claimed the estate under a bequest said to have been made by Dan Bahadur Pal Singh, his maternal grandfather. *Musammat* Sukhpal Kuar and *Musammat* Balraj Kuar claimed their respective interests under the Hindu Law.

It is not here disputed that Sripat Singh got the estate under a primogeniture *sanad*, which declared that, in the event of his dying intestate or any of his successors dying intestate, the estate shall descend to the nearest male heir according to the rule of primogeniture.

The main questions for consideration in these appeals are whether the devolution of the estate in the hands of Dan Bhahadur Pal Singh was governed by the rule of succession laid down in the *sanad* or by the personal law applicable to the religion or tribe to which he belonged, whether Dan Bahadur Pal Singh bequeathed the estate in his lifetime to Adya Bakhsh Singh and whether *Musammat* Balraj Kuar and her son, Adya Bakhsh Singh, were excluded from inheritance by the *sanad* or by a custom prevailing in the family of Dan Bahadur Pal Singh.

It is conceded that if the devolution is governed by the personal law, *Musammat* Sukhpal Kuar would be entitled to the estate and would be succeeded on her death by *Musammat* Balraj Kuar and her son, Adya Bakhsh Singh, in succession, if they survived her, provided they were not excluded by family custom. It is also conceded that if the devolution is governed by the rule of succession laid down in the *sanad*, *Musammat* Sukhpal Kuar and *Musammat* Balraj Kuar would be excluded from succession, but it is disputed whether Adya Bakhsh Singh, as the solitary male heir under the personal law, would be so excluded.

In 1899 Kishun Lal, a clerk in the office of the British Indian Association, Lucknow, issued a notice, which was published in the British Indian Association Gazette, called the *Akhbar-i-Anjuman Hind*, inviting the *taluqdars* to supply him with particulars of their family estates and also to declare the names of the persons who were to succeed them in possession of their estates, with a view to the publication of a consolidated history of the Oudh *taluqdars*. In response to that notice, a document was sent by Dan Bahadur Pal Singh to Kishun Lal, containing the necessary particulars and stating that he had no children except one daughter, who had a son, named Lal Adya Bakhsh Singh, that Adya Bakhsh Singh was his heir and successor, and that no other person than that boy was to be his heir under any law. He kept a copy of this document with himself. Kishun Lal published the document in his book, altering the narrative from the first person to the third person. The evidence, adduced on the point, has been discussed in detail by my learned colleague and need not be recapitulated here. I agree with him that the narrative, as published by Kishun Lal and contained in the copy, found among the papers of Dan Bahadur Pal Singh, accurately represents the wishes communicated by Dan Bahadur Pal Singh, as to the person whom he wanted to succeed him on his death, and that it constitutes a valid testamentary disposition, which the legatee is entitled to enforce. Under the Hindu

Law, a Will may be oral, and any statement made by a person expressing or manifesting an intention as to the posthumous disposition of his property can operate as his Will. As pointed out in *Maulvie Mohamed Shumsool Hooda* v. *Shewukram* (6), *Kalian Singh* v. *Sanwal Singh* (7), *Mathura Das* v. *Bhikhan Mal* (8) and *Janki* v. *Kallu Mal* (9), petitions addressed to officials, and papers drawn up in accordance with the intentions of a testator, though not signed by him, might constitute a valid testamentary disposition of property under the Hindu Law. Replies to official inquiries have been held by their Lordships of the Privy Council in *Hurpershad* v. *Sheo Dyal* (5), *Haidar Ali* v. *Tasadduk Rasul Khan* (10) and *Balbhaddar Singh* v. *Sheo Narain Singh* (11) to operate as Wills. Testamentary statements made in *wajib-ul-arz* or powers-of-attorney have similarly been held to operate as Wills.

Assuming, however, that the statement made in the aforesaid document does not operate as a valid testamentary disposition, the question arises whether the devolution of the estate in the hands of Dan Bahadur Pal Singh was governed by the personal law or by the rule of succession laid down in the *sanad*, as modifying that law. Section 15 of Act I of 1869, as it existed before its amendment by U. P. Act III of 1910, lays down that if any *taluqdar* or grantee shall heretofore have transferred or bequeathed to any person not being a *taluqdar* or grantee the whole or any portion of his estate, and such person would not have succeeded according to the provisions of that Act to the estate or to a portion thereof, if the transferor or testator had died without having made the transfer and intestate, the transfer of and succession to the property, so transferred or bequeathed, shall be regulated by the rules which would have governed the transfer of, and succession to, such property, if the transferee or legatee had bought the same from a person, not being a *taluqdar* or grantee. The bequest in favour of Dan Bahadur Pal Singh in the present case was made and came into operation before the Act was passed, and as Dan Bahadur Pal Singh was not a person who would have succeeded to the estate according to the provisions of the Act but for that bequest, the effect of section 15 is to render the rules as to transfer and succession laid down in the Act inapplicable to the estate in his hands. It is contended that the effect of section 15 is to render not only the rules of transfer and succession laid down in the Act, but also the rule of succession, laid down in the *sanad*, inapplicable to the estate in the hands of such a legatee. But it seems to me that the intention of this section was to exclude the estate in such a contingency from the disability imposed by the Act on *taluqdars* and grantees in the matters of transfer and succession and not from any rules which might be applicable independently of the Act. The rules which would have governed the transfer of or succession to such estates before Act I of 1869 was passed might have been either the personal law, as modified by custom, or the rules of succession as laid down in the *sanad* to which legal effect was given by the Crown Grants Act (XV of 1895). That Act provided that whereas doubts had arisen as to the power of the Crown to impose limitations and restrictions upon grants and other transfers of land made by it and it was expedient to remove those doubts, it was enacted that all provisions, restrictions, and limitations over contained in any such grant or transfer shall be valid, and take effect according to their tenor, any rule of law, Statute or enactment of the Legislature to the contrary notwithstanding. The rule of succession laid down in the *sanad*, being a condition of the grant, thus superseded or modified the personal law, so far as it went, and, if the rules for transfer and succession, laid down in Act I of 1869, could not apply to the estate by reason of the bequest, made by Sripat Singh in favour of

(6) 2 I. A. 7; 22 W. R. 409; 14 B. L. R. 226; 3 Sar. P. C. J. 405; 3 Suth. P. C. J. 43 (P. C.).

(7) 7 A. 163; A. W. N. (1884) 337; 4 Ind. Dec. (N. S.) 378.

(8) 19 A. 16; A. W. N. (1896) 171; 9 Ind. Dec. (N. S.) 11.

(9) 2 Ind. Cas. 213; 31 A. 236; 6 A. L. J. 171.

(10) 17 I. A. 82; 18 C. 1; 5 Sar. P. C. J. 529; 9 Ind. Dec. (N. S.) 1.

(11) 26 I. A. 194; 27 C. 344; 7 Sar. P. C. J. 625; 14 Ind. Dec. (N. S.) 227 (P. C.).

Dan Bahadur Pal Singh, the transfer of and succession to the estate in the hands of Dan Bahadur Pal Singh would be governed by the rules which would have governed the transfer of or succession to the estate if the transferee or legatee had bought the same from a person not being a *taluqdar* or grantee, that is, as if the rules relating to transfer and succession in the matter of *taluqdars* and grantees had not been applicable. Those rules would have been, in the case of an estate granted by means of a primogeniture *sanad*, the rules laid down in the *sanad* itself, which was the root of the title, and subject to those rules, the ordinary law of the religion and tribe applicable to the persons to whom the *sanad* was granted. In other words, to use the language of Lord Shaw in *Debi Bakhsh Singh* v. *Chandrabhan Singh* (1), the section prescribes nothing else than the relegation of the transferee or legatee in the matter of transfer and succession to the situation in which he would have been found apart from the Statute. The purchaser of an ordinary estate is governed in the matter of succession by his own personal law and not by that applicable to the transferor, and all that section 15 seems to me to lay down is that in the contingency there contemplated, the law relating to transfer and succession shall be the law applicable to the transferee or legatee, and the estate shall be free from the fetters, imposed by Act I of 1869 on *taluqdars* and grantees in regard to those matters. It does not seem to me to be probable that it was intended by section 15 to cut fetters not imposed by the Act or fetters which existed independently of it; and the statement that the transferee or legatee in such a case would be deemed to have bought from a person, not being a *taluqdar* or grantee, merely implies a release for certain purposes from the clutches of the Act and not from those imposed by any other law. The object of the section is not to wipe out the *sanad* but to wipe out the disabilities imposed in certain matters on the *sanad* holders by Act I of 1869. Had the intention been to relegate the transferee or legatee in the contingency mentioned to the situation apart from the Statute and apart from the *sanad*, the section would have said so in clearer and more unambiguous terms, and the reference in section 11 of the Act to *taluqdars* and grantees being competent to transfer the whole or any portion of the estate, subject to all the conditions under which the estate was conferred by the Government, would have been out of place. Where the special rules of succession laid down in Act I of 1869 apply, such conditions would no doubt be, as observed by their Lordships of the Privy Council in *Brij Indar Bahadur Singh* v. *Ranee Janki Koer* (12), only those relating to loyalty, good services and the like, for the rule of succession laid down in the *sanad* has been superseded thereby. But where the special rules of succession, laid down in section 22, do not apply, as in this case, all the conditions laid down in the *sanad* continue in force, so long as the estate remains in the hands of the grantee or his "successors". The matter is not free from difficulty, and the language used in section 15 is far from clear. But, on a careful consideration of the provisions of the Act, I am inclined to think that section 15 operates to take an estate for purposes of transfer and succession in the contingency therein mentioned outside the Act and relegates the transferee and legatee to the situation in which he would have been, if those rules had not been enacted or had not been applicable to the estate. In *Ghulam Abbas Khan* v. *Bibi Ummatul-Fatima* (2) the rule of succession laid down in the *sanad* was not deemed to be excluded under similar circumstances. In *Sital Singh* v. *Sitla Bakhsh Singh* (13) the circumstances were somewhat different, for the amendment made by U. P. Act III of 1910 was held in that case to be capable of retrospective operation without disturbing any vested rights. The former case was similar to the present in so far as the estate, with which it was concerned, did not come under the Act for the purpose of succession and had, therefore, continued to be governed by the *sanad*, while in the latter case the estate was governed by the Act for all purposes

(12) 5 I. A. 1; 1 C. L. R. 318; 3 Sar. P. C. J. 763; Bald. 148; Rafique & Jackson's P. C. No. 48; 3 Sath. P. C. J. 474.

(13) 40 Ind. Cas. 469; 4 O. L. J. 193.

and the main question was whether in view of the Amending Act III of 1910 the *sanad* applied when the estate went out of it for purposes of succession under section 15.

The application of the rule of succession laid down in the *sanad* would not, however, make any difference in this case, because, as my learned colleague has pointed out, the rule of succession laid down therein is confined in its operation to the grantees and their successors, implying thereby their successors by inheritance. The official correspondence, which preceded or accompanied the grant of primogeniture *sanads*, was summarized by me in my judgment in *Ghulam Abbas Khan* v. *Bibi Ummatul-Fatima* (2), where the whole matter was discussed in detail. It seems to me that it was not the intention of the *sanad* to make the rule of primogeniture applicable to persons, to whom the estate might pass, outside the line of inheritance laid down therein by any of the methods mentioned in the *sanad*; and as held in *Sital Singh* v. *Sitla Bakhsh Singh* (13) that rule would not apply to such legatees or transferees.

On the questions of custom and accretion, I have nothing to add to what my learned colleague has said.

I concur, therefore, in allowing the appeals, setting aside the decree of the learned Subordinate Judge and dismissing the suit, with one set of costs to the answering defendants in the Court below. The plaintiffs-respondents will pay the appellants' costs of both the appeals in this Court.

Appeals allowed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 189 OF 1915.

August 17, 1916.

Present:—Mr. Justice Fletcher and Mr. Justice Newbould.

BAIKANTHA NATH DEY AND OTHERS —PLAINTIFFS—APPELLANTS

versus

MOHESH CHANDRA DEY —DEFENDANT—RESPONDENT.

Mortgage—Redemption—Purchaser of share of equity of redemption, whether can redeem entire mortgage.

A purchaser of a share of the equity of redemption other than the mortgagee is entitled to redeem the entire mortgage. [p. 78, col. 1.]

Appeal against the order of the District Judge, Bankura, dated the 19th March 1915, modifying that of the Munsif, 3rd Court at Bishenpur, dated the 25th February 1914, and remanding the suit to his Court.

Babus *Gunoda Charan Sen* and *Mohini Mohan Chatterjee*, for the Appellants.

Babus *Satis Chandra Ghose* and *Mohini Nath Bose*, for the Respondent.

JUDGMENT.

FLETCHER, J.—This is an appeal against an order of the learned District Judge of Bankura, dated the 19th March 1915, modifying the order of the Munsif of the 3rd Court at Bishenpur. The suit was brought by the plaintiffs as the purchasers of the equity of redemption in a certain property. The defendant was the mortgagee under an usufructuary mortgage. It is found by both the lower Courts, and not denied, that the time for redemption has arrived. The learned Munsif decreed redemption. On appeal to the learned District Judge he remanded the case to the first Court. The first point on which the learned Judge remanded the case was that the plaintiffs, as he held, were entitled to redeem only in respect of an undivided $\frac{2}{3}$rds share in the property subject to the mortgage. The learned Judge, acting on the decision in the case of *Girish Chunder Dey* v. *Juramoni De* (1), came to the conclusion that the plaintiffs were entitled to redeem only a portion of the property. The decision on which the learned District Judges acted was, in my opinion, a wrong decision. The case on which the learned Judges who decided the case reported as *Girish Chunder Dey* v. *Juramoni De* (1) rested their decision, namely, the case of *Nawab Azimut Ali Khan* v. *Jowahir Sing* (2), does not justify that decision. In the case of *Nawab Azimut Ali Khan* v. *Jowahir Sing* (2) the mortgagee had become the purchaser of a portion of the equity and, of course, a case of that nature is clearly distinguishable from the case where there has been a severance of the equity of redemption amongst parties other than the mortgagee. The sections of the Transfer of

(1) 5 C. W. N. 83.

(2) 13 M. I. A. 404; 14 W. R. P. C. 17; 2 Suth. P. C. J. 346; 2 Sar. P. C. J. 573; 20 E. R. 602.

Property Act are quite clear on the point and the law is also quite clear. There are many decisions opposed to the decision reported as *Girish Chunder Dey* v. *Juramoni De* (1). It is sufficient to refer only to the cases of *Huthasanan Nambudri* v. *Parameswaran Nambudri* (3) and *Mora Joshi* v. *Ram Chandra Dinkar Joshi* (4). The observations of the Judicial Committee of the Privy Council in the case reported as *Norender Narain Singh* v. *Dwarka Lal Mundur* (5) are also clearly opposed to the decision reported as *Girish Chunder Dey* v. *Juramoni De* (1). The sections of the Transfer of Property Act are also opposed to such a decision. The law as stated in the text books, so far as I am aware, is to the effect that in an ordinary case, the partial owner of the equity of redemption is entitled to redeem the whole mortgage. Nobody has ever heard that proposition doubted before and I think the decision in *Girish Chunder Dey* v. *Juramoni De* (1) was founded on a misreading of the decision reported as *Nawab Azimut Ali Khan* v. *Jowahir Sing* (2). I think that, even accepting, although it is not necessary to decide that in this case, the learned Judge's finding that the plaintiffs have acquired only a $\frac{2}{3}$rd share of the equity, the plaintiffs are notwithstanding that entitled to redeem the entire mortgage.

Then it is said that a point arises on the construction of the mortgage whether this case is not premature, because the redemption, according to the terms of the deed, is to take place on payment of the principal sum on the expiration of 1319 B. S., that is, " the *Yamasiray* in 1320 B. S." Exactly what the meaning of "*Yamasiray* in 1320 B. S." is, I do not know and, notwithstanding that we are assisted in this case by Bengali gentlemen who appear both for the plaintiffs and the defendant, they do not pretend to know what it means. Whatever *Yamasiray* in 1320 is, on the most liberal construction it must have long since expired. A discussion as to the meaning of the term will be purely academic and I think there is no use sending the case back for a decision as to what " *Yamasiray* in 1320 B. S." is.

(3) 22 M. 209; 8 Ind. Dec. (N. S.) 149.
(4) 15 B. 24; 8 Ind. Dec. (N. S.) 17.
(5) 5 I. A. 18 p. 27; 3 C. 397; 1 C. L. R. 369; 3 Suth. P. C. J. 480; 3 Sar. P. C. J. 771; 2 Ind. Jur. 117; 1 Ind. Dec. (N. S.) 839.

In the result, the order of remand made by the learned District Judge must be set aside and the decree of the Munsif for redemption restored. The costs of this appeal and the costs of the appeal in the lower Appellate Court will be paid by the defendant to the plaintiffs. The order of the Court of first instance as regards costs will stand. We assess the hearing fee in this Court at two gold *mohurs*. Two months' time from the date of the arrival of the record in the Court of first instance is allowed to the plaintiffs to pay the money due to the defendant on his mortgage.

NEWBOULD, J.—I agree.

Appeal allowed

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 307 OF 1917.

November 7, 1917.

Present:—Mr. Lindsay, J. C.

GOBINDEY—DEFENDANT—APPELLANT

versus

RAM ADHIN—PLAINTIFF—RESPONDENT.

Hindu Law—Joint family - Separation in mess and residence—Separate property—Burden of proof.

In a suit for partition between brothers who were members of a joint Hindu family, it was admitted that the wife of the plaintiff during his absence from home which lasted for a considerable time, was on account of her quarrelsome disposition sent to live in a portion of the family house and to have her meals separately:

Held, that this did not constitute such an admission of separation in estate among the members as would relieve the defendant from proving that the property in dispute was his separate property. [p. 79, col. 1]

Appeal against the decree of the District Judge, Rae Bareli, dated the 2nd May 1917, upholding the decree of the Munsif, Rae Bareli, dated the 27th November 1916.

Mr. *Mohammad Anwar Ali*, for the Appellant.

JUDGMENT.—This appeal has arisen out of a suit for partition brought by one Ram Adhin against his brother Gobindey, defendant No. 1, who was the contesting defendant. Another brother was impleaded as defendant but he did not contest the claim. The plaintiff's case was that the

parties were members of a joint family, that there was joint family property consisting of three small items of property, that this property had never been divided and that the plaintiff was entitled to his share. The first defendant set up a defence that the plaintiff was separate and that the separation had taken place in the joint family 25 years before the suit. In these circumstances and on these pleadings the Courts laid the burden of proving separation on the defendant, and both the Courts are agreed that the separation so alleged was not established and consequently the claim of the plaintiff has been decreed.

The main argument of the learned Counsel who has appeared here to support the appeal is that the Courts below were wrong in their adjustment of the burden of proof. It is said that in view of certain admissions made by the plaintiff the burden rested on him. I can find nothing in the record to support the argument that the plaintiff made any admission of separation in property. What the Courts below have found is that many years before the suit was brought the plaintiff went off to some other part of India and remained away for a considerable time. He left his wife behind him, who seems to have been of a quarrelsome disposition. She could not agree with the other members of the family and so she was sent to live in a portion of the family house and to have her meals separate. That would not constitute any admission of separation in estate upon which the defendant was entitled to rely and I am satisfied, therefore, that the burden of proof was rightly laid on the defendant and that the findings of the Courts below are in all respects correct. The evidence has been carefully examined in both the Courts and the finding is that there never has been any division of the family property. In these circumstances it seems to me that this case cannot go any further. I dismiss this appeal under Order XLI, rule 11, of the Code of Civil Procedure.

Appeal dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No 1117 OF 1916.

July 9, 1917.

Present:—Sir Edward Chamier, KT., Chief Justice, and Mr. Justice Sharfuddin.

KULDIP SINGH—APPELLANT

versus

KULDIP CHOUDHURI—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 1—Withdrawal of suit with permission to bring fresh suit on payment of costs, effect of—Second suit, maintainability of, without payment of costs—Order of withdrawal, form of.

Where a plaintiff is allowed to withdraw a suit with permission to bring a fresh suit, the payment of the costs of the first suit being made a condition precedent to the institution of a fresh suit, and a second suit is instituted without payment of such costs, the suit is maintainable provided the costs are paid before the suit comes on for trial. [p. 80, col. 1.]

In such cases until the costs are paid the permission is not operative and, therefore, there is no withdrawal with liberty to bring a fresh suit, the result being that until there is such a withdrawal the former suit remains pending and is under section 10 of the Civil Procedure Code a bar to the trial of the second suit. [p. 80, col. 1.]

The order allowing withdrawal of the suit in such cases should limit the time within which costs should be paid and should go on to direct that on failure to pay costs within that time, the original suit shall stand dismissed with costs. [p. 80, col. 2.]

Second appeal from a decision of the District Judge, Monghyr, dated the 29th July 1916, reversing that of the Munsif, Begusarai, dated the 27th September 1915.

Mr. *Mahomed Fakhruddin*, for the Appellants.

Mr. *Avadh Behari Chaubey*, for the Respondent.

JUDGMENT.

CHAMIER, C. J.—The plaintiff in the present suit, which is for the rent of certain land for the years 1318, 1319 and 1320 *F.*, brought a previous suit for the years 1315, 1316, 1317 and 1318 *F.* He asked for permission to withdraw that suit and bring another suit and the Court passed the following order:—

"The plaintiff has filed a petition to withdraw the suit with permission to bring a fresh suit on the ground of errors in the plaint. Ordered that the plaintiff may withdraw the suit and bring a fresh suit if not otherwise barred. The defendant is allowed costs against the plaintiff and the payment of costs is made a condition precedent to the institution of a fresh suit."

That order was dated March 25th, 1914. The present suit was instituted on September 8th, 1914, which was exactly three years after the expiry of 1311 *F.*, the first of the years now in suit. The Munsif decreed the claim, but on appeal the District Judge, though holding in favour of the plaintiff, on the merits allowed the appeal and dismissed the suit on the ground that it was barred by the order recited above.

In second appeal it is contended that the District Judge's order is wrong. Similar orders were considered by the Calcutta High Court in the cases of *Abdul Aziz Molla* v. *Ebrahim Molla* (1) and *Shital Prasad Mondal* v. *Gaya Prosad Dingal* [*Sadhu Charan Tewari* v. *Baikuntha Nath Maduk*] (2). In the earlier case the order passed was almost in exactly the same terms as the order which we have to consider in the present case. At the time when the second suit was instituted the costs of the first suit had not been paid, but they were paid before the suit came on for trial. The High Court held that the suit was maintainable. In the latter case also the order passed was practically in the same terms as the order which we have to consider in this case, and the High Court held that as the plaintiff had obtained leave to withdraw with permission to bring a fresh suit on payment of the costs of the first suit, the Court ought merely to have regarded section 10 as a bar to its proceeding with the trial of the second suit and that it should have proceeded with that trial when the costs of the first suit were paid. The result of these rulings is curious, but it is difficult to resist the reasoning on which the decisions are based. The condition of the permission to withdraw the first suit and bring a fresh suit was the payment of costs only. Until the costs were paid the permission was not operative; and therefore there was no withdrawal with liberty to bring a fresh suit, and the result was that until there was such a withdrawal the former suit remained pending and was, under section 10 of the Code, a bar to the trial of the second suit. The difficulty which has arisen in the present case is due to the incompleteness of the order passed in the first suit. The order in such circumstances should limit the time within which costs should be paid and should go on to direct that on failure to pay costs within that time the original suit shall stand dismissed with costs. In my opinion, it is not possible to distinguish the present case from the cases cited, and I would, therefore, hold that the District Judge was wrong in dismissing this suit. I would allow this appeal, set aside the decree of the District Judge, and give the plaintiff a decree for three years' rent at the rate of Rs. 9-8-0 per annum plus 25 per cent. damages. In the circumstances I would make no order as to costs in any Court.

SHARFUDDIN, J.—I agree.

Appeal allowed.

(1) 31 C. 965.
(2) 23 Ind. Cas. 210; 19 C. L. J. 529.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 153 OF 1916.

July 23, 1917.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Richardson.

KRISHNA DAS ROY AND OTHERS—DECREE-HOLDERS—APPELLANTS

versus

KALI TARA CHOWDHURANI AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Landlord and tenant—Suit for rent against some out of several joint tenants, maintainability of—Co-tenants' liability for rent, whether joint and several—Contract Act (IX of 187), s. 43—Joint promisors, liability of—'Joint liability' and 'joint and several liability,' distinction between.

The plaintiff brought a suit for arrears of rent against six persons, three of whom were dead, and obtained a decree. In execution the representatives of the deceased defendants were brought on the record, but they objected to the execution of the decree on the ground that the decree was a nullity having been obtained against persons some of whom were dead:

Held, that the decree was not a nullity and could be executed as a money decree as against those judgment-debtors who were living at the date of the suit and the decree passed therein, although it could not be executed as against the representatives of the judgment-debtors who were dead when the suit was instituted. [p. 82, col. 2; p. 85, col. 1.]

Joy Gobind Laha v. *Monmotha Nath Banerji*, 33 C. 580, *Jogendra Nath Roy* v. *Nagendra Narain Nandi*, 11 C. W. N. 1026, *Rameswar Singh* v. *Jaideb Jha*, 6 Ind. Cas. 387; 12 C. L. J. 591, followed.

KRISHNA DAS ROY *v.* KALI TARA CHAWDHURANI.

Kashi Kinkar Sen v. *Satyendra Nath Bhadro*, 7 Ind. Cas. 840; 12 C. L. J. 642 at p. 644; 15 C. W. N. 191, *Roop Narain Singh* v. *Juggoo Singh*, 10 W. R. 304, *Khetter Mohan Pal* v. *Pran Kristo Kabiraj*, 3 C. W. N. 371, distinguished.

The liability of joint tenants for rent is, like the liability of joint promisors, a joint and several liability. [p. 83, col. 1; p. 87, col. 1.]

Section 43 of the Contract Act enables a promisee to sue one or more of several joint promisors to enforce the joint liability. [p. 82, col. 2; p. 87, col. 1.]

When a contract is made with several persons as tenants, they are jointly and severally liable for rent. But when the contract is made with a single person, after his death the liability of his heirs is a joint liability. [p. 84, col. 1.]

Per *Richardson, J.*—The liability of co-tenants is presumably joint and several, unless it is shown to be merely joint. [p. 86, col. 2.]

In England it is the right of persons jointly liable to pay a debt to insist on being sued together. But in India, apart from express agreement, this right has been abrogated by section 43 of the Contract Act. [p. 85, col. 2; p. 86, col. 1.]

Difference between 'joint liability' and 'joint and several liability' explained. [p. 85, col. 2.]

Per *Chatterjea, J.*—Where a landlord creates a tenancy in favour of two persons jointly, whether each is liable for the entire rent depends upon the intention of the parties and where there is a written contract, the intention would depend largely on the contract. [p. 83, col. 2.]

Appeal against the order of the District Judge, Tipperah, dated the 15th March 1916, affirming that of the Munsif, 2nd Court at Chandpur, dated the 20th November 1915.

FACTS.—The appellants got a decree for rent for Rs. 368 and odd in respect of a *kaimi jama*. The suit was brought against six persons as tenants. At the time of the institution of the suit three of these persons were dead and the other three were alive. The fact of death of three of the tenants was not brought to the notice of the Court as the proceedings were *ex parte*, with the result that a decree for the amount claimed was passed against the tenants, three of whom had died long before the institution of the suit. In execution proceedings the landlords-appellants substituted the heirs of the deceased tenants and applied for execution of the whole decree against them as also against those tenants who were alive at the time of the suit. The defence was that the whole decree was a nullity as the decree was obtained against some of the tenants, who had died before the institution of the suit. Both the lower Courts held that the whole decree was a nullity and the question whether the decree was so could be entered into by the execution Court. The result was that the application for execution was dismissed as against all. From the said order an appeal was preferred to the High Court.

Babu *Rupendra Kumar Mittra*, for the Appellants.—The cases lay down the following propositions:—

(1) If lands are let out to two or more tenants, their liability to pay is joint and several. See *Joy Gobind Laha* v. *Monmotha Nath Banerji* (1), *Jogendra Nath Roy* v. *Nagendra Narain Nandi* (2), *Rameswar Singh* v. *Jaileb Jha* (3), *Shaik Sahed* v. *Krishna Mohan Basak* (4) and *Abdul Aziz* v *Basdeo Singh* (5).

(2) If lands are let out to one or more tenants, and others become entitled to the tenancy right by *purchase*, the liability of the purchasers is joint and several. See *Kishori Raman Kapuria* v. *Ananta Ram Laha* (6) and *Dhunput Sing* v. *Sham Soonder Mitter* (7).

(3) If lands are let out to one tenant or more and their rights devolve upon many by reason of succession, their liability is joint and not joint and several. See *Kashi Kinkar Sen* v. *Satyendra Nath Bhadro* (8) as explained in *Shaik Sahed* v. *Krishna Mohan Basak* (4).

Even when the right of one devolves upon several heirs, whose liability is joint, any one of the heirs can be sued for the whole rent by the landlord. According to English Law several joint promisees must be sued together. If one of them be sued, he can defeat the action by the plea of non-joinder of the others. See Parke, B., in *King* v. *Hoare* (9). Section 43 of the Contract Act does not make the liability of joint promisees joint and several, but takes away from the joint promisees the plea of non-joinder, if some of them only be sued.

(1) 33 C. 580.
(2) 11 C. W. N. 1026.
(3) 6 Ind. Cas. 387; 12 C. L. J. 591.
(4) 35 Ind. Cas. 563; 24 C. L. J. 371.
(5) 17 Ind. Cas. 89; 34 A. 604; 10 A. L. J. 483.
(6) 10 C. W. N. 270.
(7) 5 C. 291; 4 C. L. R. 501; 2 Ind. Dec. (N. S.) 796.
(8) 7 Ind. Cas. 840; 12 C. L. J. 642 at p. 644; 15 C. W. N. 191.
(9) (1844) 13 M. & W. 494 at p. 505; 14 L. J. Ex. 29; 8 Jur. 1127; 2 D. & L. 382; 67 R. R. 694; 153 E. R. 206;

See *Hemendro Coomar Mullick* v. *Rajendrolall Moonshee* (10). This question could not be considered in *Kashi Kinkar Sen* v. *Satyendra Nath Bhadro* (8), because *all* the joint tenants were made parties. The decree made against one was set aside because inconsistent with the pleadings.

(4) If a joint decree be passed against many, execution can be levied against *one* for the whole amount, leaving him to adjust his claim against others as he pleases. See *Kally Mohun Bal* v. *Dinonath Chuckerbutty Chowdhry* (11).

Hence in any case here the whole decree can be executed as a money decree against any of the three who were alive at the time of the suit.

Babu *Bhabataran Brahmachari*, for the Respondents.—The liability of tenants depends upon the contract. If the terms of the contract be not proved, their liability is joint and not joint and several. See *Kashi Kinkar Sen* v. *Satyendra Nath Bhadro* (3). If the liability were joint and several in the beginning, the appellant cannot execute the decree against the tenants who were alive at the time of the suit, because by suing all the tenants together, he elected to treat their liability to be joint.

The decree which has been passed is a joint decree and it cannot be executed against some. *Kally Mohun Bal* v. *Dinonath Chuckerbutty Chowdhry* (11) is no authority for the proposition that a joint decree can be executed against any one of the judgment-debtors. There one of the judgment-debtors was held liable for the whole amount because there was a special direction to that effect in the decree itself.

Babu *Rupendra Kumar Mittra*, in reply.

JUDGMENT.

CHATTERJEA, J.—This appeal arises out of an application for execution of a decree. The appellant brought a suit for arrears of rent against six persons who were the tenants and obtained a decree. It appears that three of them had died before the institution of the suit, and when the decree-holder brought the representatives of the deceased judgment-debtors on the record in the proceedings in execution of the decree, they objected to the execution on the ground that the decree was a nullity having been obtained against persons who were dead, and the Court of first instance gave effect to the contention, and the order of that Court was confirmed by the Court of Appeal below. The decree-holder has appealed to this Court, and it is contended on his behalf that although the decree was not binding upon the heirs of the judgment-debtors who were not living at the date of the suit, the liability of the judgment-debtors is joint and several and that the decree-holder is competent to proceed against such of the judgment-debtors as were not dead at the time of the institution of the suit and that as against them the decree was binding.

The first question for consideration, therefore, is whether the liability of joint promisors is a joint or a joint and several liability.

Now section 43 of the Contract Act lays down that when two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the promise. As pointed out in *Hemendro Coomar Mullick* v. *Rajendrolall Moonshee* (10), the section allows the promisee to sue one or more of several promisors in one suit and so practically prohibits a defendant in such a suit from objecting that his co contractors ought to have been sued with him. It was decided in that case, following the rule laid down in *King* v. *Hoare* (9), that a decree obtained against one of several joint promisors is a bar to a subsequent suit against the others. We are not concerned in this case with that question, upon which there is a difference of opinion. But as pointed out by Strachey, C. J., in *Muhammad Askari* v. *Radhe Ram Singh* (12), the right of joint debtors to have all the co-contractors joined as defendants in any suit to enforce the joint obligation, which in England before the Judicature Acts could be enforced by means of a plea in abatement and since the Judicature Acts by an application for joinder, has been in India expressly excluded by section 43 of the Contract Act.

(10) 3 C. 353; 1 C. L. R. 488; 2 Ind. Jur. 758; 1 Ind. Dec. (N. S.) 812.

(11) 8 C. L. R. 34.

(12) 22 A. 307; A. W. N. (1900) 73; 9 Ind. Dec. (N. S.) 1236.

The next question is whether the liability of joint tenants for rent is a joint and several liability. That question has been considered in several cases in this Court. In *Joy Gobinda Laha* v. *Monmotha Nath Banerji* (1) a preliminary objection was taken to the hearing of the appeal on the ground that one of the defendants-respondents (in a suit for rent), had died and no substitution of his heirs had been made. The learned Judges (Mitra and Geidt, JJ.) overruled the objection on the ground that the "liability of the defendants is, however, joint and several, and the death of one of the defendants without his legal representatives being substituted in his place cannot exonerate the other defendants from liability. The appeal abates only so far as the deceased defendant is concerned." The same principle was followed in *Jogendra Nath Roy* v. *Nagendra Narain Nandi* (2), where a suit for rent was brought and an *ex parte* decree obtained against all the tenants, which was set aside at the instance of some of the defendants, and the other defendants not having been served with notice of the restoration of the suit, the plaintiff did not proceed against them; it was held by Rampini, A. C. J., and Sharfuddin, J., that "joint tenants are jointly and severally liable for the rent. To hold that they are only liable each for his own share of the rent would be directly opposed to the policy of the Act as laid down in section 88 of the Act (Bengal Tenancy Act)." This decision was approved of by D. Chatterjee and Vincent, JJ., in *Rameswar Singh* v. *Jaideb Jha* (3). In that case one of the defendants in a suit for rent died before the issue of summons. The fact of the death was brought to the notice of the Court, and there was an application to bring in his heirs. No further steps were taken by the Court and a decree was passed against the deceased defendant as if he were living. In the lower Appellate Court the alleged heirs of the deceased were brought in as defendants, and there it was contended that they had been brought in after the expiry of the period allowed by law, that the application for substitution was, therefore, barred by limitation and that the whole suit ought to fail and the contentions were given effect to. On second appeal this Court held that the deceased being only one of several tenants, it was quite competent to the plaintiff to maintain his suit against any number of several joint tenants and that, therefore, the suit against the other defendants was maintainable.

In another case, however, in the same Volume [*Kashi Kinkar Sen* v. *Satyendra Nath Bhadro* (8)] Mookerjee and Sharfuddin, JJ., were of opinion that the proposition that the landlord may maintain a suit for rent against any number of several joint tenants had been too broadly laid down in *Rameswar Singh* v. *Jaideb Jha* (3) and that when a landlord creates a tenancy in favour of two persons jointly, whether each is liable for the entire rent depends upon the intention of the parties, and that in order to determine whether the promise is joint and several, it is to be ascertained not only whether several persons have joined in making a promise to the same person, but also whether at the same time each of them has in addition made the same promise separately to the same promisee. In that case, the landlord sued three persons who were the tenants for recovery of rent at the rate of Re. 1-5 annas per year The defendants pleaded that the rent payable was at the rate of 12 annas 16 *gandas* only, but the plaintiff having produced a road-cess return filed by the first defendant which supported the rate alleged by the landlord, the Court of first instance gave a decree at that rate as against the 1st defendant for the entire rent and dismissed the suit against the other two. That decree was affirmed on appeal and in second appeal the learned Judges, after stating that the rule that the landlord may maintain a suit for rent against any number of several joint tenants was stated in too comprehensive terms, observed as follows :—"We may add that even if it could be laid down that ordinarily a landlord may make one of several joint tenants responsible for the whole rent, the doctrine would be inapplicable to the present case for two special reasons. In the first place, the landlord has brought his suit against all three tenants, as against one he has got an admission in favour of the rate of rent asserted by himself, as against the other two, he has no evidence to prove the rate and cannot possibly obtain a decree at a rate higher than the rate ad-

mitted by them. Under such circumstances, he cannot obviously be permitted to obtain a decree for the whole rent against the 1st defendant and ask for a dismissal of the suit as against the others. If this decree were maintained in a suit for contribution by the 1st defendant against his co-sharers, the position of the former would be one of considerable embarrassment. The first defendant would be liable to satisfy the claim of the landlord at one rate, and then possibly find himself unable to recover anything from his co-sharers except at a very much smaller rate: this would be clearly unjust. In the second place, the tenancy is admittedly an ancient one, and the tenants in occupation are the representatives of the original tenant. Now, even if it be assumed that one of several joint tenants is liable for the whole rent, it does not follow by any means that when land is let out by *A* to *B* upon the death of *B*, every one of his heirs is liable for the whole rent. As was pointed out in the case of *Ahinsa Bibi* v. *Abdul Kader Saheb* (13), the heirs really constitute one body and cannot be treated necessarily as persons who have made joint and several promises."

I think the principle upon which the actual decision in the above case was partly based, viz., that the heirs of the original tenant constitute one body, and that in such a case there is only a joint liability, cannot be disputed. In such a case there is no promise by two or more persons. The contract is with a single person as tenant, and when he dies the liability of his heirs is a joint liability. The principle was followed in *Shaik Sahed* v. *Krishna Mohan Basak* (4).

In the present case the contract was made with six persons, who were the tenants, and the cases cited above go to show that in such a case there is a joint and several liability.

The earlier cases referred to in the judgment in the case of *Kashi Kinkar Sen* v. *Satyendra Nath Bhadro* (8) are distinguishable. In *Roop Narain Singh* v. *Juggoo Singh* (14), it was no doubt held that a suit for rent due from several *ryots* on account of a holding which had been let out to them cannot be brought against one of them, but must be brought against all of them. The case, however, was decided before the passing of the Indian Contract Act and section 43 of that Act, therefore, was inapplicable to that case. In *Khetter Mohan Pal* v. *Fran Kristo Kabiraj* (15) the suit for rent was brought against one of the heirs of the original tenant and the question was whether he alone could be made liable for the entire rent. The rent claimed was on account of a permanent tenure and the learned Judges held that there is no law which compels a landlord, in order that he might succeed in a suit for rent, to sue all the heirs of a deceased tenure-holder when he had no notice who the heirs are. As stated above, the liability of the heirs of a tenant is a joint liability and in the case of an occupancy right all the heirs must be sued, and it was because the rent claimed in that case was on account of a permanent tenure (in respect of which the law provides for notice of succession to the landlord) that the learned Judges observed that the defendant being admittedly one of the heirs and in possession of the tenure was liable for the rent and he could not defeat the plaintiffs' suit by showing that there are other heirs equally liable, unless possibly he goes further and shows that their names have been notified as successors of the original holders or that they have been paying the rent and getting receipts as successors. In *Ram Taran Chatterjee* v. *Asmatullah Sheikh* (16) one of several joint tenants, who had executed a *kabuliyat* in favour of the landlord for the entire tenure, was held not to be bound in excess of his share and not liable for the whole rent, but it was proved in that case that the other tenants did not acquiesce in the *kabuliyat* and in a separate suit by the other tenants against the landlord it was found that they were not bound by the *kabuliyat*. The case of *Ananda Kumar Naskar* v. *Hari Das Haldar* (17) related to the heirs of the original tenant (an occupancy *ryot*) and as the landlord had sold the holding in execution of a decree obtained against some of the heirs ignoring the plaintiffs who were also heirs and from whom he had accepted rent, it was held that the entire *jama* did not pass by the sale and the

(13) 25 M. 23 at p. 35.
(14) 10 W. R. 304.
(15) 3 C. W. N. 371.
(16) 6 C. W. N. 111.
(17) 27 C. 545; 4 C. W. N. 608; 14 Ind. Dec. (N. S.) 359.

plaintiffs' right was not affected thereby. In *Abdul Rab Chowdhury* v. *Eggar* (18) it was held that the landlord cannot succeed in a suit for rent in respect of a *patni* tenure (which had devolved on two *mutwallis*) against one of the *mutwallis* because *mutwallis* stand in the position of trustees.

The actual decision in the case of *Kashi Kinkar Sen* v. *Satyendra Nath Bhadro* (8) turned upon the grounds stated at page 645* of the report, which I have quoted above. There are, however, the observations made by the learned Judges that where a landlord creates a tenancy in favour of two persons jointly, whether each is liable for the entire rent depends upon the intention of the parties. In a case where there is a written contract, the question of intention would depend largely upon the terms of the contract. But in the present case it does not appear that there was any written contract and we do not know what were the terms of such contract if there was any. There is, therefore, nothing to show that the parties intended only a joint liability.

No argument can be founded on the ground that the landlord chose to sue all the tenants because the landlord had no knowledge that some of the tenants were dead when he instituted a suit. So far as the decree is concerned, there is nothing in the decree to indicate that the nature of the original liability was changed by it. It is unnecessary to state that if the landlord wished to proceed against the holding itself under the provisions of Chapter XIV of the Bengal Tenancy Act, he could not do so unless he obtained a decree against the heirs of the deceased tenants also, but he wants to execute the decree only as a money decree. The present case is covered by the principle of the decisions in the cases of *Joy Gobind Laha* v. *Monmotha Nath Banerji* (1), *Jogendro Nath Roy* v. *Nagendra Narain Nandi* (2) and *Rameswar Singh* v. *Jaideb Jha* (3).

I accordingly hold that the decree is not a nullity and that the plaintiff is entitled to execute the decree against the judgment-debtors who were living at the date of the rent suit and the decree passed in that suit. The case will go back to the Court of first instance for proceeding with the execution against them. The decree, however, will be executed only as a money-decree. We make no order as to costs.

(18) 35 C. 182; 12 C. W. N. 160.

*Page of 12 C. L. J.—*Ed.*

RICHARDSON, J.—I agree that the appeal should succeed. It is clear that the decree cannot be executed as against the representatives of the judgment-debtors named in it who were dead when the suit was instituted, but why should it not be executed as against the judgment-debtors who were alive at the date of the suit or their representatives?

In the argument before us the question was raised whether under the original contract between the landlords and their tenants, the liability of the latter was joint or joint and several. The question, I suppose, where there is a written contract, must turn largely on its express terms. But as I understand the matter, the principal difference between a joint liability and a joint and several liability is this. A liability is joint if on the death of one of the joint promisors the liability becomes the liability of the surviving promisors and no liability devolves upon the heirs or legal representatives of the deceased promisor. In *Kendall* v. *Hamilton* (19), Lord Penzance says at page 526: "If a man deliver goods or lend money to two partners, the promise which the law implies is a joint promise. The effect of such a promise, as distinguished from a joint and several promise, is that in case of death the debt is enforcible only against the survivor." It may be said, therefore, that this survivorship is the distinguishing mark of a joint contract. Where there is no survivorship and the liability extends beyond the surviving debtors to the estate of a deceased debtor, the liability is presumably joint and several with the ordinary incidents of such a liability subject possibly, in exceptional cases, to any modification imposed by express agreement.

No doubt there may be differences in other respects between a liability which is joint and a liability which is both joint and several. For instance, in England, it is "the right of persons jointly liable to pay a debt to insist on being sued to-

(19) (1879) 4 A. C. 504; 48 L. J. Q. B. 705; 41 L. T. 418; 28 W. R. 97.

gether" [Lord Cairns, L. C., in *Kendall* v. *Hamilton* (19)]. In India, however, apart from express agreement, this right has been abrogated by section 43 of the Contract Act. Nevertheless even in India the doctrine established in England by *King* v. *Hoare* (9) may still hold good [*Hemendro Coomar Mullick* v. *Rajendrolall Moonshee* (10)]. But such differences as these, where they exist, are consequences which flow from a liability being joint or which a particular system of law annexes to a joint liability. They are not the essential distinctions between a joint and a joint and several liability.

Now it may be the general rule in England that "where several persons agree to perform a particular act, they are bound jointly and not severally" (Addison on Contracts, 11th Edition, page 319). But is this general rule applicable in India in the case of co-tenants holding under a common landlord? As between the co-tenants themselves, their interest in the tenancy is presumably not a joint interest but an interest in common. The principle of joint ownership "appears to be unknown to Hindu Law except in the case of co-parcenary between the members of an undivided family" [*Jogeswar Narain Deo* v. *Ram Chandra Dutt* (20)]. If the rent is in arrears and the landlord desires to obtain a decree good against the land under the Bengal Tenancy Act, he must ordinarily (apart from any question of representation) implead all the co-tenants including the heirs or legal representatives of a deceased co tenant. In the ordinary case neither side contemplates a survivorship of the liability. As to a money-decree for the rent, good only under the Civil Procedure Code, even if the liability be one which would in England be regarded as joint and not as joint and several, the landlord need not under our law (in the absence of express agreement compelling him to do so) bring all the co-tenants on the record (Contract Act, section 43). But if he were bound to sue all the persons liable or if he in fact intends to take that course, he would, I imagine, naturally include the representatives of a deceased co tenant. He would not in the ordinary case suppose that his remedy was against the surviving co-tenants and them alone.

(20) 23 I. A. 37 at p. 44; 23 C. 670; 7 Sar. P. C. J. 13; 6 M. L. J. 75; 12 Ind. Dec. (N. S.) 445 (P. C.).

If then there is no survivorship and if under section 43 the co-tenants have not the right to insist on being sued together, I should have thought that *prima facie* the liability was joint and several. This seems to have been the view adopted in *Sourendra Mohan Tagore* v. *Surnomoyi* (21), *Joy Gobind Laha* v. *Monmotha Nath Banerji* (1), *Jogendra Nath Roy* v. *Nagendra Narain Nandi* (2) and *Rameswar Singh* v. *Jaideb Jha* (3). It may be that in *Kashi Kinker Sen* v. *Satyendra Nath Bhadro* (8), Sir Asutosh Mookerjee, J., expressed a somewhat different view, but in that case the question was as to the liability to the landlord of the representatives of the original tenants. A similar question was considered in *Shaik Sahed* v. *Krishna Mohan Basak* (4). The question was decided in both cases on the footing that different considerations arose where the defendants were the representatives of a single tenant and not the co-tenants who had themselves contracted with the landlord. For the present purpose, therefore, it is not necessary to consider the result which was arrived at in those two cases and as to that I express no opinion.

I have made these observations because it was urged on behalf of the respondents in support of the order made below that as the original liability of the co-tenants was a joint liability and as the appellants chose to sue all the co-tenants, therefore, the decree could only be executed if it was a good and valid decree as against all the co-tenants. The precise terms of the agreement between the parties are not before us. I do not even know whether the agreement was embodied in a written lease.

The answer, in my opinion, to the first part of the argument, is that presumably the liability of the co-tenants was joint and several and it is neither found nor shown to be merely joint.

But even if it was a joint liability, I do not follow the second part of the argument. It was put on the ground of election. But the question raised has to do with the legal rights of the parties and has nothing to do with election. Reference may be made to the head-note of the case already

(21) 26 C. 103; 3 C. W. N. 38; 13 Ind. Dec. (N. S.) 670.

so often cited, *Kendall* v. *Hamilton* (19), and to the observations of Lord Blackburn at page 542.

Even if anything turned on election, there is nothing to show and it is not found—that the appellants knew that some of the persons whom they joined as defendants in their plaint were already dead. It certainly cannot be supposed that they intended or elected to join the dead with the living.

As to the legal rights of the parties, even if the contract was joint, it is not shown that there was any express agreement which obliged the landlord to bring all the tenants on the record. It was open to the landlords, therefore, under section 43 of the Contract Act to bring their suit against one or more of the tenants, and there is nothing in the law which prevents the suit from being a good suit as against the tenants who were alive at its institution.

In my opinion, in the absence of anything to show the contrary, the tenants were jointly and severally liable to the landlords but in any view of the matter the decree is as against those tenants who were alive when the suit was instituted a good and valid decree capable of execution against them or their present representatives.

I concur in the order proposed.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 336 OF 1916.

June 15, 1916.

Present:—Mr. Justice Shah Din.

YAD RAM AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Musammat MANBHARI—PLAINTIFF—RESPONDENT.

Punjab Courts Act (III of 1914), s. 41 (3)—Appeal, second, on point of custom—Certificate, defective, effect of.

A second appeal on a point of custom cannot be admitted upon a certificate granted by the lower Appellate Court in terms which do not satisfy the requirements of section 41 (3) of the Punjab Courts Act.

Second appeal from the decree of the Additional District Judge, Delhi, dated the 29th October 1915, affirming that of the Munsif, 1st Class, Delhi, dated the 6th April 1915, decreeing the claim.

Pandit *Sham Lal*, for the Appellants.

Mr. *Nihal Chand Mehra*, for the Respondent.

JUDGMENT.—This second appeal, which involves a question of custom, was admitted to a hearing by me provisionally upon a certificate granted by the Additional District Judge of Delhi in terms which did not satisfy the requirements of section 41 (3) of the new Punjab Courts Act, and the appellants' Counsel was directed to obtain and file a properly worded certificate at an early date. An application was made by the appellants to Additional District Judge, Delhi, for a proper certificate under the aforesaid section of the Punjab Courts Act, but the learned Judge has refused to grant the certificate required, on the ground that he cannot certify that the evidence regarding the existence of the custom involved in the case is "conflicting".

The result is that there is no certificate before me such as would satisfy the requirements of section 41 (3) of the Punjab Courts Act and on the strength of which a second appeal involving a question of custom could be admitted.

The other questions involved in the case are questions of fact and cannot be considered in second appeal.

As a result of the non-production of a proper certificate, this second appeal fails and is dismissed with costs.

Appeal dismissed.

MOHAMMED ISHAQ KHAN *v.* MOHAMMED RUSTUM ALI KHAN.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL No. 3 OF 1917.
January 9, 1918.

Present:—Sir Henry Richards, KT., Chief Justice and Justice Sir P. C Banerji, KT.

MOHAMMED ISHAQ KHAN AND OTHERS —PLAINTIFFS—APPELLANTS

versus

MOHAMMED RUSTUM ALI KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11, Expl. V, O. II, r. 2, O. XX, r. 12—Res judicata—*Suit for possession and mesne profits—Subsequent suit for mesne profits from date of institution of suit up to delivery of possession, maintainability of—Amendment of Statute, effect of—Precedents, value of.*

Plaintiff brought a suit for possession and claimed a certain sum for mesne profits. There was a further claim for mesne profits during the pendency of the suit and after decree. The suit resulted in a decree for possession and for a portion of the sum claimed for mesne profits. The Court did not purport to deal with the question of mesne profits during the pendency of the suit and after decree. Plaintiff then brought a suit for mesne profits from the date of the institution of the previous suit up to the date of delivery of possession:

Held, that the suit was maintainable and was not barred either by Explanation V to section 11 or by rule 2 of Order II of the Civil Procedure Code. [p. 90, col. 2.]

Where there have been decided cases before an Act is amended, if the amendment does not expressly show that the law as interpreted by the decisions is altered, the rule laid down by the decisions is to be adhered to. [p. 89, col. 2.]

First appeal from a decree of the Additional Subordinate Judge, Meerut, dated the 30th August 1916.

The Hon'ble Dr. *Tej Bahadur Sapru*, Messrs. *Kailash Nath Katju* and *Mohammed Abdullah*, for the Appellants.

Mr. *A. E. Ryves*, Sir *Sunder Lal* and Mr. *Oudh Behari Lal*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for mesne profits. A previous suit had been brought in which possession of the land had been claimed. A certain sum of monies was also claimed as mesne profits for the period prior to the institution of the suit. There was a further claim for mesne profits during the pendency of the suit and after decree. The suit resulted in a decree for the plaintiffs for possession of the land and also a decree for a portion of the amount claimed by the plaintiffs for mesne profits. The rest of the plaintiffs' claim was dismissed. On referring to the judgment, it is quite clear that the Court never dealt or purported to deal with the mesne profits during the pendency of the suit or after decree. In the present suit mesne profits are claimed from the date of the institution of the suit up to the date of delivery of possession. The defence is that the decree in the previous suit operates as *res judicata*, and reliance is placed upon the provisions of section 11, Explanation V. Section 11 provides that "no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties.....in a Court competent to try such subsequent suit." Explanation V provides that "any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused." This explanation corresponds exactly with Explanation 3 of section 13 of the old Code.

Reliance is also placed upon the provisions of Order II, rule 2, which provides that "every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action."

The contention on behalf of the defendant is that the Court, in the previous suit not having granted mesne profits during the pendency of the suit and from the date of the decree up to the date of delivery of possession, must be deemed to have refused it. Further, the decree ought to be interpreted as having expressly dismissed the suit in respect of mesne profits save to the extent that mesne profits were granted. The very same question had frequently arisen in the High Courts in India before the coming into operation of the present Code of Civil Procedure. All the Courts appear to have held that notwithstanding the provisions of the old Code a suit for mesne profits *pendente lite* and from the date of decree to delivery of possession could be maintained. This was expressly held in the case of *Ram Dayal* v. *Madan Mohan Lal* (1). In that case just like the present there had been in a previous suit a claim for mesne

(1) 21 A. 425; A. W. N. (1899) 153; 9 Ind. Dec. (N. S.) 979.

profits prior to the institution of the suit and also future mesne profits. Nevertheless the Court held that the subsequent suit for mesne profits from the date of the institution of the suit up to delivery of possession could be maintained when the Court in the previous suit had not decided the right of the plaintiff to these mesne profits. We think that we are bound to follow this decision, unless it is shown that the Legislature when enacting the present Code of Civil Procedure altered the law. It is a recognised rule that where there have been decided cases before an Act is amended, if the amendment does not expressly show that the law as interpreted by the decisions is altered, the rule laid down by the decisions is to be adhered to.

We now propose to consider whether the provisions of the Code of Civil Procedure of 1908 altered the law in respect of the matter with which we are dealing. Section 211 of the Code of Civil Procedure of 1882 provided that "in a suit for the recovery of possession of immoveable property yielding rent or other profits the Court may provide in the decree for the payment of rent or mesne profits in respect of such property from the institution of the suit until the delivery of possession to the party in whose favour the decree is made"....

It is to be noted that in this section there is no reference to the claim in the plaint being made for mesne profits. Section 212 provided that whether the suit was a suit for "possession of immoveable property and for mesne profits which have accrued on the property during the period to the institution of the suit, and the amount of such profits is disputed, the Court may either determine the amount by the decree itself, or may pass a decree for the property and direct an inquiry into the amount of mesne profits, and dispose of the same on further orders."

The provisions of these two sections seem to have been amalgamated in the provisions of Order XX, rule 12 of the new Code. That Order provides that "where there is a suit for the recovery of possession of immoveable property and for rent or mesne profits, the Court may pass a decree (*a*) for possession of the property, (*b*) for the rent or mesne profits which have accrued on the property during the period prior to the institution of the suit or directing an enquiry as to such rent or mesne profits, and (*c*) directing an enquiry as to the rent or mesne profits from the institution of the suit until (*i*) the delivery of possession to the decree-holder, (*ii*) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or (*iii*) the expiration of three years from the date of the decree, whichever event first occurs." Clause 2 of this rule provides: "Where an enquiry is directed under clause (*b*) or clause (*c*), a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of the enquiry."

Under the old Code the practice was that excepting those cases in which the Court had actually found a certain amount due for mesne profits, the Court executing the decree used to be called upon to make an enquiry and to ascertain in execution the amount of mesne profits, whether they were mesne profits which had accrued prior to the institution of the suit or mesne profits which had accrued between that date and the delivery of possession. The authority to make this enquiry was conferred on the Court executing the decree by section 244 of the Code of Civil Procedure of 1882, to which we shall presently refer. It would seem, therefore, that the only substantial change that has been made in the law is that it is the Court which hears the suit which is to ascertain the mesne profits, whether those mesne profits be mesne profits which accrued before the institution of the suit or afterwards up to the date of delivery of possession, and it is this Court which is to make the *final* decree for mesne profits which has to be executed by the Court executing the decree. We do not think that any significance is to be attached to the fact that in section 211 of the old Code there is no reference to a claim for mesne profits or to the fact that Order XX, rule

12, purports to deal with suits in which mesne profits are claimed. Section 244 of the old Code dealt with certain matters which were to be determined by the Court executing the decree, and not by a separate suit, and amongst other questions the very first mentioned were questions regarding the amount of any mesne profits as to which the decree, had directed an enquiry. There is a proviso at the end of the section in the following words: "Nothing in this section shall be deemed to bar a separate suit for mesne profits accruing between the institution of the first suit and the execution of the decree therein, where such profits are not dealt with by such decree." The corresponding section of the Code of 1908 is section 47. In this section reference to all questions of mesne profits is omitted and the proviso which we have quoted from section 244 is also omitted. The argument is that this last mentioned omission is most significant and that it demonstrates the intention of the Legislature that suits for the recovery of mesne profits after a previous suit for possession cannot be maintained. A little consideration shows that this argument is not so forcible as might appear at first sight. The proviso to section 244 of the old Code seems to have presumed that there was nothing in the Code itself which would prevent a second suit for mesne profits but that it might be contended that the provisions of section 244 would preclude a second suit, and accordingly the words of the proviso are, not that nothing "in the Code" shall be deemed to bar a separate suit for mesne profits, but that nothing "in the section" shall be deemed to bar such a suit. It becomes apparent that the retention of this proviso in the new Code would have been altogether meaningless and out of place, because in section 47 of the new Code there is no reference to enquiries as to mesne profits at all and Order XX, rule 12, to which we have already referred, expressly takes away the jurisdiction of the Court executing the decree to make any enquiry in respect of mesne profits. The learned Judge in the Court below has referred to the report of the Select Committee on the provisions of the contemplated amendment of the Code of Civil Procedure. If it were permissible to consider the report at all, the inference would seem to be rather against the respondents than in their favour. The question had reference to a Bill which was subsequently withdrawn. In this Bill there was a provision which would have made it quite clear that a second suit for mesne profits could not be maintained. This provision does not find a place in the measure which was actually enacted. If any legitimate inference could be drawn at all, it would seem as if the Legislature knowing well the course of decisions in the Courts in India had come to the conclusion that it was best to maintain the rule of law as established by the cases. In this connection it may not be altogether out of place to suggest that there are some practical difficulties in the way of ascertaining mesne profits *pendente lite* and particularly future mesne profits in the original suit. Where there are more defendants than one, their liability may not altogether be the same and the final ascertainment of the amount due for mesne profits from the date of the decree to the time of delivery of possession can never be made until possession is actually taken by relinquishment on the part of the defendants or through the Court. We may mention here that the question recently arose in the Madras High Court in the case of *Doraisami Aiyar* v. *Subramania Aiyar* (2), in which the majority of a Full Bench of that Court were of opinion that nothwithstanding the provisions of the new Code a suit for mesne profits like the present could be maintained.

We allow the appeal, set aside the decree of the Court below and remand the case to that Court with direction to re-admit the suit in its original number and to proceed to hear and determine the same according to law. The appellants will have their costs of this appeal, including fees on the higher scale. Other costs will follow the event.

Appeal decreed;
Cause remanded.

(2) 42 Ind. Cas. 929; 33 M. L. J. 699; 22 M. L. T. 484; (1917) M. W. N. 847; 6 L. W. 784; 41 M. 188.

LOWER BURMA CHIEF COURT.

CIVIL REVISION No. 95 OF 1916.

March 9, 1917.

Present:—Mr. Justice Ormond, Officiating Chief Judge.

MA PAN U—PLAINTIFF—APPLICANT

versus

MA SHWE TINT—DEFENDANT—RESPONDENT.

Registration Act (XVI of 1908), ss. 17, 49—Secondary evidence of unregistered lost document, admissibility of, to prove oral agreement not affecting land.

Secondary evidence of a lost unregistered document affecting an interest in immoveable property and therefore required to be registered is not admissible as evidence of any transaction affecting such property but such evidence is admissible to prove the document so far as it evidences an oral agreement not affecting the land or any interest in land.

Mr. *Lambert*, for the Applicant.

Mr. *Maung Thin*, for the Respondent.

JUDGMENT.—In 1910 the plaintiff-appellant advanced Rs. 450 to the parents of the respondent in consideration of being put into possession of certain land, and it was agreed that the plaintiff should take the profits in lieu of interest. The transaction was reduced to writing but not registered. In 1915 the plaintiff had to give up possession to the respondent because the document not having been registered, the plaintiff had no right or interest in the land and therefore had no legal right to possession. The plaintiff then instituted this suit in September 1915 asking for a money-decree for the Rs. 450. In the Township Court the plaintiff obtained a decree: in the District Court plaintiff's suit was dismissed on the ground that the plaintiff was prevented from proving the agreement under which he obtained possession by sections 49 and 17 of the Registration Act. The plaintiff applies in revision on the ground that the District Court wrongly rejected that evidence.

Section 17 requires this document to be registered. Section 49 says: "No document requiring under section 17 to be registered shall affect any immoveable property comprised therein, or be received as evidence of any transaction affecting such property." The document in the present suit has been lost but if the plaintiff could not prove that document if available, he would be debarred from proving it by secondary evidence. But the plaintiff does not rely upon that document to prove any

transaction affecting the land. He does not claim that he ever had any legal right to the possession of the land under that document. That he is entitled to use that document as evidence of an oral agreement which does not affect the land or any interest in the land, has been held by all the High Courts of India, *vide*, *Ulfatunnissa* v. *Hosain Khan* (1) and in this Court *Myat Thin* v. *P. C. V. E. Kasu Visvanathan Chetty* (2). The District Judge, therefore, wrongly held that that evidence was inadmissible. From his judgment it appears that he concurs with the Township Judge in the findings of fact, if this evidence was admissible, *i. e.*, that the plaintiff advanced Rs. 450 to the defendant's parents in 1910 and obtained possession and received the profits in lieu of interest and was dispossessed in 1915. That being so, plaintiff is entitled to a decree for Rs. 450 against the respondent in her representative capacity with costs in both Courts, and three gold *mohurs* for the costs of this application.

Application accepted.

(1) 9 C 520; 12 C. L. R. 209 (F. B.); 4 Ind. Dec. (N. S.) 995.
(2) 4 L. B. R. 52.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 91 OF 1915.

February 28, 1917.

Present:—Justice Sir George Woodroffe, KT., and Justice Sir Asutosh Mookerjee, KT.

JADUB CHANDRA MAULIK—PLAINTIFF—APPELLANT

versus

MANIK SARKAR—DEFENDANT—RESPONDENT.

Appeal, second—New point involving question of fact, whether can be taken.

A point involving questions of fact, which was not taken in either of the lower Courts, cannot be taken for the first time in second appeal. [p. 92, col. 2.]

Where such a point was allowed to be taken in second appeal, the High Court reversed the decision of the Court of second appeal. [p. 92, col. 2.]

Appeal against the decree of Mr. Justice Chapman, dated the 28th May 1915, in

BHOLI BAI *v.* CHIMNI BAI.

Appeal from Appellate Decree No. 2231 of 1913.

FACTS appear from the following judgment of

CHAPMAN, J.—This appeal arises out of a suit for rent. It appears that the land was settled with the tenant for the first time under a lease for a term of three years. The lease recited that rent had been fixed at Rs. 48 but that the landlord seeing the tenant unable to pay took pity on him and kept in abeyance the sum of Rs. 15. At the end of the lease there is a provision to the effect that after the expiry of the term of three years if the tenant does not take a fresh settlement at an enhanced rent, the landlord shall be entitled to claim rent at the full amount of Rs. 48. The period of the lease expired in the year 1311. Rent was claimed at the rate of Rs. 48 for the years 1314 to 1317. The learned District Judge gave a decree to the plaintiffs at the rate of Rs. 33. The grounds of his judgment are (*i*) that since the expiry of the term of the lease the plaintiff had been realising rent at the rate of Rs. 33 and not at the enhanced rate and, therefore, the plaintiff must be held to have waived the right to realise rent at the rate of Rs. 48 and (*ii*) that the lease was not read over to the defendant who was an illiterate man. It appears to me that the judgment of the learned District Judge cannot be supported upon either of these grounds. There was no evidence that the plaintiff had realised rent at the rate of Rs. 33. The plaintiff's case was that he had realised nothing since the expiry of the term. The defendant's case was that he had paid Rs. 29. It is clear, therefore, that no case of waiver against the plaintiff was made out and so far as the ground that the lease was not read over to him is concerned, it is not sufficient in my opinion for an illiterate man merely to say that the lease was not read over to him. He must make out more than that in order to evade the document which he has signed. If he is foolish enough to sign a document without having it read over to him, he must suffer the consequence.

It is argued on behalf of the respondent that this lease was a mere device to evade the provisions of section 29 of the Bengal Tenancy Act. Having regard to the judgment of Coxe, J., in the case of *Mahamaya Kar* v. *Kishore Chang* (1), I feel constrained to say that the lease was a device in order to evade the provisions of section 29 of the Bengal Tenancy Act and, therefore, cannot be given effect to. It is true that this plea was not expressly raised in either of the Courts below, but it was alleged in the written statement that the condition was unlawfully written in the invalid *kabuliyat*. The defendant succeeded in the Court of Appeal below on other grounds and I feel it difficult to say, where there is a clear authority for holding that the document was executed for the purpose of evading the law, that it is not within my duty to allow the plea to be taken for the first time in second appeal.

The appeal is dismissed without costs.

Babu *Mohini Mohan Chakraburty*, for the Appellant.

Babu *Panchanan Ghose*, for the Respondent.

JUDGMENT.—In our opinion this judgment of Mr. Justice Chapman must be reversed. The learned Judge has allowed a point to be taken before him which was not taken in either of the lower Courts and which involves two questions of fact. In the first place, it had to be shown before section 29 of the Bengal Tenancy Act came into operation that the defendent was an occupancy *ryot*, and, even if that were shown, it would further have to be proved that the contract was a mere device to evade the provisions of the Statute.

The appeal, therefore, is decreed with costs and the decree of the first Court restored.

Appeal decreed.

(1) 21 Ind. Cas. 948; 18 C. W. N. 738; 18 C. L. J. 502.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 2319 1916.

January 8, 1918.

Present:—Mr. Justice Scott-Smith and Mr. Justice Shadi Lal.

Musammat BHOLI BAI—PLAINTIFF —APPELLANT

versus

Musammat CHIMNI BAI —DEFENDANT—RESPONDENT.

Civil Procedure Code (*Act V of* 1908), *s.* 11—Res

BHOLI BAI *v.* CHIMNI BAI.

judicata - *Suit by widow against daughter-in-law for share of estate—Previous suit by collaterals compromised by widow, effect of.*

In a suit by a Hindu widow against her daughter-in-law for possession of a moiety of the estate alleged to have been left by the former's husband or in the alternative for maintenance, it appeared that the collaterals of the plaintiff's deceased son (the husband of the defendant) had sometime previously sued for possession of the entire estate on the allegation that the defendant having become unchaste had forfeited her widow's estate. The present plaintiff, who was impleaded as a defendant in that suit, resisted the claim and eventually effected a compromise with the plaintiffs, according to which she agreed to relinquish her rights in their favour in lieu of certain property to be given to her as absolute owner in the event of the collaterals' suit succeeding. In the event of their defeat, she was to receive the property on the death of the defendant:

Held, that this compromise could not and did not affect the rights of the two widows *inter se*, and that so far as the plaintiff's claim against her daughter-in-law was concerned, there had been neither an adjudication nor any agreement which could be set up as a bar to the suit, and that therefore the rule of *res judicata* had no applicability to the case. [p. 93, col. 2; p. 94, col. 1.]

First appeal from the decree of the Subordinate Judge, 1st Class, Multan, dated the 23rd June 1916, dismissing the claim.

The Hon'ble Mr. *Muhammad Shafi*, for the Appellant.

The Hon'ble Pandit *Sheo Narain*, R. B, and Lala *Shiv Ram Das*, for the Respondent.

JUDGMENT.—This appeal arises out of an action brought by the appellant *Musammat* Bholi Bai, against her daughter-in-law *Musammat* Chimni Bai, for possession of a moiety of the estate alleged to have been left by the former's husband, or in the alternative for maintenance. The suit has been dismissed by the Subordinate Judge on the ground that it was barred by the rule of *res judicata* and the sole question which we are called upon to determine is whether the plea of *res judicata* has been established.

The following brief pedigree-table explains the relationship of the parties:—

Jhangi Ram=*Musammat* Bholi Bai.

Hoa Ram=*Musammat* Chimni Bai.	*Musammat* Mungi Bai.

The previous suit, which has been relied upon in support of the defence of *res judicata*, was instituted in August 1910 by the collaterals of Hoa Ram for possession of the entire estate on the allegation that *Musammat* Chimni Bai having become unchaste had forfeited her widow's estate, and that the collaterals were consequently entitled to the possession of the property. *Musammat* Bholi Bai, who was impleaded as a co-defendent, resisted the claim; but the collaterals subsequently came to terms with her, which were embodied in a deed of compromise executed on 25th May 1911. According to this compromise *Musammat* Bholi Bai agreed to relinquish her rights in favour of the collaterals in lieu of two houses and a plot of land, which were to be given to her as an absolute owner in the event of the collaterals' suit succeeding against *Musammat* Chimni Bai. In the event of their defeat, she was to receive the above property on the death of *Musammat* Chimini Bai.

This compromise could not, and did not, affect the rights *inter se* of the two widows, and indeed the matter is placed beyond all possible doubt by the following clause in the deed :—

"If the plaintiffs' suit be dismissed the rights of defendant No. 2 (*Musammat* Bholi Bai) as against *Musammat* Chimni Bai shall stand as before."

After the said compromise the collaterals' suit proceeded against *Musammat* Chimni Bai and ultimately the dispute between them was settled by a compromise entered into on 11th May 1912; in consequence of which the collaterals gave up their claim against *Musammat* Chimni Bai (who was to remain in possession of the property until her death) and accepted certain mortgagee's rights in a plot of land in lieu of the costs incurred by them. The District Judge, before whom the deed was placed for verification, passed a decree accordingly.

The aforesaid decree refers not only to the compromise of 11th May 1912, but also to the earlier one which need not have been embodied in the decree. Now, we fail to understand how the principle of *res judicata* has any applicability to the claim of *Musammat* Bholi Bai against her daughter-in-law. No judicial pronouncement was ever made upon that claim, and indeed it is conceded on behalf of the respondent that the rule of *res judicata* does not apply to the case. It is, however, contended that as the suit resulted in a decree, that decree must be treated as the final determination of the rights of the parties interested in the estate. And the decree, it is argued, states that *Musam-*

mat Chimni Bai " shall remain in possession of the rest of the property (namely, the entire estate with the exception of the mortgagee's rights assigned to the collaterals) on life tenure." But a perusal of the decree itself makes it absolutely clear that this provision is taken from the compromise entered into between *Musammat* Chimni Bai and the collaterals, and that it has no bearing upon the rights of *Musammat* Bholi Bai. So far as this lady's claim against her daughter-in-law is concerned, there has been neither an adjudication nor any agreement which can be set up as an answer to the suit. The absurdity of the defendent's plea is demonstrated by the fact that *Musammat* Bholi Bai has not even got the property which she was to receive from the collaterals ; and her Counsel Mr. Muhammad Shafi states that she is prepared to abandon her suit, if she gets as an absolute owner the aforesaid property from *Musammat* Chimni Bai who is said to be in possession thereof.

The only matter relied upon in support of the decision of the lower Court is the clause in the decree allowing *Musammat* Chimni Bai to hold the estate for her life; but that clause, as pointed out above, is the outcome of the compromise between her and the collaterals, and does not in the least prejudice the rights of the plaintiff. No other argument has been advanced before us in justification of the dismissal of the suit ; and we have no hesitation in holding that the Subordinate Judge's decision is entirely wrong. Indeed, the decision seeks to make *Musammat* Chimni Bai's compromise with the collaterals binding upon *Musammat* Bholi Bai, to which she was no party, but leaves out of account the earlier settlement which gave her something. There is absolutely no justification for it either in law or in equity.

For the aforesaid reasons we accept the appeal, and setting aside the judgment and the decree of the lower Court remand the case under Order XLI, rule 23, for decision on the remaining issues. The Court-fee on the memorandum of appeal shall be refunded and other costs shall abide the event.

Appeal accepted;
Case remanded.

PATNA HIGH COURT.
FULL BENCH.

LETTERS PATENT APPEAL No. 8 OF 1916.
July 24, 1917.

Present—Sir Edward Chamier, KT., Chief Justice, Mr. Justice Chapman, Mr. Justice Mullick, Mr. Justice Roe and Mr. Justice Jwala Prasad.

JANKI SINGH—DEFENDANT—APPELLANT
versus
Mahant JAGANNATH DAS—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII B. C. of 1885), Sch. III, Art. 1 (a), ss. 3, 4, 5, 116—Zirat land, acquisition of non-occupancy rights in—Ejectment from zirat land—Limitation—Interpretation of Statutes—Headings, whether can be referred to.

Per *Curiam* (*Chapman* and *Jwala Prasad, JJ.*, dissenting).—The Bengal Tenancy Act applies to a proprietor's private land, and a suit by a landlord to eject a non occupancy *raiyat* of his private land on the ground of the expiration of his lease is governed by Article 1 (*a*) of Schedule III of the Act. [p. 96, col. 1; p. 99, col. 2; p. 102, col 1; p. 104, col. 1.]

(Case-law discussed.)

Per *Chamier, C. J.*—The operation of Article 1 (*a*) of Schedule III of the Bengal Tenancy Act is not excluded by section 116 of the Act in the case of *zirat* land. [p. 96, col. 2.]

Section 116 of the Bengal Tenancy Act prevents the application of Chapter VI to *raiyats* of a proprietor's private land in two cases only, namely, where such land is held under a lease for a term of years and where it is held under a lease from year to year. Except in these two cases Chapter VI of the Act was intended to apply to *raiyats* of a proprietor's private land, and such *raiyats* may be non-occupancy *raiyats* within the meaning of the Act. [p. 96, cols. 1 & 2.]

Per *Mullick, J.*—There is nothing in the Bengal Tenancy Act to support the view that it is not open to a *zemindar* to create *raiyati* interests in his private lands. On the contrary section 116 of the Act clearly contemplates the acquisition of occupancy rights in such land under certain circumstances and if of occupancy rights, then why not of non-occupancy rights also? [p. 99, col. 2.]

Per *Chapman, J.*—The classification of tenants in sections 4 and 5 of the Bengal Tenancy Act was not intended to be scientific or precise, and in order to render the Act intelligible these sections must be applied with a reasonable amount of elasticity. [p. 98, col. 1.]

Zirat land is not *raiyati* land although the *zemindar* may lose his rights in it by treating it as if it was *raiyati*. But if he lets it for a term or from year to year, it remains his own and the tenant of it is not a *raiyat*. [p. 98, col. 2.]

Article 1 (*a*) of Schedule III of the Bengal Tenancy Act does not apply to tenants in *zirat* land. [p. 99, col. 1.]

Per *Jwala Prasad, J.*—The Bengal Tenancy Act does not purport to be a complete and exhaustive Code even in respect of the law of landlord and tenant. A person holding *zirat* land under a lease for a term of years is not a *raiyat* and will not be governed by the Bengal Tenancy Act but by the

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general law. He does not become a non-occupancy *raiyat* after the expiry of the lease and is a trespasser only. Therefore, Article 1 (*a*) of Schedule III of the Bengal Tenancy Act does not apply to persons holding under a lease the proprietor's private lands. [p. 108, col. 2.]

A Court is required to have regard to custom in determining whether a person is a *raiyat* or not. No custom is more certain than that a tenant in *zirat* is not a *raiyat*. [p. 108, col. 2]

The headings prefixed to sections or sets of sections may be used for the purpose of interpreting the meaning, scope and intention of Statutes. [p. 105, col. 2.]

The recital or preamble of an Act is a key for opening the meaning and intent of the Act. [p. 105, col. 2.]

Per *Roe, J.*—It is only when words are of doubtful meaning that the Courts should look to probable intention [p 103, col. 2.]

Per *Mullick, J.*—The words of the heading should not be allowed to affect the construction of a section. [p. 101, col. 2]

Letters Patent Appeal against the judgment of Mr. Justice Atkinson, in Second Appeal No. 1297 of 1915, dated the 7th February 1917, reported as 39 Ind. Cas. 389.

Sir *Ali Imam* (with him Mr. *Siva Narayan Bose*), for the Appellant.

Mr. *Kulwant Sahay* and Syed *Mohammad Tahir*, for the Respondent.

JUDGMENT.

CHAMIER, C. J.—This appeal arises out of a suit brought by the respondent Jagannath Das for possession of 6 *bighas* 8 *cottahs* 18 *dhurs* of land, which were held by the appellant and another under a lease for a term of nine years which expired on May 31st, 1912. It was found by the Court of first appeal and it is now admitted that the land in question is *zirat*, that is, the proprietor's private land within the meaning of Chapter XI of the Bengal Tenancy Act. The suit was brought on December 5th, 1912, a little more than six months after the expiration of the term of the lease. The only question which we have to decide in this appeal is whether the suit is barred by limitation. The Munsif and Subordinate Judge held that the suit had been brought within time and their view was accepted by a learned Judge of this Court. Article 1 (*a*) of Schedule III to the Bengal Tenancy Act provides that a suit to eject a non-occupancy *raiyat* on the ground of the expiration of the term of his lease shall be brought within six months from the expiration of the term. The appellant contends that the suit is governed by this provision and is, therefore, barred by limitation. The plaintiff-respondent contends that the appellant was not a non-occupancy *raiyat* at all within the meaning of the Bengal Tenancy Act and secondly, that even if he was a non-occupancy *raiyat*, Article 1 (*a*) of Schedule III does not apply to the present case.

I am unable to hold that the appellant was not a non-occupancy *raiyat* of the land in question. He was admittedly a tenant within the meaning of section 3, sub-section (3), of the Bengal Tenancy Act. Section 4 of the Act provides that there shall be for the purposes of the Act certain classes of tenants, namely, tenure-holders, *raiyats* and under-*raiyats* and the following classes of *raiyats*, namely, *raiyats* holding at fixed rates, occupancy *raiyats* and non-occupancy *raiyats*. The appellant was certainly not a *raiyat* holding at a fixed rate or an occupancy *raiyat*. *Prima facie* he was a non-occupancy *raiyat*. I am aware that it has been held in some cases that section 4 of the Bengal Tenancy Act is not exhaustive, but it appears to me that there can be no doubt that the appellant was a non-occupancy *raiyat*. There are provisions in the Bengal Tenancy Act outside Chapter VI which refer to "non-occupancy *raiyats*" and which appear to apply to *raiyats* of *zirat* land. Chapter VI deals exclusively with non-occupancy *raiyats* The framers of the Act evidently intended that Chapter VI should be applied to *raiyats* holding *zirat* land, but as it was part of the policy of the Act to enable a landlord to prevent *raiyats* from acquiring rights against him in his *zirat* land, they provided by section 116 of the Act that nothing in Chapter VI shall apply to a proprietor's private land known in Bengal as *khamar*, *nij*, and *nijjot* and in Bihar as *zirat*, *nij*, *sir*, or *kamat*, where any such land is held under a lease for a term of years or under a lease from year to year. Previous to 1907 there was in Chapter VI of the Act a section, 45, which provided that notice should be served upon a non-occupancy *raiyat* whom the landlord wished to eject and that a suit for ejectment should be instituted within six months after the expiry of the term for which the non-occupancy tenant held the land. Section 116 of the Act excluded the operation of section 45 in the case of a proprietor's private land,

with the result that the period of limitation prescribed by section 45 did not apply to a suit like the one now before us. By Bengal Act I of 1907 section 45 was repealed and the second part of it, that is to say, the part relating to limitation, was replaced by Article 1 (*a*) of Schedule III. The result of the amendment appears to be that the operation of Article 1 (*a*) of Schedule III is not excluded by section 116 in the case of *zirat* land. This view was taken by Mookerjee and Beachcroft, JJ., in *Ganpat Mahton* v. *Rishal Singh*. (1) and by Newbould, J., in *Dwarkanath Chowdhury* v. *Tufazir Rahman Sarkar* (2). In the last mentioned case Newbould, J., said: "By taking the provisions of section 45 out of Chapter VI and putting them into the Schedule, the Legislature, whether intentionally or not, has compelled the landlord to bring a suit for ejectment of a tenant of *khas khamar* land on the termination of his lease within six months." The decision of Newbould, J., was reversed on appeal under the Letters Patent by Woodroffe and Chaudhuri, JJ. The judgment of the Court was delivered by Woodroffe, J., who said: "Reliance also is placed on the amendment of the heading under Chapter XI of the Bengal Tenancy Act. In that heading there has been inserted 'non-accrual of occupancy and non-occupancy rights.' I think we may look at this heading for the purpose of interpreting the sections mentioned above, and on this it is contended on behalf of the appellants that the defendants holding *khamar* lands are not included in the term 'non-occupancy *raiyat*' within the Schedule. I think that this argument has force and I hold that the suit is accordingly not barred."

I take it that the learned Judge intended to hold that a *raiyat* of a proprietor's private land could not be a non-occupancy *raiyat* within the meaning of Chapter VI or Schedule III of the Act. I am unable to accept this view, for section 116 of the Act prevents the application of Chapter VI to *raiyats* of a proprietor's private land *in two cases only*, namely, where such land is held under a lease for a term of years and where it is held under a lease from year to year. In my opinion it is reasonably clear that except in those two cases Chapter VI of the Act was intended to apply to *raiyats* of a proprietor's private land, and that such *raiyats* may be non-occupancy *raiyats* within the meaning of the Act.

It was contended, however, that even if a *raiyat* of a proprietor's private land is a non-occupancy *raiyat*, Article 1 (*a*) does not apply to such a suit as the one now before us. It was urged that the only provision in the Act entitling a landlord to eject a non-occupancy *raiyat* on the ground of the expiration of the term of his lease is contained in section 44 of the Act, that Article 1 (*a*) applies only to a suit brought under section 44 (*c*) and that as the present suit cannot have been brought under section 44 (*c*), Article 1 (*a*) does not apply at all. It must be conceded that the present suit was not brought under section 44 (*c*) of the Act, but no provision of this kind was required to enable a landlord to bring a suit to eject his tenant on the expiration of the term for which the tenant held his land. Those provisions of the Act which apply to non-occupancy tenants appear to apply to *raiyats* holding a proprietor's private land, except where the application of those provisions is excluded by the Act, as for instance by section 116. The Bengal Tenancy Act applies to a proprietor's private land, and it appears to me that a suit by a landlord to eject a non-occupancy *raiyat* of a proprietor's private land on the ground of the expiration of the term of his lease is governed by Article 1 (*a*) of Schedule III of the Bengal Tenancy Act. In this connection I would refer to Article 3 of Schedule III, which provides a special period of limitation for a suit to recover possession of land claimed by the plaintiff as a *raiyat* or under-*raiyat*. There is no special provisions in the Act expressly authorising a *raiyat*, who has been wrongly ejected by his landlord, to bring a suit to recover possession of the land. But no such provision was required to enable a tenant to bring a suit to recover possession. It has never been suggested that Article 3 of Schedule III is a dead letter merely because there is no express provision in the Act authorising a tenant to sue for recovery of possession of land from which he has been wrongly ejected by his landlord.

(1) 33 Ind. Cas. 978; 20 C. W. N. 14.
(2) 39 Ind. Cas. 64; 20 C. W. N. 1097; 44 C. 267.

Similarly I am unable to hold that Article 1 (*a*) does not apply to the present suit merely because there is no express provision in the Act authorising a landlord to sue to eject a non-occupancy *raiyat* of his private land on the expiration of the term of a lease. I think it is doubtful whether the Legislature intended by the amendments made in 1907 to compel a landlord to sue for ejectment of a tenant of his private land within six months of the termination of the lease held by the tenant, and it may be that the result of holding that a *raiyat* of *zirat* land is or may be a non occupancy *raiyat* will be that landlords will be placed in a less favourable position than the framers of the Act intended, but we must take the Act as we find it; and on a consideration of the Act as it now stands, it appears to me that the only possible conclusion is that Article 1 (*a*) of Schedule III applies to such a suit as the one now before us. I would, therefore, allow this appeal, set aside the decisions of the Courts below, and dismiss the suit with costs in all Courts.

CHAPMAN, J.– Prior to the Rent Act of 1859 *raiyats* were divided into two classes, *khudkasht* and *paikasht*, corresponding roughly to the present classes of occupancy and non-occupancy *raiyats*. Neither class included tenants of the *zemindar's zirat* or demesne [Phillips' Land Tenures, page 239, and *Thakooranee Dossee* v. *Bisheshur Mookerjee* (3)]. The Act of 1859 did not abolish the names *khudkasht* and *paikasht* [see Bengal Act VIII of 1865]. The Act of 1859, defined for the first time the manner in which a right of occupancy could be acquired and the vernacular terms gradually fell into disuse. The Bengal Tenancy Act of 1885 with which we are now concerned provided the new term "non-occupancy *raiyat*" as a convenient symbol for the remainder of the *raiyats* for whom it was desired for the first time then to create rights.

In my opinion a tenant in *zirat* is *prima facie* not a *raiyat*, (1) because he has never been so regarded; and (2) because he neither has rights of occupancy nor has been vested with the new non-occupancy rights.

The classification of tenants in section 4 of the Bengal Tenancy Act is "for the purpose of the Act." The purpose referred to is apparent from the headings of Chapters III to VII which immediately follow. The purpose for which the classification is made is to introduce the definition of the rights of the various classes of tenants, and that purpose is exhausted when the definition of these rights is completed in Chapters III to VII. Chapter XI is headed "Non-accrual of occupancy and non-occupancy rights", and deals therefore with the circumstances in which such rights shall not accrue A consideration of the provisions of the Act would make it clear that no purpose of the Act is served by placing a temporary cultivator who is not to have the rights of a non-occupancy *raiyat* under any of the classes mentioned in section 4. If, however, it is thought desirable to classify tenants in *zirat*, they may be called tenure-holders as was done by the Calcutta High Court in Second Appeal No 2626 of 1904 in the case of a cultivator holding *fakirana* land and in *Bandhu Acharja* v. *Nathni Bahar Singh* (4) in the case of a cultivating *tankidar*.

For "the purpose" of saying that non-occupancy rights shall not accrue in the case of a tenancy in *zirat*, section 116 merely says that Chapter VI shall not apply and some difficulty no doubt arises from the fact that there are one or two scattered provisions on the subject of non-occupancy *raiyats* which are not in Chapter VI. I do now, however, attach importance to this in the present connection, having regard to the heading of Chapter XI, "non-accrual of non-occupancy rights", which indicates "the purpose" of the Chapter. The heading of Chapter VI and the first section, section 41, indicates that Chapter VI was designed to be exhaustive on the subject of non-occupancy *raiyats*. I hold by reference to the heading of Chapter XI that, by saying in section 116 that Chapter VI does not apply, it was meant that the tenant should not be regarded as a non-occupancy *raiyat*. A heading may be used with considerable freedom to extend the meaning of a section which follows it.

The significance of the words "non-accrual of non occupancy rights" is enhanced when it is remembered that

(3) B. L. R. Sup. Vol. 202 at p. 260; 3 W. R. Act X Rulings 29.

(4) 7 C. L. J. 460.

these words were added to the heading in Chapter XI at the time that Article 1 (*a*) was added to the Schedule. The object of the simultaneous change in the heading must have been to make it clear that the reference to non-occupancy *raiyats* in Article 1 (*a*) was not meant to include the tenants dealt with in Chapter XI.

It should be noted in this connection that the classification in sections 4 and 5 was not intended to be scientific or precise.

For instance, the classification does not include the case of a co-sharer holding land subject to payment to his co-proprietor under section 22. There are several other kinds of tenants not easily placed under any of the classes. If the classification be treated as a series of precise definitions, the Act will be misinterpreted. As an example I may refer to the case of *Bhut Nath Naskar* v. *Surendra Nath Dutt* [*Bhutnath Naskar* v. *Monmotho Nath Mitra*] (5), in which by the application of precision the result was obtained by one of the Judges that a *raiyati* at fixed rates is not a protected interest, a conclusion which I am entirely unable to accept. It is obvious that in order to render the Act intelligible sections 4 and 5 must be applied with a reasonable amount of elasticity and this is apparent from the use of the word "primarily" and the reference to custom in section 5.

To apply Article 1 (*a*) to the tenants referred to in section 116 would clearly tend to defeat the obvious purpose of Chapter XI, which is to afford some substantial protection to the proprietors of *zirat*.

That this purpose will be defeated will be evident if the result of applying Article 1 (*a*) to section 116 is considered. Under the law as it stood before the amendment of 1907 which introduced Article 1 (*a*), the main protection conferred by section 115 in respect of *zirat* was that on the expiry of an oral or written lease the tenant in *zirat* could *ipso facto* be ejected at any time up to twelve years after the expiry of the lease. If the effect of Article 1 (*a*) is to reduce the limitation from twelve years to six months, there remains little, if any, special protection for the proprietor of *zirat*. The only distinctions remaining between a tenant in *zirat* and a tenant in land not *zirat* will be the following:—(1) To enable the proprietor of *zirat* to eject on the expiry of a lease—the lease need not be written or registered; (2) an agreement to enhance will not require registration; but, on the other hand, (3) a tenant in *zirat* will not be liable to ejectment for failure to pay rent, unless this remedy is provided for in his lease; and (4) will not be liable to ejectment for refusal to agree to enhancement. I cannot believe that the elaborate provisions of Chapter XI would have been framed if the only privilege it was intended to confer on the proprietor of *zirat* was the use of unregistered documents.

The view I have taken is also consonant with what has always been held in regard to *zirat* [Regulation VIII of 1793]. True *zirat* belongs to the *zemindar* [section 6, Act X of 1859] as distinguished from the rest of his estate, his rights in which are subject to the rights of his *raiyats* [see Regulation VII of 1799, section 15, and *Thakooranae Dossee* v. *Bisheshur Mookherjee* (3)]. *Zirat* land is not *raiyati* land although the *zemindar* may lose his rights in it by treating it as if it was *raiyati*. But if he lets it for a term or from year to year, it remains his own and the tenant of it is not a *raiyat*. The custom under which a tenant of *zirat* is not a *raiyat* is a custom recognised in the Act of 1859. It was again recognised in the Act of 1885 by the expedient of placing all *raiyati* rights in two Chapters and then saying that those Chapters shall not apply to *zirat*. It was recognised in the statement of the objects and reasons of the Act of 1885 and in the account of that Act given in the Bengal Administration Report, 1892-93 [see page 93]. It is recognised in Mr. Finucane's Tenancy Act published in 1904. The custom is recognised also by a series of decisions both of the *Sadar Diwani Adalat* and of the High Court, a series which includes *The Great Rent Case of* 1865 [*Thakooranae Dossee* v. *Bisheshur Mookerjee* (3)] and continues till the decision of the present question by Woodroffe and Chaudhuri, JJ., in 1916 [*Dwarka-*

(5) 2 Ind. Cas. 675; 13 C. W. N. 1025; 11 C. L. J 98.

nath Chowdhury v. *Tafazar Rahaman Sarkar* (2).] The series of precedents is unbroken save for the *obiter dictum* of Mookerjee, J., in 1914 [*Ganpat Mahton* v. *Rishal Singh* (1)], a *dictum* which it is impossible to reconcile with his considered judgment in *Jonab Ali* v. *Rakibuddin Mallik* (6) in 1905, where he held that a tenant in *zirat* is neither an occupancy nor a non-occupancy *raiyat*.

Again, it is impossible to apply Article 1 (*a*) as it stands to tenants in *zirat* in a satisfactory manner. There is no difficulty in applying the Article to a non occupancy *raiyat* who enjoys the rights provided for in Chapter VI. Six months after the expiry of his registered lease, though he cannot be ejected upon the ground of the expiry of the lease, he can be ejected upon other grounds provided for in section 44, for instance, upon the ground that he has failed to pay arrears of rent. The application of Article 1 (*a*) in the case of a tenant of *zirat* would be by no means so simple. The following views are possible as to his status after the expiry of six months from the end of his lease if Article 1 (*a*) applies to him:—

First, there is the view that Chapter VI then becomes applicable to him. I am unable to concur with this view [*Bhugwan Bhagut* v. *Jug Mohun Roy* (7)]. There is in the alternative the view that he then becomes entirely immune from ejectment, a view which would defeat the express provision in section 116 that he shall not have a right of occupancy. There is another possible view that he is liable to ejectment upon any grounds provided for in his lease, and there is a fourth possible view that he is a tenant from year to year upon the terms of his lease and that the right to eject continues to recur at the end of every year, and to expire at the end of six months from the end of every year. I am confident that if the Legislature had intended Article 1 (*a*) to apply to a tenant in *zirat* they would not have left the matter in this nebulous condition.

I would, therefore, hold that Article 1 (*a*) does not apply to the present case and dismiss the appeal.

(6) 1 C. L. J. 303; 9 C. W. N. 571.
(7) 20 W. R. 308.

This judgment is merely an amplification of the judgment of Woodroffe, J., in *Dwarkanath Chowdhury* v. *Tafazar Rahaman Sarkar* (2) with which Chaudhuri, J., concurred.

MULLICK, J.—I agree with the view taken by the learned Chief Justice.

I think the first point for consideration is whether the Bengal Tenancy Act applies at all to the proprietor's private lands. I am quite satisfied that the answer to this is in the affirmative. Under the Permanent Settlement Regulation [Regulation VIII, 1793, sections 37 and 39] no land was recognized as a proprietor's private land which was not such on the 12th August 1765, the date of the assumption of the *diwani*, and there is no law recognising the creation of such lands since that date. Although the distinction between these lands and the *raiyati* lands of the country was at the time of the settlement a well-established one and, although there may be some doubt whether these lands as well as *chakran* lands [section 41 of the Regulation] were taken into account for assessing the revenue of the *zemindari*, yet it is quite clear that both these classes of land were annexed to the *malguzari* lands and were made responsible for the revenue [see sections 37 to 41]. What reason is there for holding that it is not open to a *zemindar* to create *raiyati* interest in his private lands? There is nothing in Act VIII of 1885 to support such a view, on the contrary section 116 of the Act clearly contemplates the acquisition of occupancy rights under certain circumstances and, if of occupancy rights, then why not of non-occupancy rights also?

It is urged that section 4 of the Bengal Tenancy Act is not exhaustive and that a *raiyat* of *zirat* lands belongs to a class by himself, who is not covered by the classification into *raiyats* at fixed rates, occupancy-*raiyats* and non-occupancy-*raiyats*. Now, although there are authorities which say that the definition of a *raiyat* is not exhaustive, there is to my knowledge no authority which says that the classification is not exhaustive. All that the authorities say is that section 4 rather describes than defines a *raiyat* and that it is not exhaustive only to the extent that a cultivator who may *prima*

facie answer the qualifications of a *raiyat* may really turn out to be a tenure-holder. The scheme of the Act is to determine the relations between cultivator and landlord in every inch of agricultural land, and for that purpose it divides the former into classes set out in section 4 and declines to recognise any rights or liabilities in relation to the landlord except those enjoyed by or imposed upon those classes. For this reason the Act omits settled *raiyats* from the classification although by section 20 it defines such a *raiyat*. The Act intends that as a settled *raiyat* must be either an occupancy or non-occupancy-*raiyat*, or a *raiyat* at fixed rates, it is unnecessary to make a separate class for him. A cultivator may be a settled *raiyat* on *zirat* lands, but as such he has no rights.

Reliance has been placed upon *Sheo Nandon Roy* v. *Ajodh Roy* (8) and on *Jonab Ali* v. *Rakibuddin Mallik* (6) for the purpose of showing that there can be no occupancy or non-occupancy-*raiyats* in *zirat* or *chakran* lands. Now although at page 542 of the first of these cases there is an observation to the effect that occupancy or non-occupancy rights cannot be acquired in *zirat* lands, that expression of opinion was clearly *obiter* and not necessary to the decision of the case. Indeed as an absolute proposition of law it is incorrect. The point which their Lordships were concerned to decide was that no tenant brought upon the land by a *thikadar* holding under the proprietor under a lease for a term of years can acquire rights of occupancy, for the reason that the *thikadar* could not create any interest greater than his own; and in coming to this conclusion their Lordships declined to extend the doctrine of *Binad Lal Pakrashi* v. *Kalu Pramanik* (9) to *zirat* lands and held that a tenant inducted by such a *thikadar* could not claim *raiyati* rights in *zirat* lands, the primary character of which was that the proprietor should be in *khas* possession. In the other case too a like view was expressed by Harington, Bodilly and Mookerjee, J.J., in regard to *chowkidari chakran* lands. It is obvious that the learned Judges never intended to lay down the rule that non-occupancy rights cannot be acquired in *zirat* lands; for in *Ganpat Mahton* v. *Rishal Singh* (1) one of these same learned Judges, namely, Mookerjee, J., expressed the clear opinion that a non-occupancy *raiyati* interest could be acquired in *zirat* lands and was subject to the operation of Article 1 (*a*) of Schedule III of the Bengal Tenancy Act.

There is, therefore, in my opinion no ground for the contention that the nature of the land will bar the operation of section 4 of the Bengal Tenancy Act.

This view is also supported by the history of the legislation on the subject. The classification of *raiyats* into *raiyats* at fixed rates, occupancy *raiyats* and non-occupancy-*raiyats* was made for the first time by Act X of 1859, but section 6 of that Act provided that the rule that a *raiyat* who has cultivated land for a period of twelve years has a right of occupancy in the land so long as he pays the rent payable on account of the same does not apply to *khamar*, *nij-jot* or *sir* lands belonging to the proprietor when let by him on a lease for a term of years or from year to year. The Act nowhere stated that a *raiyat* cultivating a proprietor's private land was not a non occupancy-*raiyat*, and in this respect the Amending Act of 1869 [Act VIII (B. C.) of 1869] does not appear to have made any substantial alteration. Such a *raiyat* was apparently liable to ejectment any time within twelve years on expiry of his lease. He was also liable to have his rent enhanced upon service of notice. So in *Janoo Mundur* v. *Brijo Singh* (10) it was held that a landlord, seeking to obtain an enhanced rate of rent on account of *nij-jot* land held by a tenant without a right of occupancy had no right to obtain a judicial enhancement upon the footing of a notice under Act VIII (B. C.) of 1869. His right according to section 8 was to make his own terms with his tenant, or to turn him out of occupation.

Considerable diversity of opinion, however, began to arise on the point whether the *raiyat* was entitled to ask for an adjudication of fair and equitable rent,

(8) 26 C. 546; 3 C. W. N. 336; 13 Ind. Dec. (N.S.) 950.

(9) 20 C. 708 (F. B.); 10 Ind. Dec. (N. S.) 477.

(10) 22 W. R. 548.

and one of the purposes of enacting Act VIII of 1885 was to put the status of non-occupancy-*raiyats* on a more satisfactory basis in this and other matters. To this end the two principal changes introduced were (1) that a non-occupancy *raiyat* could be ejected at the will of his landlord only if he was admitted into occupation under a registered lease and then only after service of six months' notice to quit, and upon suit being brought within six months after the expiration of the lease and (2) that a non-occupancy *raiyat* who objected to pay an enhanced rent could have his rent fixed by the Court; if he refused to pay he could be ejected.

The position of *raiyats* in *zirat* lands was not materially altered, for we find that the provisions of the old Act were practically reproduced in section 116, which was enacted in the following terms:—

"Nothing in Chapter V shall confer a right of occupancy in, and nothing in Chapter VI shall apply to, a proprietor's private lands known in Bengal as *khamar*, *nij* or *nij-jot* and in Bihar as *zirat*, *nij-sir*, or *kamat* where any such land is held under a lease for a term of years or under a lease from year to year."

And it is to be observed that the beneficial provisions of Chapter VI, which ameliorated the position of non-occupancy *raiyats*, were excluded from operating in *zirat* lands held under a lease for a term of years or from year to year.

In 1907 the section was amended and the heading "record of proprietor's private lands" was changed into "non-accrual of occupancy and non-occupancy rights and record of proprietor's private lands." In the body of the section the area saved from the operation of Chapters V and VI was widened by the inclusion of lands acquired under the Land Acquisition Act, and lands belonging to the Government within a Cantonment. At the same time section 45, which was one of the sections in Chapter VI, was wholly repealed. That section provided for the service of notice and six months' limitation. The result of its repeal was that in suits for ejectment of non-occupancy *raiyats* on expiry of their leases service of notice was done away with on the ground that it was unnecessary and difficult to prove and the provision as to limitation was put into Schedule III of Article 1 (*a*).

The question is, what is the effect of the repeal on the words "nothing in Chapter VI shall apply to a proprietor's private lands"?

In order to construe the words it is certainly not necessary to read them as meaning no *raiyats* shall acquire non-occupancy rights in proprietors' private lands held for a term of years. The amendment of the heading does to some extent assist the contention of the respondent before us, but in the absence of any authority I do not think the words of the heading should be allowed to affect the construction of the section.

In my opinion the body of the section means that the rights and liabilities of non-occupancy-*raiyats* in the matter of paying the rent agreed between them and their landlord (section 42), enhancement by registered agreement (section 43), ejectment (section 44), conditions of ejectment on the ground of refusal to agree to enhancement (section 46) shall not be enforced in the case of *raiyats* of private lands. But there are other rights and liabilities enjoyed by and imposed upon non-occupancy *raiyats* by other parts of the Act and there is nothing in section 116 which exclud-s the operation of those parts of the Act from the holdings of non-occupancy *raiyats* in *zirat* lands held on a lease for a term of years or from year to year. It is quite clear that section 116 itself contemplates that in *zirat* lands both occupancy and non-occupancy rights can be acquired under certain circumstances, and if it was the intention of the framers of the Act that in *zirat* lands held for a term of years or from year to year the cultivator should not acquire the status of non-occupancy *raiyats* they have signally failed to carry out that intention. If again their intention was to recognize the non-occupancy status of such a cultivator and to leave him in the same position as that in which he was before 1885 then, too, has the intention failed. Regarded from whatever point of view the result can scarcely be called satisfactory, and this class of cultivator, while excluded from the operation of Chapter VI, remains

within the purview of the remainder of the Act and therefore also of Article 1 (*a*) of Schedule III. The position appears to be this. Now, as before 1885, the landlord can make successive enhancements but the tenant can no longer take advantage of the protection offered by section 13 of Act X of 1859 or section 14 of Act VIII (B. C.) of 1869: on the tenant's failure to pay an arrear of rent he can only be ejected after decree now, though it was otherwise before 1885, and a suit for the ejectment of the tenant on expiry of his lease must now be brought within six months and not twelve years as before.

The learned Counsel for the respondent has somewhat ingeniously contended that Article 1 (*a*) is a necessary and inseparable part of section 44, and if that section is excluded the Article must be also excluded. In my opinion this contention is not well-founded. Article 1 (*a*) is applicable to every suit in which it is sought to eject a non-occupancy *raiyat*. It is not limited to suits under section 44 which are suits brought under the provisions of the Bengal Tenancy Act. A non-occupancy *raiyat* whose lease has expired is liable to ejectment on the general law as one who has become a trespasser.

Finally a reference to section 180 of the Act which deals with *utbandi raiyats* and *raiyats* of *biara* lands does, I think, assist us in elucidating the effect in section 116 of the words "nothing in Chapter VI shall apply to a proprietor's private lands." Section 180, clause (2), runs thus:—

"Chapter VI shall not apply to *raiyats* holding land under the custom of *utbandi* in respect of land held by them under the custom."

Although the section does not in terms say that the *raiyat* in this case is a non-occupancy *raiyat* the reference to Chapter VI implies that he is such a *raiyat* and the framers of the section therefore considered it necessary to provide that his rent is liable to be fixed by agreement with his landlord without the protections of Chapter VI. If in respect of such a *raiyat* Article 1 (*a*) applies, and I see no reason why it should not, the Article must also apply to the case of the appellant before us. Whether the Legislature in repealing section 45 and removing the provision as to limitation to the Schedule intended to cut down the period of limitation and to apply it to a larger class of tenants it is not our province to speculate. The Schedule was introduced for the first time in 1885, before which the special provisions as to limitation were few and for the most part contained in section 30 of Act X of 1859 and section 27 of Act VIII (B. C.) of 1869. We must interpret the law as we find it, and if the result of the amendment to Act VIII of 1885 is to place the landlord in a worse position than was intended, then the only remedy is to amend the law. I am of opinion, therefore, that the appeal should be allowed.

ROE, J.—Any one having no previous knowledge of the subject would say upon reading section 4 that for the purposes of the Bengal Tenancy Act there are three classes of *raiyats*: (*a*) *raiyats* holding either at a rent fixed in perpetuity or at a rate of rent fixed in perpetuity; (*b*) *raiyats* having a right of occupancy in the land held by them; (*c*) *raiyats* not having such a right of occupancy, and would note that these three classes are for the saving of ink and paper called thereafter *raiyats* holding at fixed rates, occupancy *raiyats*, and non-occupancy *raiyats*. On reading section 5 he would note that any one who (*i*) cultivates with his own ploughs, etc., and (*ii*) holds directly under a proprietor is a *raiyat*. He would further note on reading Chapter VI that non-occupancy *raiyats* have certain privileges, and on coming to Chapter XI would note that those privileges do not prevail over a definite contract made for the cultivation of proprietors' private lands for a term of years, or a definite contract renewed from year to year. If asked what might be the position of a *raiyat* holding under such a definite contract, he would reply that he was a non-occupancy *raiyat* not protected by Chapter VI. On reading Schedule III it would be clear to him that for a suit to evict a non-occupancy *raiyat* who had, by holding over without permission, become a trespasser the limitation was six months from the date of the trespass. O

his attention being drawn to the fact that section 45 had been repealed and Schedule III, clause 1 (*a*), substituted for it, he would say that this had been deliberately done with the purpose of removing the limitation clause from Chapter VI.

But for the high reputation of those learned Judges who have taken an opposite view I should have felt that there was no more to be said. Their view is, I venture to think, born of a misconception of the Legislature's jealousy of encroachment upon private lands. More than twenty-five years' experience of the working of section 120 in the Settlement, Sub-Divisional and Civil Courts has taught me that when once a proprietor has let out what he claims to be private lands it is almost impossible for him to prove that they are private lands.

The old law (section 6, Act X of 1859) gave a loophole to the proprietor to deny occupancy rights to *raiyats* holding over after the expiry of a lease for a term of years. It ran :—

"But this rule does not apply to *sir* land let on lease for a term or year by year."

To prevent the argument that a hold-over was equivalent to a letting year by year the Act of 1885 deliberately re-cast the phrase and section 116 runs :—

"When any such land is held under a lease for a term of years or under a lease from year to year."

Section 8 of Act X of 1859 ran :—

"*Raiyats* not having rights of occupancy are entitled to *pattahs* only at such rates as may be agreed on between them and the persons to whom the rent is payable."

That was the position of non-occupancy *raiyats* until the Act of 1885 gave to all, save those inducted under a definite contract to cultivation of private lands, the protection of Chapter VI. Even for those cultivating private lands section 8 was further cut down and a proviso added that not only the rates but also the term must be a matter of agreement.

It cannot be suggested that in these amendments of the law there was any desire to keep sacred lands claimed as *zirat*, *nij*, *sir*, or *kamat*. On the contrary, it was deliberatly made as difficult as possible to prove that the lands were *zirat*, and deliberately enacted that a tenant taking lands proved to be *zirat* should have a clear understanding with the proprietor of the term for which he would be permitted to cultivate them. Believing this to have been the temper of the Legislative Council in 1885 I can see no reason for holding that the Council in 1907 would, if it had intended to nullify in favour of the proprietor the taking of the limitation clause out of Chapter VI into a Schedule, have been content to make this intention apparent by such a clumsy expedient as the changing of the heading of Chapter VI. Anyone not on the look-out for veiled intentions would imagine that the change was merely an amplification made because the old heading referred only to sections 117—120. The new heading refers also to section 116, and is now complete.

It is only when words are of doubtful meaning that the Courts should look to probable intention. Granting that the arguments of Woodroffe, J., give reason to believe that the Act is open to an interpretation different to that apparent on its surface, I am of opinion that the most probable intention in placing the limitation clause in the Schedule was to limit the exercise of the proprietor's right to evict a *raiyat* cultivating private lands to six months. It is a fallacy to suppose that there is a hardship in reducing the proprietor's limitation from twelve years to six months. The moment the proprietor accepts rent without taking a new agreement, the *raiyat* is holding over without a lease and is protected by Chapter VI. No proprietor could be so foolish as to leave his private lands in the possession of a stranger for twelve years without accepting rent. Even the most exorbitant decree for mesne profits for three years would not balance the loss of twelve years' rent. No sane proprietor would fail to sue within three years In the interest of the *raiyat* the proprietor should not be allowed to tempt him to continue cultivation without a title and then not only take from him by a claim for mesne profits the whole produce of his labour, but also ruin him by the costs of the inevitable litigation. If a proprietor has any love for his private lands he should be able to make up his mind in six months as to what he will do with them. If he is uncertain of his love for them it is

open to him to enter into a new agreement with regard to them. If he cares so little about them that he cannot be troubled to make definite arrangements for their cultivation he deserves that they cease to be his private lands.

In considering the intention of the Legislature we have to consider not the intention of the Select Committee but those of the Council. In the Bill of 1907, as laid before the Council, there was a clause taking the procedure for commutation of rent out of Chapter V into Chapter VIII. The intention was clearly said in the statement of objects and reasons to be:—"Under section 40 only occupancy-*raiyats* are allowed to apply for commutation. It seems reasonable that the same privilege should be conferred on all classes of *raiyats*."

This proposal was vetoed by the Council. Surely the Council's attention having been drawn to the effect of the proposal to repeal section 40, we must presume that it was also drawn to the effect of repealing section 45.

I am of opinion that the amendment made by the Act of 1907 indicates a general intention to prevent suits for mesne profits against *raiyats* not having a right of occupancy holding over after the expiry of the term of their agreement; and, having regard to the conditions of agriculture in this Province, feel strongly that this intention has been well expressed by the limitation of a suit in ejectment to a period of six months from the expiry of the agreement. I can find nothing in the Act to indicate that proprietors' private lands are to be protected from this general intention.

I would decree this appeal, and dismiss the plaintiff's suit with costs in all Courts.

JWALA PRASAD, J.—This appeal arises out of a suit in ejectment. The Courts below have decreed the plaintiff's suit, holding that the lands were the *kamat* or *zirat* lands of the plaintiff-landlord and were settled with the defendants for a term of nine years under a registered *kabuliyat* dated 6th May 1903, and that the defendants have no right to remain in possession of the lands after the expiry of the term of the lease.

The term of the lease expired on 31st May 1912. The suit was instituted on the 5th December 1912, that is, more than six months by four days after the expiry of the term of the lease.

The Courts below have held that six month's limitation prescribed by Article 1 (*a*) of Schedule III of the Bengal Tenancy Act does not apply to the case, as the lands held by the defendants are the proprietors' private lands described as *kamat* or *zirat* in section 120 of the Act.

On appeal to this Court by defendant No. 1 Mr. Justice Atkinson* has confirmed the view of the Courts below, holding that the "defendant No. 1 in point of law could not acquire in the *zirat* lands of the plaintiff the non occupancy right."

The defendants have preferred a further appeal to this Court under the Letters Patent and repeat their contention that the suit is barred by Article 1 (*a*) of Schedule III.

The question raised is of the utmost importance and is by no means free from doubt or difficulty.

Article 1 (*a*) of Schedule III requires that a suit "to eject a non-occupancy *raiyat* on the ground of the expiration of the term of his lease" should be brought within six months from the expiration of the term. This Article was for the first time introduced in the Schedule by the Bengal Tenancy Amendment Act [I (B. C.) of 1907] and has taken the place of section 45 of the Act, repealed by the Amending Act. Section 45 of the Act ran as follows:—

"A suit for ejectment on the ground of the expiration of the term of a lease shall not be instituted against a non-occupancy *raiyat* unless notice to quit has been served on the *raiyat* not less than six months before the expiration of the term and shall not be instituted after six months from the expiration of the term."

The provisions in section 45 were two-fold—(1) that a notice shall have been served not less than six months before the expiration of the term, and (2) that the suit for ejectment should be brought within six months from the expiration of the term.

The Amending Act repealed the provision regarding the notice to quit but retained the provision regarding the limitation for a suit for ejectment of non-occupancy

*See 39 Ind. Cas. 389.—*Ed.*

raiyats on the ground of the expiration of the term of the lease. By the amendment in 1907 section 45 was reduced to a simple clause providing limitation for a suit for ejectment and was, therefore, rightly transferred to and included in Schedule III as Article 1 (*a*) of the Act, read with section 184 of the Act, which deals specially with limitation for suits.

Section 45 occurred prior to its repeal in 1907 in Chapter VI headed "Non-occupancy *raiyats*." Section 116 excludes the application of Chapter VI to the proprietor's private lands if any such land is held under a lease for a term of years or under a lease from year to year. So there was no question before 1907 that the limitation of six months then provided by section 45 did not apply to a suit for recovery of possession of *zirat* lands held under a lease for a term of years.

The question is whether the aforesaid clause 1 (*a*) in Schedule III would apply to *kamat* or *zirat* lands held under a lease and the period of twelve years' limitation, which prior to 1907 applied to a suit for recovery of possession of *zirat* land, would now be curtailed to six months applicable to suits for ejectment of non occupancy *raiyats*.

There is a conflict in the decisions of the Calcutta High Court passed since the aforesaid Amendment of 1907 [*vide Ganpat Mahton* v. *Rishal Singh* (1), Mookerjee and Beachcroft, JJ., *Dwarkanath Chowdhury* v. *Tafazar Rahaman Sarkar* (2), Woodroffe and Choudhuri, JJ.]

Woodroffe, J., who delivered the judgment in the last case referred to the insertion in 1907 of the words "Non-accrual of occupancy and non occupancy rights" in the heading of Chapter XI as one of the grounds for the purpose of holding that no rights of occupancy or non-occupancy can accrue in *kamat* or *zirat* lands when let out for a term of years.

Formerly the heading of Chapter XI was "Record of proprietors' private lands"—The words "non-accrual of occupancy and non-occupancy rights" were added in the heading at the same time that the limitation clause in section 45 was transferred to Schedule III.

It has been said that the heading of a Chapter cannot control an enactment in a Statute. The authorities quoted in Maxwell's Interpretation of Statutes [82 (1912)] will show that the headings prefixed to sections or sets of sections have been frequently used for the purpose of interpreting the meaning, scope and intention of Statutes.

Lord Coke (1 *Inst.* 79) laid down the well-known canon that the recital or preamble of an Act of Parliament is a key for opening the meaning and intent of the Act. This canon has been applied in *Rex* v. *Bigg* (11), *Hughes* v. *Chester and Holyhead Ry. Co.* (12), *Rayson* v. *South London Tramways Company* (13), *West* v. *Gwynne* (14) and *Union Steamship of New Zealand* v. *Melbourne Harbour Commissioners* (15).

Baron Channell in *Eastern Counties etc., Companies* v. *Marriage* (16) observed as follows:—

"As might have been expected, the enactments contained in the Statute embrace various objects or purposes. In different parts of the Act there are to be found classes of enactments applicable to some special object.

"Such enactments are in many instances preceded by a heading, special no doubt in one sense, as addressed to the object or purpose, but, where not otherwise provided for, general in its application to enactments passed to accomplish the object.

"These...headings are not to be treated as if they were marginal notes, or were introduced into the Act merely for the purpose of classifying the enactments. They constitute an important part of the Act itself.

"They may be read, I think, not only as explaining the sections which immediately follow them, as a preamble to a Statute

(11) (1717) 24 E. R. 1127 at p. 1132; 3 P. Wms. 419 at p. 434.

(12) (1861) 31 L. J. Ch. 97; 3 DeG. F. & J. 352; 7 L. T. 197; 8 Jur. (N. S.) 221; 10 W. R. 219; 130 R. R. 166; 45 E. R. 914.

(13) (1893) 2 Q. B. 304; 62 L. J. Q. B. 593; 4 R. 522, 69 L. T. 49; 42 W. R. 21; 17 Cox C. C. 691; 58 J. P. 20.

(14) (1911) 2 Ch. 1; 80 L. J. Ch. 578 at p. 587; 104 L. T. 759; 55 S. J. 519; 27 T. L. R. 444.

(15) (1884) 53 L. J. P. C. 59; 9 A. C. 365; 50 L. T. 337; 5 Asp. M. C. 222.

(16) (1860) 11 E. R. 639; 9 H. L. C. 32 at p. 41; 31 L. J. Ex. 73; 7 Jur. (N. S.) 53; 3 L. T. 60; 8 W. R. 748; 131 R. R. 17.

may be looked to, to explain these enactments, but as affording, as it appears to me, a better key to the constructions of the sections which follow than might be afforded by a mere preamble."

In the present case where there is an intentional alteration of the heading it is impossible to ignore it for the purpose of interpreting the meaning, intention and scope of the Legislature in inserting Article 1 (*a*) to Schedule III and in adding at the same time the heading to Chapter XI of the Act. If there was any purpose in the alteration in the heading, it was absolutely to bar the accrual of occupancy or non-occupancy rights in the *zirat* or *khudkasht* lands, provided such lands are let out by the proprietor under a lease for a term of years or under a lease from year to year.

The alteration in the heading does not appear to have been considered in the case of *Ganpat Mahton* v. *Rishal Singh* (1) referred to above. To my mind the heading was intended to safeguard against possible misapprehension in the application of Article 1 (*a*) of the Schedule, which did not apply prior to the amendment, by expressly adding the words to the heading of Chapter XI, "Non-accrual of occupancy and non-occupancy rights." The intention of the Legislature can well be gathered by the express words in the heading of Chapter XI as being to exclude *kamat* or *zirat* lands from the operation of Article 1 (*a*) of the Schedule. I am, therefore, of opinion that the limitation of 12 years is not curtailed by Article 1 (*a*) prescribing six months' limitation and that the Article has no application to the present case.

The condition prescribed by section 116 of the Act, namely, the letting out of the *zirat* lands for a term of years is fulfilled in this case according to the findings of the Court below, so that the defendants were not non-occupancy *raiyats* under Article 1 (*a*) of the Schedule but were mere trespassers upon the land after the expiry of the term of the lease.

Even irrespective of the heading the result to my mind is the same, namely, that a person holding the proprietors' private land such as *kamat* or *zirat* would not be a non-occupancy *raiyat* within the meaning of Article 1 (*a*) of the Schedule provided the land is let under a lease for a term of years, or under a lease from year to year. In order to arrive at this result one has to look at the history of the legislation on the subject.

As pointed out by my learned brother Mr. Justice Chapman, prior to the Rent Act of 1859 there was no such classification of *raiyats* as occupancy and non-occupancy and the *raiyats* were divided into two classes, namely, "resident cultivators" and "non-resident cultivators." The Regulations relating to the Decennial and Permanent Settlements scrupulously protected the right of landlords or *zemindars* with regard to the lands in their *khas* possession. In Act X of 1859 and in Act VIII of 1869 the manner in which a right of occupancy could be acquired was for the first time defined. Section 6 of the Act ran as follows:—

"Every *raiyat* who shall have cultivated or held land for a period of 12 years shall have a right of occupancy in land so cultivated or held by him whether it be held under a *patta* or not, so long as he pays the rent payable on account of the same: but this ruling does not apply to *kamat*, *nij-jote*, or *sir* land *belonging to the proprietor* of the estate or tenure and let by him on a lease for a term or year by year."

It was pointed out in *Bhugwan Bhagut* v. *Jug Mohun Roy* (7) "that the express purpose of the Legislature in the section was to prevent the *zemindar's* rights in this particular class of land from being invaded or restricted by the growth of the occupancy rights on the part of a *raiyat* to whom he had let it for periods equal to or exceeding twelve years." (Phear and Morris, JJ.) The same Judges in *Janoo Mundur* v. *Brijo Singh* (10) held that a landlord has a right to make his own terms with the tenants of *nij-jote* lands as to enhancement of the rent and that he has no right to have a judicial assessment at an enhanced rate and that he can turn out the tenant of the occupation if the tenant does not agree to the rent proposed by him. They further held that a tenant who holds over after the expiry of the lease does

so on the terms on which the land was let to him.

Similar was the view taken recently by Stephen and Doss, JJ., in *Syed Khalil-ur Rahman* v. *Rupan Mahton* (17), where they held that the tenant-defendant had no defence to the landlords' action for recovery of lands after the expiration of the lease in 1896, as he was a mere trespasser on the lands which were *kamat*. In short, the view taken in that case appears to be that a tenant of *kamat* land does not acquire a right of occupancy by holding it over after the expiry of the lease.

From the above it is clear that the *kamat* or *zirat* lands of the landlord were protected under the Acts of 1859 and 1869 from the accrual of occupancy rights by tenants holding for a term. Non-occupancy rights were not dealt with or defined in those Acts. In 1885 for the first time non-occupancy rights were introduced.

Tenants under the Act of 1885 are classified under the following heads "for the purposes of the Act," namely:—(1) Tenure-holders, (2) *raiyats*, (3) under-*raiyats*; and *raiyats* again have been divided into three classes:—

(*a*) *raiyats* holding at fixed rates, (*b*) occupancy *raiyats*, that is to say, *raiyats* having a right of occupancy in the land held by them, and (*c*) non-occupancy *raiyats*, that is to say, *raiyats* not having such a right of occupancy.

The classification of tenants in section 4 is not exhaustive. As an instance may be mentioned the class of tenants known as 'settled *raiyats*' under section 20.

It was pointed out in *Kuldip Singh* v. *Chhatur Singh Roy* (18) that every occupancy *raiyat* is not necessarily a settled *raiyat*, though every settled *raiyat* is a *raiyat* of occupancy as the status of a settled *raiyat* cannot be transferred and can only be acquired by holding some land as a *raiyat* in the village for twelve years, whereas an occupancy right may be acquired by purchasing a transferable occupancy holding.

(17) 12 C. W. N. 436.
(18) 3 C. L. J. 355

Chapter III deals with tenure-holders; Chapter IV deals with *raiyats* at fixed rates; Chapter V with occupancy *raiyats*, and Chapter VI with non-occupancy *raiyats*. Thus the rights and incidents of each class of *raiyats* have been dealt with in a separate Chapter, those of non-occupancy in Chapter VI.

Section 116 of the Act is intended to exclude the proprietor's private lands from the operations of Chapters V and VI provided the proprietor has taken the precaution indicated by the concluding words of the section, *i.e.*, when any such land is held under a lease for a term of years, or under a lease from year to year.

The words in section 116, namely, "nothing in Chapter VI shall apply to the proprietor's land" can bear one and only one interpretation, that no right of non-occupancy can arise in lands known as *zirat* or *kamat* where such land is let out by the proprietor for a term of years; for in excluding such lands from the operation of Chapter VI it was intended that the rights and incidents of non-occupancy *raiyats* as defined or described in Chapter VI shall not apply to such lands. There does not appear to be any other interpretation.

While introducing the 'occupancy rights' in the Act of 1885 the Legislature intended that these rights shall not accrue with respect to the proprietor's private lands in the same way as the occupancy rights did not accrue in respect of these lands prior to 1885 This protection is expressed in section 116 of the Act.

The history of land tenures in the Province clearly shows that the lands in the *khas* possession of the *zemindars* or proprietors were protected by the Legislature from any rights of occupancy and non-occupancy accruing thereon under certain conditions as set forth in section 116. The Decennial and the Permanent Settlement recognized the distinction between the proprietor's *khas* lands and the lands which may be said to be the *raiyati* stock.

Khamar lands denote proprietors' private lands as distinguished from those let out to tenants. The *khamar* lands have always been recognized as being in a special and

exclusive sense a private property of the *zemindar* as distinguished from all the rest, cultivated or cultivable, which may be called *raiyati* land, and in respect of which the *zemindor's* rights were merely to receive a share of the produce or equivalent in money [Finucane and Ameer Ali, Bengal Tenancy Act, 2nd Edition, pages 533-534]. It was to protect the latter class of lands that in section 8 of Regulation I of 1793 (Permanent Settlement) it was declared as follows:—

"The Governor-General in Council will, whenever he may deem it proper, enact such regulations as he may think necessary for the protection and welfare of the dependent *talukdars*, *raiyats*, and other cultivators of the soil."

In section 39 of the Decennial Settlement Regulation [VIII of 1793] the *khamar* lands were understood to signify lands appropriated to the subsistence of *zemindars* and their families. The distinction between such lands and the *malguzari* or *raiyati* lands was recognized and the former was annexed to and assimilated with the latter for the purposes of the security of the revenue and for such security only [*Jonab Ali* v. *Rakibuddin* (6)].

The *raiyati* lands in the Regulation were the lands cultivated by residents of village known as *khudkasht raiyats* and those cultivated by the non-residents known as *paikasht* tenants. The enactments passed since the Permanent Settlement are all in accordance with the declaration in section 8 of Regulation I of 1793, referred to above, and were directed to the protection of the *raiyats* with regard to the *raiyati* lands as distinguished from the *khamar* lands [Rampini, Bengal Tenancy Act, page xii, Introduction].

The expression in section 116 has also been held to mean as barring the acquisition of non occupancy rights in proprietors' private lands. [*Vide*, *Sheo Nandan Roy* v. *Ajodh Roy* (8), where it was held that a person brought on the *malik's zirat* lands by a lease for a term of years cannot acquire any right of occupancy or non-occupancy on the said lands and that he is a trespasser only on the expiry of the lease and is liable to ejectment.

In *Damodar Narayan* v. *Dalgliesh* (19) their Lordships of the Privy Council, disagreeing with the Calcutta High Court, upheld the decree of the Court below for possession claimed by the landlord in respect of *zirat* lands which were leased to the defendants for a term. The Subordinate Judge had expressly held that "under section 116 the defendant is neither an occupancy or non-occupancy-*raiyat* in respect of the lands." This statement of the law has not been taken exception to by their Lordships of the Privy Council while dealing with and affirming his judgment. The effect of all the decisions is that the clause in section 116, "nothing in Chapter VI shall apply to the proprietor's private lands" is to bar the acquisition of non-occupancy rights in respect of *zirat* lands.

A Court is required to have regard to custom in determining whether a person is a *raiyat* or not (section 5 of the Act). No custom is more certain than that a tenant in *zirat* is not a *raiyat*. This custom has been recognized in every text book and in a multitude of enactments and decisions [*vide* also Sir Courtenay Ilbert's speech on the Tenancy Act].

The Bengal Tenancy Act does not purport to be a complete and exhaustive Code even in respect of the law of landlord and tenant [*Kripa Sindhu Mukerjee* v. *Annada Sundari Debi* (20).] A person holding under a lease for a term of years the *zirat* land is not a *raiyat* and will not be governed by the Bengal Tenancy Act but by general law. He does not become a non-occupancy *raiyat* after the expiry of the lease and is a trespasser only. Article 1 (*a*) of the Schedule, which applies expressly to non-occupancy *raiyats*, does not apply to persons holding under a lease the proprietor's private lands. Thus apart from the heading added to the section the history of the Legislation, the object and scope of the Act and the meaning and true interpretation of the actual words used in the Act lead to the conclusion that the general

(19) 9 Ind. Cas. 913; 38 C. 432; 15 C. W. N. 345; 9 M. L. T. 364; 8 A. L. J. 44; 13 C. L. J. 512; 13 Bom. L. R. 396; (1911) 2 M. W. N. 182 (P. C.).

(20) 11 C. W. N. 983; 6 C. L. J. 273; 35 C. 34 (F. B.).

limitation of twelve years applicable to trespassers under the general Limitation Act will apply and that the new Article 1 (*a*) does not apply to the case.

It cannot be contended that the provisions barring the acquisition of non-occupancy rights cease to apply when the tenant holds over after the expiry of the term of the lease. Section 51 of the Bengal Tenancy Act clearly lays down that when a tenant holds over, the conditions under which he held the land in the last preceding agricultural year shall be presumed to continue. This is also the general principle of holding over.

The authorities on the point noticed above both under the old and the new Act clearly support the view that when the tenant has been brought on the land for a term of years under the lease, he is a trespasser on the land after the expiry of the lease and can be ejected if the suit is brought under the ordinary law applicable to the eviction of trespassers, *i. e.*, twelve years from the expiry of the lease.

For the above reasons I hold that the suit is not barred by Article 1 (*a*) of Schedule III of the Act and that the appeal should be dismissed.

Appeal allowed.

LOWER BURMA CHIEF COURT.

SPECIAL SECOND CIVIL APPEAL NO. 47 OF 1916.

January 19, 1917.

Present:—Mr. Justice Parlett.

MAUNG HTAT AND OTHERS—APPELLANTS

versus

MAUNG SAN DUN AND OTHERS—RESPONDENTS.

Stamp Act (II of 1899), Sch, I, Arts. 13, 35 —*Lease, agricultural—Document hypothecating moveable property—Stamp duty chargeable—Landlord and tenant—Charge on crops—Liability of person removing crops.*

An agricultural lease is exempt from stamp duty under exemption (*a*) to Article 35, Schedule I of the Stamp Act. [p. 110, col. 1.]

A document which gives the landlord the sole right over the whole crop until the rent is paid and in which the tenants agree not to alienate or otherwise do away with the crops without his consent until such pgyment, is an instrument evidencing an agreement relating to the hypothecation of moveable property by way of security for the repayment of a future debt and as such is liable to stamp duty chargeable on a bill of exchange under Article 13 (*b*) of Schedule I of the Stamp Act. [p 110, col. 1.]

Where the landlord has a charge for rent on the crops, a person removing the crops with notice of the charge is liable for the difference between the amount of the rent due and the quantity of the crops not removed, and not for the whole of the crops removed, [p. 110, col 1.]

Mr. *Maung Gyi*, for the Appellants.

Mr. *R. N. Burjorji*, for Respondents Nos. 2, 3 and 4.

JUDGMENT.—The appellants sued to recover 700 baskets of paddy or its value, Rs. 875, due as rent from their tenants Maung Lu Gale and Ma Hnin Zi, and obtained a decree against them against which there was no appeal.

They joined the present respondents as defendants, because they alleged that they had removed respectively 100, 500, 50 and 50 baskets of paddy from the tenants' land knowing that appellants had a charge upon the whole crop until their rent of 700 baskets had been paid. The Court of first instance found on the evidence that the respondents had removed these quantities of paddy with notice that appellants claim a charge upon it, and granted decrees against them for these quantities of paddy or their values Rs. 125, Rs. 625, Rs. 62-8 and Rs. 62-8 respectively. These decrees were reversed upon appeal and the appellants now ask for their restoration.

The respondents have contended that they had no notice of appellants' charge on the paddy, and further that as far as 2nd respondent Po Lun is concerned, the proceeds of the paddy he took have been paid to the 1st and 3rd appellants in satisfaction of a decree of theirs against their tenants, the 1st and 2nd defendants in this suit.

As regards the first point there is no room for doubt that the 3rd appellant took his lease to the land and warned the respondents against removing the crop as he had a charge thereon for rent.

As regards the second, it appears that 1st and 3rd appellants got a decree against Lu Gale and Ma Hnin Zi in another suit, in which they had attached certain of their property before judgment, and 2nd respond-

ent Po Lun gave a security bond for the due payment of the decree and costs in order to obtain release of the property from attachment, and he subsequently paid up the amount of the decree and costs. This no doubt gives him a right to sue Mg. Lu Gale and Ma Hnin Zi for the money he paid, but it is no defence to the present action. We come now to the main points in the case. The District Judge held that inasmuch as plaintiffs admitted that after the respondents had removed the paddy some 400 to 500 baskets still remained on the land, there could be no claim against respondents for a greater quantity of paddy than the difference between the rent due, 700 baskets, and the quantity remaining, *viz.*, 400 to 500 baskets. In my opinion this view is correct and the respondents cannot in the aggregate be held liable for more than 200 baskets of paddy, the difference between 700 and 500 baskets. Apportioned between them according to the gross amounts they took the quantities for which each is liable are the following—

1st respondent 29 baskets;
2nd respondent 143 baskets;
3rd respondent 14 baskets;
4th respondent 14 baskets.

The Divisional Judge, however, held that under the document sued upon plaintiffs could in no case recover more than Rs. 320, and as the paddy remaining after respondents had removed what they took was admittedly worth this sum or more, plaintiffs could recover nothing from the respondents. The document sued upon is a lease for nine months at a rental of 700 baskets of paddy for that period. So far as it is a lease it is exempt from stamp duty under exemption (*a*) to Article 35, Schedule I, of the Stamp Act, 1899, the tenants being cultivators. The document, however, gave the appellants the sole right over the whole crop until the rent was paid, and the tenants agreed not to alienate or otherwise do away with the crops without appellants' consent until the rent was paid. It was, therefore, an instrument evidencing an agreement relating to the hypothecation of moveable property by way of security for the re-payment of a future debt, and as such was liable to the duty chargeable on a bill of exchange under Article 13 (*b*) of Schedule I of the Stamp Act, 1899, see Entry No. 80 in Government of India Finance Department Notification No. 3616, Exhibit C, dated the 16th July 1909 (Burma Stamp Manual, Part XIV, page 9). Now the document actually bears an 8-anna stamp and under the Article referred to above this would have been sufficient to cover a sum of Rs. 600, and under section 26 of the Stamp Act no more than that sum is claimable under it. The value of the 200 baskets of paddy for which the respondents are liable is, however, only Rs. 250, and that amount is recoverable under the document. I, therefore, reverse the decree of the Divisional Court and instead grant appellants decree as follows, with costs in all Courts,

against San Dun for 29 baskets of paddy or Rs. 36-4 0;

against Po Lun for 143 baskets of paddy or Rs. 178-12-0;

against Yaung Zaung for 14 baskets of paddy or Rs. 17-8-0; and

against Maung Ba U for 14 baskets of paddy or Rs. 17-8-0.

The respondents will get 2 gold *mohurs* Advocate's fee in this Court.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 152 OF 1917.

December 21, 1917.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Sadasiva Aiyar.

NYNAM VEETILL MAYAN KUTTI—PLAINTIFF—APPELLANT

versus

VALAPPILAKATH KUNHAMMAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Malabar Law—Landlord and tenant—Ejectment, decree for, with compensation to tenant—Decree barred—Fresh suit in ejectment, maintainability of—Malabar Compensation for Tenants' Improvements Act (I Mad. of 1900), ss. 5, 6, scheme of.

A landlord who obtains a decree in ejectment against his tenant, which also directs payment of compensation to the latter under the Malabar Compensation for Tenants' Improvements Act, cannot on the decree becoming barred maintain another suit on the same cause of action. [p. 111, col. 2; p. 112, col. 2.]

NYNAM VEETILL MAYAN KUTTI v. VALAPPILAKATH KUNHAMMAD.

Kutti Ali v. *Chindan*, 23 M. 629; 8 Ind Dec. (N. S.) 842 and *Chowakkaran Keloth* v. *Karuvalote Parkum*, 29 Ind. Cas 559; 2J M. L J. 144, dissented from.

Vedapuratti v. *Vallabha Valiya Raja*, 25 M. 300; 12 M. L. J. 128 (F. B.), applied.

Per *Wallis, C. J.*—When a man has a cause of action and brings a suit upon it, that cause of action is merged in the decree, *transit in rem judicatum*, and then his remedy is in execution and if he does not enforce his remedy and allows it to become barred, his rights are gone. [p. 111, col. 2.]

The payment of compensation which is assessed in a suit for ejectment by a decree under the Malabar Compensation for Tenants' Improvements Act, is a matter relating to execution and is intended to be dealt with as such. According to the scheme of the Act, the decree for ejectment on payment of compensation is left to be governed by the law of limitation with regard to the execution of decrees and it was not intended to interfere with the general principle that a man who sues on his cause of action and obtains a decree and allows his decree to become barred has no further remedy. [p. 112, cols. 1 & 2.]

Per *Sadasiva Aiyar, J.*—When a plaintiff has obtained in one suit based on some legal title a decree for the reliefs which he was entitled to as against a defendant and has allowed that decree to become barred, he cannot be allowed to bring another suit for obtaining *the very same relief* against the very same defendant, though on a different basis, if the latter ground of claim is founded on a right or title which existed and could have been relied on as a basis of relief when the first suit was brought. [p. 112, col. 2.]

Second appeal against the decree of the Court of the District Judge, South Malabar, in Appeal Suit No. 143 of 1916, preferred against that of the Court of the District Munsif, Ponnani, in Original Suit No. 400 of 1914.

FACTS appear from the judgment.

Mr. *C. Madhavan Nair*, for the Appellant, contended, relying on the decision of *Kutti Ali* v. *Chindan* (1), that the effect of the ejectment decree becoming barred was not to extinguish the landlord's title to the property and that he was not precluded from instituting a fresh suit in ejectment. The suit was one based on title.

Mr. *M. N. Krishna Aiyar*, for the Respondents, urged that the landlord had no fresh cause of action for a fresh suit and the original cause of action could not be revived, having become merged in the decree. He pointed to the analogy of redemption decree in mortgage suits and argued that the principle of law having a first suit for redemption after the redemption decree had become barred applied equally to ejectment suits. *Vide* the Full Bench decision in *Vedapuratti* v. *Vallabha Valiya Raja* (2). In the case of Malabar tenants there was the further fact that under the ejectment decree the tenants have a statutory right to remain on the land till compensation is paid for improvements. It was the plaintiff's duty to seek his remedy on the decree obtained by him in execution and on the extinction of the remedy by the statutory bar, his rights also were extinguished.

JUDGMENT.

WALLIS, C. J.—This case raises a question of considerable importance and interest, namely, what is the effect of a plaintiff, who obtains a decree in ejectment in Malabar directing payment of compensation, allowing that decree to become barred. The question is whether he is entitled to maintain another suit, as it is contended, upon his title, a proposition which is supported by reference to the decision in *Kutti Ali* v. *Chindan* (1). Now, the ordinary principle is that, when a man has a cause of action and brings a suit upon it, that cause of action is merged in the decree, *transit in rem judicatum*; and then his remedy is in execution and if he does not enforce his remedy and allows it to become barred, his rights are gone. When a lessor sues to eject a lessee, he has to prove that there was in existence a lease and a determination of that lease. That is his cause of action, and if he gets a decree and allows that decree to become barred, it seems to me that, on general principles, his remedy is gone. I do not, with great respect, quite understand what is meant in *Kutti Ali* v. *Chindan* (1) by saying that he will still be allowed to sue on title. The suit on title, I take it, is a suit to eject the defendant on the ground that he was a trespasser. Even if it could be said that the effect of a decree in ejectment was to determine the tenancy and convert the tenant into a trespasser, that would not apply to the present case where the tenant has a statutory right to continue in possession after decree until he is paid

(1) 23 M. 629; 8 Ind. Dec. (N. S.) 842.

(2) 25 M. 300; 12 M. L. J. 128 (F. B.).

for his improvements. Further, the decision in *Kutti Ali* v. *Chindan* (1) seems difficult to reconcile with the subsequent decision of a Full Bench of five Judges in *Vedapuratti* v. *Vallabha Valiya Raja* (2), in which it was held, overruling some earlier cases, that, where a mortgagor brings a suit for redemption and allows the decree for redemption to become barred, his rights are gone and he cannot bring a subsequent suit for redemption. I do not see any reason why the same doctrine is not applicable to the case of lessor and lessee. Lastly, as regards the Malabar tenancies, I think that the provisions of sections 5 and 6 of the Malabar Compensation for Tenants' Improvements Act strongly support the view I have taken and show that it was the intention of the Legislature that these matters should be dealt with in execution. Section 5 provides that, notwithstanding the determination of the tenancy, the tenant is entitled to remain in possession until ejectment in execution of a decree or order of Court. Section 6 deals with the form of the decree in ejectment and the determination of compensation, and the decree is to direct that "on payment by the plaintiff into Court of the amount so found due and also the mortgage money (if any), the defendant shall put the plaintiff into possession of the land with the improvements thereon," which is very like a decree for redemption. Sub-section (3) deals with compensation for subsequent improvements and re-valuation, if necessary, of the improvements at the time of ejectment. Sub-section (4) provides that "every matter arising under sub-section (3) shall be deemed to be a question relating to the execution of the decree within the meaning of clause (c) of section 244 of the Code of Civil Procedure." It seems to me *a fortiori* that the payment of the compensation which is assessed in the suit by the decree is still more a matter, or at least as much a matter, relating to execution and is intended to be dealt with as such. As I understand the scheme of the Act, it is that it leaves the decree passed under the Act for ejectment on payment of compensation to be governed by the law of limitation with regard to the execution of decrees, and it was not intended to interfere with the general principle, that a man who sues on his cause of action and obtains a decree and allows that decree to become barred has no further remedy. With great respect I am not prepared to follow the decision in *Kutti Ali* v. *Chindan* (1) in this case. The second appeal is dismissed with costs.

SADASIVA AIYAR, J.—When a plaintiff has obtained in one suit, based on some legal title, a decree for the reliefs which he was entitled to as against a defendant and has allowed that decree to become barred, he cannot, in my opinion, be allowed to bring another suit for obtaining *the very same relief* against the very same defendant, though on a different basis, if the latter ground of claim is founded on a right or title which existed and could have been relied on as a basis of relief when the first suit was brought. If he had failed in the first suit on the basis on which he had brought it, he might be entitled to claim the same relief in a second suit on another basis, if this latter basis could be treated as affording a different cause of action.

In *Chowakkaran Keloth* v. *Karuvalote Parkum* (3) the provisions of section 6 of the Malabar Compensation for Tenants' Improvements Act and the decision in *Vedapuratti* v. *Vallabha Valiya Raja* (2) do not seem to have been considered and brought to the attention of the Court. I do not, therefore, with great respect, feel bound to follow the decision in *Chowakkaran Keloth* v. *Karuvalote Parkum* (3).

Appeal dismissed.

M. C. P.

(3) 29 Ind. Cas. 559; 29 M. L. J 144.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 889 OF 1917.

January 4, 1918.

Present:—Mr. Justice Piggott.

DEBI—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 182—False information—Petition of resignation containing untrue statements—Offence.

The accused, a peon of the Court of Wards, had a quarrel with one S, brother of a *zilladar* employed by the Court of Wards, and afterwards submitted a petition of resignation to the Collector, the officer in charge of the Court of Wards, in which he gave a distorted version of the whole affair in order to forestall any proceedings which might be taken against him by S or his brother:

Held, (1) that the petition did not amount to a complaint; [p. 113, col. 2]

(2) that the accused was not guilty of an offence under section 182 of the Penal Code inasmuch as he never intended the Collector to use his powers to the injury or annoyance of the persons mentioned in the petition nor had he any knowledge that such a result was likely. [p. 113, col. 2; p. 114, col. 1.]

Criminal revision from an order of the Sessions Judge, Farrukhabad.

Mr. *Satya Chandra Mukerji*, for the Applicant.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—I take what seem to me the essential facts of this case from the judgment of the learned Sessions Judge. The applicant Debi, being at the time a peon in the service of the Court of Wards, had a quarrel with a youth of the name of Shiam Deo, brother of one Suraj Bali, *zilladar* in the service of the Court of Wards. The quarrel resulted in a scuffle and came to the notice of Mrs. Thomas, wife of the Special Manager locally employed by the Court of Wards. She interposed to stop the scuffle and later on Suraj Bali appears to have complained to the Special Manager, Mr. Thomas. Under these circumstances Debi addressed to the Collector, the officer in charge of the Court of Wards, a petition in which he requested to be allowed to resign his employment. In that petition he embodied his own version of his affray with Suraj Bali's brother; and I have no doubt that in so doing he departed from the truth and made statements defamatory to Mrs. Thomas. The Collector seems to have felt it incumbent on him to make some enquiry into the matter and to record the statements on oath of Debi and Shiam Deo. The Sessions Judge says that this was done by the Collector of the district in the exercise of his powers as District Magistrate, but this I hesitate to believe. The petition addressed to the Collector by Debi did not amount to a complaint and the Criminal offence therein referred to was not a cognisable one. At any rate, the result was that the Collector satisfied himself that the allegations made in Debi's petition against Mrs. Thomas were untrue and he ordered his prosecution for committing an offence punishable under section 182 of the Indian Penal Code.

I have to consider in revision whether the petition presented by Debi supplied the necessary ingredients for such an offence. I wish to make it quite clear that, if that petition had contained any allegations against any person employed as a subordinate under the orders of the Collector of the district as Manager of the Court of Wards, I should have been prepared to hold that the making of such allegations under the circumstances amounted to an offence under section 182 of the Indian Penal Code. The presumption would be that the person complaining to a superior officer of misconduct on the part of his subordinate intended that the superior officer in question should use his powers to the injury or annoyance of the person complained of, or at any rate knew that such a result was likely. I do not think, however, that anything in Debi's petition can be construed as an allegation either against Mr. Thomas, or against Suraj Bali. Reading this petition in connection with the facts as found by the Sessions Judge, it seems to me that Debi's object was, *firstly*, to get his resignation accepted at once, so that he might leave the neighbourhood, and *secondly*, to place on record a document containing a distorted version of what had actually happened, in order to discount beforehand any proceeding which might be instituted against him by Suraj Bali or his brother in a Criminal Court, or by Mr. Thomas, as Special Manager of the Court of Wards, for his dismissal from his employment. I certainly do not think that he intended that the Collector should use his powers as Manager of the Court of Wards so as to cause injury or annoyance to Mrs. Thomas

or to Suraj Bali's brother, nor am I prepared to infer that he knew it to be likely that such a result would follow. I do not think the conviction can be affirmed. I set aside the conviction and acquit Debi of the offence and direct that the fine, if paid, be refunded.

Conviction quashed.

BOMBAY HIGH COURT.

CRIMINAL APPEALS NOS. 394 AND 423 OF 1917.

November 8, 1917.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

BANDU EBRAHIM AND ANOTHER—ACCUSED —APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 343—Wrongful confinement—Prostitute kept in brothel house—Offence.

Accused No. 1 brought the complainant, his mistress, to Bombay and after living with her for a few days in a brothel house left her in charge of accused No. 2, the brothel-keeper, who kept guard over the complainant and allowed her to go out only on rare occasions under proper control. Accused No. 1 was aware of the conditions under which the complainant would have to live in the house:

Held, that both the accused were guilty of the offence of wrongful confinement. [p. 115, col. 2 p. 116, col. 1; p. 117, cols. 1 & 2.]

Criminal appeals from convictions and sentences passed by the Acting Fourth Presidency Magistrate, Bombay.

Mr. *Velinkar* (with him Mr. *D. W. Pilgamkar*), for the Appellants

Mr. *S. S. Patkar* (Government Pleader), for the Crown.

JUDGMENT.

SHAH, J.—We have heard an interesting and a careful argument from Mr. Velinkar on behalf of the appellants in this case. I have considered the evidence in the light of his arguments and the criticism to which the evidence has been subjected by him. The charge against the two accused is that from the 10th of October 1916 they wrongfully confined one Vithibai for three or more days and thereby committed an offence punishable under section 343 of the Indian Penal Code. The accused No. 2 is a brothel-keeper in Bombay and accused No. 1 is said to have supplied women to be used as prostitutes in this brothel from time to time. He brought Vithibai, the complainant in this case, to Bombay and kept her in the brothel of accused No. 2. The case for the prosecution is that this Vithibai like other women in the brothel was kept in confinement. Vithibai stayed on in the house kept by accused No. 2 from the 10th of October until May 1917, when an application was prepared on her behalf by the witness Abdul Gani and sent to the Commissioner of Police. Thereafter an enquiry was made and the present prosecution is the result of that investigation.

The evidence for the prosecution consists of the statements made by Vithibai and three other women who stayed in the house, namely, Chandrabai, Godibai and Sundri. Vithibai describes the manner in which she was kept in this house in these terms:—"I was always kept in confinement by the accused No. 2. The accused No. 1, Bandu, lived with me in the brothel of the accused No. 2 for eight days. During these eight days I was not free to go out anywhere. The brothel of the accused No. 2 is on the first floor of a house at Kamatipura. The entrance to the building was always kept closed. It used to be opened for the visitors but the servant in charge used to close it up. The servant used to be always at the door. Besides this servant a man and his woman used to keep guard over us and, therefore, we were not free to go out of the house." To the same effect is the evidence of Chandrabai. She says as follows:—"We four were kept like prisoners in the brothel. We were never allowed to go out. One Vitha and her paramour Dewoo used to keep watch over us." And Godibai deposes to the same effect: "They were constantly in a state of confinement. There is a woman named Vitha in the brothel and she has a paramour named Dewoo. Vitha and Dewoo watched the four girls." Sundri who was examined by the Court stayed in the brothel for a short time; she swears that accused No. 2 never allowed her to go down. This evidence, if believed, would clearly show that accused No. 2 wrongfully confined the complainant Vithibai.

The main argument on behalf of the defence has been that these women, who more or less voluntarily submitted themselves to prostitution, now exaggerate matters and that their evidence is not worthy of credence. In the first place the learned Trial Magistrate, who saw these witnesses, has in the main believed them. I have read the evidence of these witnesses, particularly the cross-examination of Vithibai; and after a careful consideration thereof I am unable to find any good reason to hold that in so far as they speak of wrongful confinement their evidence is not true. I am satisfied on the evidence of these four women that not only was Vithibai kept in a state of confinement, but that the women in this brothel house were kept in that state and that such confinement was a part of the life which the inmates of the house were constrained to live. It has been urged on behalf of the accused that Vithibai had abandoned her husband and lived for some time with accused No. 1 at Kolhapur as his mistress, that she accompanied him to Bombay also voluntarily and that she took to the life of prostitution voluntarily. I have carefully considered this argument; and having regard to the circumstances of the case I am not satisfied by any means that Vithibai did voluntarily submit herself to the life which she undoubtedly led in the house of accused No. 2. If the evidence as to wrongful confinement is true, it is not easy to believe that these women submitted themselves to prostitution voluntarily. However, I am willing to assume for the sake of argument in favour of the defence that Vithibai of her own accord accompanied accused No. 1 and commenced to stay in the house of accused No. 2 to lead the life of a prostitute. Even then the question is whether the wrongful confinement to which she is said to have been subjected is proved. I am satisfied that the evidence as to wrongful confinement is true. It is urged on behalf of the defence that now and then Vithibai and other women in the brothel were allowed to go out. It seems to me, however, that their going out casually does not make their confinement in the house any the less wrongful on that account. The mere fact that they could leave it on occasions, probably under proper control and largely according to the wishes of accused No. 2, goes to emphasize in my opinion the truthfulness of the evidence that generally they were kept confined in the house and were used for the purposes of prostitution under that restraint. Having regard to this view of the evidence in the case there can be no doubt about the guilt of accused No. 2.

It has been urged as regards accused No. 1 that he stayed in the house of accused No. 2 only for a short time after Vithibai was placed in her charge and that during that time Vithibai had no reason to complain. As stated by her in her cross-examination, for a week or fortnight after she was brought to Bombay she was all right and that after accused No. 1 left, accused No. 2 put her to prostitution. No doubt this statement so far as it goes is in favour of accused No. 1, but there is evidence in the case to show that this was not the first time that accused No. 1 supplied a woman to accused No. 2. There is a letter, Exhibit C in the case, which goes to show that accused No. 2 depended upon accused No. 1 for this purpose; and there is other evidence in the case to show that the accused No. 1 used to supply women to accused No. 2 for this immoral purpose. That being so, it is a fair and proper inference that he knew the conditions under which the women in this house had to live. The accused No. 1 himself was in the house for some days, certainly exceeding three days. The evidence also shows that the wrongful confinement alleged in respect of Vithibai was not restricted to that particular woman but that such confinement was an ordinary incident of life in this brothel. I am, therefore, unable to accept the argument on behalf of the defence that accused No. 1 could not have known the conditions under which Vithibai would have to live in the brothel. The evidence of Vithibai herself shows that during the time that accused No. 1 stayed in the house of accused No. 2, she was practically confined in the house and was not allowed to move out. It may be that she was not put to prostitution during that time, but the fact remains that accused No. 1 brought her to this house and left

her there practically in a helpless condition, knowing the kind of life which she would have to lead and the conditions under which she would have to live. There is also evidence in the case to show that certain moneys were borrowed from two Marwadis in the name of Vithibai, and I am satisfied on the evidence that though the borrowing was in the name of Vithibai, the money did not reach her or remain with her. Under the circumstances it is not an unreasonable inference that the sum of Rs. 100 which was borrowed in the name of Vithibai was given by accused No. 2 as a consideration to accused No. 1. But whatever the truth about this sum of Rs. 100 may be, the evidence makes it clear that accused No. 1 and accused No. 2 knew each other very well and that accused No. 1 was fully aware of the condition in which he left Vithibai in the house of accused No. 2. I am, therefore, satisfied that accused No. 1 was also instrumental in wrongfully confining Vithibai during his stay in the house of accused No. 2 and that he is equally guilty, though he may not be equally responsible for the subsequent wrongful confinement by accused No. 2. I am unable to accept his explanation that when he left Bombay for Kolhapur he offered to take Vithibai with him but that Vithibai of her own accord refused to leave the house of accused No. 2. I have no hesitation in accepting the evidence of Vithibai on this point in preference to the explanation offered by accused No. 1. The charge brought against the two accused is clearly established, and their convictions must be confirmed.

As regards the sentence it is undoubtedly a serious offence and not easy of detection. Further, the evidence shows that this system of wrongful confinement was not restricted only to the complainant but was generally adopted in respect of practically all the women who were kept in the house. On the other hand, it is to be remembered that Vithibai's antecedents are not in her favour and it is possible that she voluntarily accompanied accused No. 1 to Bombay and was perhaps not unwilling to be kept in the house of accused No. 2 for an immoral purpose. Having regard to all the circumstances of the case, I think that the sentence ought to be substantial and deterrent. I do not think, however, that there is any need for the maximum sentence allowed by the section. I think that the sentence of one year's rigorous imprisonment in the case of each of the accused would be sufficient to meet the ends of justice, and I would accordingly reduce the sentence to that period in the case of each of the appellants.

HEATON, J.—This case is of some considerable importance in itself as it raises a question that needs very careful consideration and so I will give in my own words my view of the salient features of the case.

It is admitted that the inmates of accused No. 2's brothel were subject to a certain degree of restraint. There was a barred door and the egress and ingress of persons was watched. The prostitutes were dependent on the brothel-keeper accused No. 2 for their food, clothes and ornaments. The money earned by the prostitutes was taken by the brothel keeper.

All these matters are either notorious and admitted or are clearly indicated by the evidence. The daily circumstances of life are, therefore, such that this normal restraint could very easily be tightened so as to become virtual imprisonment and be of such a nature as to amount to wrongful confinement within the meaning of the Indian Penal Code. The question before us is whether on the evidence recorded by him the Magistrate was rightly convinced that this was the case. I think he was. The evidence is specific enough and it is the evidence of persons with knowledge of what they spoke about. Not only did the principal person concerned, the complainant in the case, give evidence but three other prostitutes, inmates of this brothel, also deposed to the state of virtual imprisonment in which they lived.

It is perfectly true that prostitutes are not reputed to be scrupulously truthful persons and it is true also that the four witnesses I have mentioned were no doubt indignant with, and exasperated against, the brothel-keeper accused No. 2. These are matters to make us cautious in accepting their testimony. Nevertheless with this need for caution in my mind I accept their testimony as a substantially true

account of their ordinary conditions of life. I do not suppose, however, that they were never allowed to go out, that they were perpetually in confinement. That was probably not so, indeed, certain excursions into the outside world are admitted. But though not perpetual the normal condition of the complainant Vithibai was, I am satisfied, a condition of real confinement. There is nothing improbable or remarkable in this. As I have shown the normal restraint is easily tightened. In Vithibai's case, moreover, there is an undoubted circumstance which shows that she felt herself to be a helpless prisoner.

What released her from this brothel was a petition which was sent to the Commissioner of Police. The petition was got written by one Abdul Gani who had visited and conversed with Vithibai in the brothel. It relates that she is ill-treated and anxious to be released. That petition, unless it can otherwise be explained, does show conclusively that this woman felt herself to be in a hopeless condition, unable to escape, unable to reach freedom. And that could hardly be unless in fact she were under such restraint as to amount indubitably to wrongful confinement within the meaning of the Indian Penal Code. An explanation of this petition is offered on behalf of the accused, but I confess it seems to me that it has far less probability about it than the explanation which I have just recited. I believe myself that this petition was signed by the woman, or caused to be signed by her, because of a genuine desire to escape and a very real feeling that unaided she was unable to do so.

The case of accused No. 1 is, of course, different. But I think that as against him also the evidence establishes the charge. Taking into account the evidence and the circumstances which have been disclosed, I cannot but believe that accused No. 1 knew the state of affairs in accused No. 2's brothel. He knew that Vithibai would be subjected to the conditions of life there prevailing. I do not doubt that he did all that was on his part necessary to detain Vithibai in the brothel so long as he himself was there and I do not doubt that he left in the assurance that she would be, as indeed she was, detained there after he had left. On those facts I think that he took so essential and material a part in the confining of this girl that he is guilty of this offence as a principal.

I agree with my learned colleague that this is not one of those peculiarly atrocious cases which sometimes arise under the section of Indian Penal Code which we are now considering and I agree that the sentence of twelve months' imprisonment for each of these appellants is in the circumstances quite as heavy a sentence as justice and law in this case require.

Sentences reduced.

PUNJAB CHIEF COURT.

CRIMINAL CASE No. 908 OF 1916.

August 23, 1916*.

Present:—Mr. Justice Chevis.

EMPEROR THROUGH *Sardarni* ANUP KAUR—COMPLAINANT

versus

ABDUL AZIZ AND OTHERS—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 145, 146—Attachment of land—Decree of Civil Court, effect of—Punjab Land Revenue Act (XVII of 1887), s. 36, applicability of—Revision—Chief Court, interference by.

In proceedings under Chapter XII of the Criminal Procedure Code where the Magistrate attaches property, the attachment should continue only until a competent Court has determined the rights of the parties thereto, and the mere fact that an appeal from such determination is pending before a higher Court is no reason for the Magistrate continuing to keep the property in attachment. [p. 119, col. 1.]

Obiter dictum.—Section 36 of the Punjab Land Revenue Act is not properly applicable to cases in which property has been attached by a Magistrate under section 146 of the Criminal Procedure Code. [p. 119, col. 1.]

Where after the attachment of certain property by a Magistrate under section 146 of the Criminal Procedure Code, one of the parties is put in possession of it by a Revenue Officer acting under section 36 of the Punjab Land Revenue Act, the Chief Court, as a Criminal Court, cannot interfere with the Revenue Officer's order. [p. 119, col. 1.]

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*Referred to in 43 Ind. Cas. 216.—*Ed.*

EMPEROR *v.* ABDUL AZIZ.

Case reported on 8th May 1916 by the District Magistrate, Lahore.

FACTS of the case appear from the following report of the Sessions Judge:—

"Sardar Kahan Singh, the grandfather of complainant, Sardarni Anup Kaur, made a registered deed of gift of 1229 *ghomaos* 4 *kanals* and 4 *marlas* of land in favour of *Musammat* Bishen Kaur, his daughter-in-law and complainant's mother. Possession was given to the donee. It was stated in the deed of gift that the gifted property is the self-acquired property of the donor and after the death of the donee, her offspring is entitled to possession. The above said donee was forcibly dispossessed by the collaterals of the Sardar, and a mutation was effected in their favour by the Revenue Officers. The complainant then filed a suit for declaration of right to the effect that she was entitled to the land. This was decreed in her favour. At the time when the complainant was forcibly dispossessed proceedings under section 145 were taken and with the consent of both parties the property was made over to a Receiver. When the complainant asked the Court to put her in possession of the land after the decision of the Civil Court was announced, she was not put in possession on the ground that the opposite party had appealed to the Chief Court and the Revenue (Settlement) Authorities had made a mutation in the favour of the collaterals.

"The application by the complainant was rejected by Malik Sahib Khan, exercising the powers of a Magistrate of the 1st Class in the Lahore District, by order dated 6th December 1915.

GROUNDS.—"Certain landed property was in dispute between Sardarni Anup Kaur (wife of Sardar Tara Singh, and daughter of Sardarni Bishen Kaur, deceased) and her father Sardar Abdul Aziz. The land had been owned by Sardarni Bishen Kaur. Feelings ran high and in June 1913 proceedings were taken under section 145, Criminal Procedure Code, with the result that a Receiver was appointed with the consent of both parties till a decision had been arrived at by a Civil Court. In October 1915 the Subordinate Judge decided that Sardarni Anup Kaur had right and title to the land, but when the Receiver was asked to hand over the property it transpired that in December 1914, the Settlement Authorities had effected mutation in favour of Sardar Abdul Aziz and given him possession, though the Receiver was still actually in possession, when this happened.

"This, it is clear, was a most inequitable proceeding. But when the lady applied to the successor in office of the Magistrate who appointed the Receiver, the succeeding Magistrate refused to upset the arrangement made by the Settlement Authorities. I recommend that, if practicable, the Chief Court may order the Receiver to again be put in possession with a view to handing over the land to Anup Kaur.

"It is said that Abdul Aziz has appealed against the decision of the Subordinate Judge, but, be that as it may, his present possession is clearly inequitable."

Mr. *Nanak Chand*, for the Complainant.

The Hon'ble Mr. *Muhammad Shafi*, Mr. *Habib Ullah* and Sheikh *Ghulam Mohi-ud-Din*, for the Respondents.

JUDGMENT.—The land in dispute was the property of Sardar Kahan Singh, who left it by gift to his daughter-in-law *Musammat* Bishen Kaur. On the death of *Musammat* Bishen Kaur, a dispute arose between the present petitioner, who is the daughter of *Musammat* Bishen Kaur, and, therefore, granddaughter of Sardar Kahan Singh, and the respondents, who are the collaterals of Sardar Kahan Singh. Proceedings under Chapter XII of the Criminal Procedure Code were started and by agreement of the parties the Magistrate attached the property and made it over to a Receiver who held possession for some time. The present petitioner, having brought a Civil suit to establish her right to the property, has succeeded in obtaining a decree against which decree an appeal is pending in this Court. On the strength of her decree the petitioner has applied to the Magistrate to put her in possession of the property, but the Magistrate has refused saying that the result of the appeal to this Court should first be awaited. This order of the Magistrate by no

means meets with my approval. In such cases where the Magistrate attaches the property, the attachment should continue only until a competent Court has determined the rights of the parties thereto (see section 146, Criminal Procedure Code). And in the present case a competent Court has determined the petitioner's title and the mere fact that an appeal to this Court is pending is no good reason for the Magistrate continuing to keep the property in attachment

But a more serious obstacle stands in the way of the petitioner's claim to get possession. The property is, as a matter of fact, no longer in possession of the Receiver. Some time after the appointment of the Receiver the Revenue Authorities decided the mutation dispute in favour of the respondents, and the Revenue Officer, acting apparently under section 36 of the Land Revenue Act, directed that the respondents should be put in possession. Thereupon the respondents got possession and are still in possession (though I may here note that the land in question or at all events the greater part of it is, so I understand, in the possession of tenants who have been in physical possession throughout).

On behalf of the petitioner it is urged that the Magistrate having attached the land and put in a Receiver he, as the ministerial officer, is responsible to the petitioner for the return of the land. The fact, however, remains that it is the Revenue Officer who has put the respondents in possession and I fail to understand how I, as a Criminal Court, can interfere with the Revenue Officer's orders. Those orders are appealable to the Land Revenue Authorities. As far as I can see at present, section 36 of the Land Revenue Act is not properly applicable to cases in which property has been attached by a Magistrate. It seems, therefore, to me that the petitioner has an excellant case for applying to the Revenue Authorities either by way of appeal or by application for revision, as the case may be, to get the orders of the Revenue Officer revised and the possession of the land handed back to the Receiver. As soon as this has been done the petitioner can then make a fresh application to the Magistrate, who, unless the appeal lodged by the respondents to this Court has in the meantime been decided in their favour, should then put the petitioner in possession. Or possibly the Revenue Authorities on appeal may find their way to cutting matters short by themselves putting the petitioner in possession. As matters stand, however, I am at present unable to do anything for the petitioner and I, therefore, dismiss this application for revision.

Application rejected.

PATNA HIGH COURT.

CRIMINAL REVISION No. 3 OF 1918.

January 25, 1918.

Present:—Mr. Justice Roe.

SHEONANDAN MAHTON—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 202, 203—Postponement of process—Procedure—Irregularity not amounting to miscarriage of justice—Revision—High Court, power of.

If a Magistrate takes it upon himself to postpone the issue of process for compelling the attendance of the person complained against for any purpose at all, he is required either to enquire into the case himself or to direct a local investigation. The fact that a local investigation has already been made does not affect the proceedings necessary under section 202 of the Criminal Procedure Code when once process has been postponed. [p. 120, col. 2.]

If an irregularity in procedure has not resulted in a miscarriage of justice, the High Court will not make an order which can result only in harassment to the parties and waste of public time. In a case in which a perfunctory enquiry has been made by the Police and the report considered in a perfunctory fashion by the Magistrate, the High Court will interfere and insist upon the provisions of section 202 being strictly enforced. But where the enquiry has been carefully made and carefully considered, the Court will exercise its discretion and refuse to re-open the matter. [p. 120, col. 2.]

Criminal revision from an order of the District Judge, Patna.

Mr. *Bankim Chandra Dey*, for the Appellant.

Mr. *Bimala Charan Sinha*, for the Respondent.

JUDGMENT.—On the 21st October 1917 the complainant lodged an information at Chandi Police Station to the effect that he was taking his cattle to plough his *rabi* lands

when he saw the accused's cattle grazing in his paddy fields. He made an attempt to seize the cattle but was attacked by the accused and as a result of the attack received a severe injury from a *garasa*. His brother was also beaten with a *lathi*. The Sub-Inspector in charge of the *thana* took up the enquiry and on the 9th November submitted a long report, more in the nature of a judicial pronouncement than a statement of the result of a Police enquiry, to the effect that the complainant had no doubt been struck on the head and his brother beaten by two of the accused's party, but that the whole story of the cattle grazing was obviously false. The real quarrel arose from an altercation between the complainant and a woman of the accused's family. This report did not reach the Magistrate until the 15th of November. In the meantime, *i.e.*, on the 13th November the complainant had filed a complaint before the Magistrate and had been examined on oath and an order made: "Put up at Bihar on the 19th November with Police papers if any." On the 19th November the Police report was considered and the complaint dismissed, and an order recorded on the Police report: "Enter true section 324, Criminal Procedure Code, place of occurrence and real subject-matter of dispute changed." The complainant on the 24th November filed a petition before the Sessions Court asking for further enquiry into his complaint. The learned Judge on the 15th December rejected the application on the ground that in view of the Police report it would be idle to order a further enquiry. On the 3rd January an application was made to this Court in revision. It was admitted by the Criminal Bench of which I was a member.

In support of the Magistrate's proceedings a judgment has been shown to me in an unreported case decided by my learned brother Mr. Justice Jwala Prasad, in which it is held that under section 203 a Magistrate is entitled to dismiss a complaint if after examining the complainant there is in his judgment no sufficient ground for proceeding, and that there is nothing in section 203 requiring an enquiry under section 202. The basis of this decision is that section 202 deals only with the question of postponing the issue of process, whereas section 203 deals with the procedure to be adopted in dismissing the complaint. It has been argued before me that if a Magistrate takes it upon himself to postpone the issue of process for any purpose at all, he is required either to enquire into the case himself or to direct a local investigation. The fact that a local investigation had already been made would not affect the proceedings necessary under section 202, when once process has been postponed. I am myself of opinion that this argument is sound. But it is not in every case that this Court should interfere in revision. If an irregularity in procedure has not resulted in a miscarriage of justice, this Court will not make an order which can result only in harassment to the parties and waste of public time. In a case in which a perfunctory enquiry has been made by the Police and the report considered in a perfunctory fashion by the Magistrate, the Court will interfere and insist upon the provisions of section 202 being stringently enforced. But where the enquiry has been carefully made and as in this case carefully considered, this Court will exercise its discretion and refuse to re open the matter. I have read the Police report with care and am satisfied that there was no cattle grazing and that, therefore, the whole basis of the complaint was false. In this view of the matter I decline to order any further enquiry.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 26 OF 1917.

September 5, 1917.

Present:—Mr. Justice Bakewell and Mr. Justice Phillips.

RAPAKA VIYYANNA—RESPONDENT No. 1—APPELLANT

versus

PARAKALA BAJAMMA *alias* SESHAMMA—PETITIONER—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 195 (6), (7)—Sanction to prosecute granted by Subordinate Judge—Appeal, forum of—Madras Civil Courts Act (III Mad of 1873), ss 13, 27.

A District Court is the authority to which the Court of a Subordinate Judge is subordinate within the meaning of sub-section (6 of section 195 of the Criminal Procedure Code [p. 21, col. 2.]

That section only refers to Courts and makes no distinction between appellate and original jurisdiction. [p. 121, col. 2.]

Muthuswami Mudali v. *Veeni Chetti*, 30, M. 382; 17 M. L. J. 266; 2 M. L. T. 239; 6 Cr. L. J. 102 (F. B.), followed.

An appeal lies, therefore, from orders passed by Subordinate Judges under section 195 of the Criminal Procedure Code, whether in the exercise of original or appellate jurisdiction, to the District Court and not to the High Court. [p. 121, col. 2.]

Appeal against the order of the Court of the Subordinate Judge, Kistna at Ellore, in Appeal Petition No. 64 of 1916, preferred against that of the Court of the District Munsif, Tanuku, in Miscellaneous Petition No. 2104 of 1914, in Original Suit No. 778 of 1911.

FACTS.—The District Munsif of Tanuku passed an order under section 195 of the Criminal Procedure Code in Original Suit No. 778 of 1911. There was an appeal against the order to the Subordinate Judge's Court at Ellore, and from the order passed by the latter Court, the appellant preferred an appeal to the High Court.

Mr. *P. Narayanmoorthy*, for the Respondent, took the preliminary objection that the appeal to the High Court was not maintainable, and that, under section 195, Criminal Procedure Code, the Subordinate Judge's Court was subordinate to the District Court, and the appeal should, in the first instance, have been presented to the latter Court. Under section 195 (7) (*a*) the District Court is the Appellate Court of inferior jurisdiction, and an appeal from an order of the Subordinate Judge granting sanction for prosecution of a party or witness lies to the District Court.

Mr. *V. Ramadoss*, for the Appellant, argued that the order in question was an appellate order of the Subordinate Judge and the High Court was the only Court competent to entertain and hear the appeal.

Mr. *Narayanamoorthy*, in reply, urged that the order of the Subordinate Judge should itself be treated as an original order on an application to him for reversing the order of the Munsif.

JUDGMENT.—Under section 27 of the Civil Courts Act, the general control over all Civil Courts in any District is vested in the District Judge and the latter is, therefore, an authority to which the Court of a Subordinate Judge is subordinate within the meaning of the Criminal Procedure Code, section 195 (6). The High Court has general powers of superintendence over all Courts and is a similar authority. Sub-section (7) of that section deals with the case of several controlling authorities and provides that only the Court to which appeals ordinarily lie from the Court granting sanction shall exercise the power conferred by sub-section (6). Sub section 7 (*a*) also provides that where such appeals lie to more than one Court the Appellate Court of inferior jurisdiction shall be the authority to exercise this power.

Appeals lie from the Court of a Subordinate Judge in certain cases to the District Judge and in other cases to the High Court, and section 13 of the Civil Courts Act treats the latter class of cases as an exception to the general rule that appeals lie to the District Judge. Since appeals ordinarily lie to the District Court and the latter is of inferior jurisdiction to the High Court, the District Court is the authority to which the Court of the Subordinate Judge is subordinate within the meaning of sub-section (6).

It is contended by Mr. Ramadoss that in this case the Subordinate Judge passed the order in the exercise of his appellate jurisdiction and that appeals lie from orders so passed only to the High Court under section 100 of the Civil Procedure Code. Section 195 of the Criminal Procedure Code, however, only refers to Courts and makes no distinction between appellate and original jurisdiction, and in *Muthuswami Mudali* v. *Veeni Chetti* (1) it was held that an order of a Superior Court passed under section 195 was not merely an order confirming or reversing the order of a Subordinate Court, but was itself an order granting or refusing sanction. If it were treated as a mere appellate order, section 195 makes no provision for further applications and it is only by treating the order as an original order that any further application lies under section 195. We, therefore, think that this application should have been made to the District Court and accordingly dismiss it.

Application dismissed.

M.C.P.

(1) 30 M. 382; 17 M. L. J. 266; 2 M. T. 239; 6 Cr. L. J. 102 (F. B.).

PATNA HIGH COURT.

CRIMINAL REVISION No. 480 OF 1917.

January 9, 1918.

Present:—Mr. Justice Roe and Mr. Justice Jwala Prasad.

HALDHAR SINGH—2ND PARTY—PETITIONER

versus

BULAKI SINGH—1ST PARTY OPPOSITE—PARTY.

Criminal Procedure Code (Act V of 1898), s. 145, proceedings under—Arbitration—Award accepted by both parties—Revision—Objection to award, validity of.

Where after drawing up proceedings under section 145 of the Criminal Procedure Code the matter is, with the consent of the parties, referred to arbitration and the award is filed and accepted by both parties, it is not open to either of them to object to the award in revision.

Criminal revision from an order of the Magistrate, Patna.

Mr. *Seshir Kumar Mitter*, for the Petitioner.

Mr. *Nirsu Narain Sinha*, for the Opposite Party.

JUDGMENT.—The facts of this case are that on proceedings under section 145 having been drawn up and parties having appeared in Court, it was agreed that the matter should be referred to arbitration. On the submission of the award by the arbitrators, both sides accepted it and an order was made in accordance with the award which was in favour of the first party. The second party now comes to this Court on the basis of the decisions in the cases of *Hamidul Haq* v. *Ataet Hossain* (1) and *Hari Prasad Tiwari* v. *Sewak Das* (2). We may say at once that we are in entire agreement with the principles of those two decisions; but it is to be noted that in both these cases the parties were not disposed to accept the award when it arrived before the Magistrate. It was, therefore, if we may say so, correct to say that the Magistrate was still required in spite of the award to proceed in accordance with law as prescribed in section 145, clause (4). In the case before us the second party acquiesced in the award. It is recorded upon the

(1) 37 Ind. Cas. 513; 2 P. L. J. 86; 1 P. L. W. 81; 18 Cr. L. J. 145.

(2) 40 Ind. Cas. 333; 1 P. L. W. 748; (1917) Pat. 251; 18 Cr. L. J. 685.

award itself, "filed by the parties. Second party accepts the decision of the arbitrators." No evidence was offered by the second party. The Magistrate, therefore, proceeded in accordance with section 145, clause (4). In the absence of any written statement he perused the statement made by the arbitrators which had been handed to him by the parties jointly, he heard the parties and the only reason why he did not receive evidence may be said to be that there was no evidence to receive. Having heard the second party declare that he accepted the decision of the arbitrators, it was hardly open to him to go outside that statement and to insist upon the production of evidence which the second party had no desire to produce. We are, therefore, of opinion that there was nothing in the proceedings of the Court below to justify our interference.

The application is rejected.

Application rejected.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 1329 OF 1917.

January 4, 1918.

Present:—Mr. Justice Chitty and Mr. Justice Smither.

OHIDUDDIN CHOUDHURY AND OTHERS—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 107—Breach of peace apprehended in sub-division—Accused living in Sudder Division—Procedure—Irregularity—Overt acts—Apprehension of breach of peace.

In a case under section 107, Criminal Procedure Code, the breach of the peace apprehended being in a sub-division and the accused residing in the Sudder Division, the District Magistrate was moved for the commencement of the proceedings, but he, instead of drawing up the proceedings and sending them to the Sub-Divisional Magistrate for trial, merely said that he "sanctioned the proceedings" and sent the case to the Sub-Divisional Magistrate:

Held, that although the District Magistrate did not express his intention strictly in accordance with law, the irregularity in expression did not deprive the trying Magistrate of jurisdiction in the case and could not affect the merits of the trial in any way. [p. 123, col. 1.]

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Held, also, that though there were no actual overt acts on the part of the accused during the six months preceding the commencement of the proceedings still the proceedings were not bad as there was a likelihood that the accused might commit a breach of the peace or disturb the public tranquillity or do some wrongful act which might occasion a breach of the peace. [p. 123, col. 1.]

Babus *Manmatha Nath Mukerjee* and *Hemendra Kumar Das*, for the Petitioners.

Mr. *Orr* (Deputy Legal Remembrancer), for the Crown.

JUDGMENT.—In this case an objection is taken on behalf of the three accused who have been bound down under section 107, Criminal Procedure Code, that the proceedings before the Trying Magistrate were without jurisdiction. It appears that the breach of the peace apprehended was within the Sub-Division of Chandpur, whereas the accused reside in the Sudder Division. It was, necessary, therefore, under section 107 (2), Criminal Procedure Code, to go before the District Magistrate for commencement of the proceedings. The District Magistrate, instead of drawing up proceedings and sending them to the Sub-Divisional Magistrate, said that he 'sanctioned' proceedings and sent the case to the Sub-Divisional Magistrate. The intention of the District Magistrate is clear, but he expressed himself loosely and not strictly in accordance with the section. We do not think, however, that that would deprive the Trying Magistrate of jurisdiction in the case. It is a mere irregularity in expression which could not affect the merits of the trial in any way.

Then it is urged that the overt acts, if any, proved against the accused were sometime prior to the commencement of these proceedings in January 1917. That, however, is a matter which must be taken into consideration with all the circumstances in the case and it may well be that, though there were no actual overt acts on the part of the accused during the six months preceding the commencement of this trial, there might still be a likelihood that they would commit a breach of the peace or disturb the public tranquillity or do some wrongful act which might occasion a breach of the peace. We do not, therefore, feel disposed to interfere on this ground.

The last ground, which is taken by Ohiduddin Choudhury alone, is that the amount of the security demanded from him is excessive and that he will not be readily able to find it. He was ordered to enter into his own bond for Rs. 5,000 and to find one surety in a like sum. It is urged that it may be difficult for him to find a single surety in a sum of Rs. 5,000. He will, however, be able to find two sureties in Rs. 2,500 each. To this the Crown has no objection. We accordingly vary the order and direct that, besides his own bond of Rs. 5,000, Ohiduddin Choudhury do find two sureties in two sums of Rs. 2,500 each. In other respects the Rule is discharged.

Rule discharged.

PUNJAB CHIEF COURT.

June 18, 1917.

Present:—Mr. Justice Leslie Jones and Mr. Justice Broadway.

In the matter of M. NARINDRA SINGH,

B. A., LL. B., A PLEADER OF THE 2ND GRADE.

Legal Practitioners Act (XVIII of 1879), s. 13 (f)—Pleader asking Judicial Officer to decide case in favour of one of the parties—Grossly improper conduct.

A Legal Practitioner, who writes a letter to a Judicial Officer recommending that a case pending before that officer should be decided in favour of one of the parties, is guilty of grossly improper conduct within the meaning of section 13 (*f*) of the Legal Practitioners Act, and it is immaterial whether the party for whom the recommendation is made is on the right or wrong side, and whether the letter is written by the Pleader at the instigation of another or of his own accord. [p. 124, cols. 1 & 2.]

Dr. *Gokal Chand Narang*, for the Defence.

The Government Advocate, for the Prosecution.

JUDGMENT.—Mr. Narindra Singh, B.A., LL.B., a Pleader of the 2nd Grade, practising at Una in the District of Hoshiarpur, has been charged under section 13 (*f*) of the Legal Practitioners Act of 1879, as amended by Act IX of 1884, of being guilty of grossly improper conduct in that on the 8th March 1916 he wrote a letter to M. Jamiat Singh, Magistrate, 1st Class, Jullundur, in which

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he asked the Magistrate to dismiss a criminal case under section 420 of the Indian Penal Code, then pending against one Nur Mahomed, an *Arain* of Basti Danishmandan in the Jullundur District.

Narindra Singh has admitted writing the letter in question, and it has been further admitted by him that his action was wholly unjustifiable. It has, however, been argued on his behalf that there were extenuating circumstances, (*a*) in that the charge against Nur Mahomed was false, Nur Mahomed, though convicted by the Magistrate, having been ultimately acquitted by the Sessions Judge on appeal, and (*b*) that the letter was written at the instance of Mian Nihal Singh, the father of the Magistrate.

As regards (*a*), the character of the case against Nur Mahomed is, in our opinion, entirely immaterial. Further, Narindra Singh admits that he had no personal knowledge of the facts of that case and did not know whether it was true or false.

As regards (*b*), the contention that the letter was written at the instance of M. Nihal Singh, we have ourselves examined Narindra Singh at some length.

The allegation of Mian Jamiat Singh, the Magistrate, was that the letter had been written at the instigation of *Munshi* Wazir Din, Naib Tahsildar of Una, who is himself a resident of Basti Danishmandan. An enquiry was held by the Deputy Commissioner of Hoshiarpur into the conduct of *Munshi* Wazir Din regarding this and other matters, with the result that he was suspended; he was, however, afterwards given the benefit of the doubt on this point by the Commissioner of Jullundur. We do not intend to discuss the question whether or not it was Wazir Din who instigated the letter written by Narindra Singh. We are, however, completely confident that whoever instigated the writing of that letter it was not M. Nihal Singh, the father of the Magistrate. The statement of Narindra Singh on this point is hopelessly unconvincing, and we do not believe that there is any truth in it at all. It is a fact that Mian Nihal Singh was, at a later date, induced to write to his son on the subject of the case against Nur Mahomed, but it is beyond doubt that M. Nihal Singh knew nothing about the letter which is the subject of this charge, and had no acquaintance whatever with the facts of the case pending against Nur Mahomed.

We have, accordingly, no hesitation in finding Narindra Singh guilty of the grossly improper conduct with which he is charged and we are unable to see any extenuation; on the contrary we think that Narindra Singh has greatly aggravated his offence both by his plea that the letter was written at the instance of M. Nihal Singh, and by his adherence to that plea in the statement which he has made before us. He would have done much better to have admitted the truth frankly and to have thrown himself on the mercy of the Court.

It is apparent from the terms of the letter that the writer was fully aware that he was doing wrong. It is indeed impossible that he should not have been aware of that, and the offence is not one which it is possible for us to regard lightly.

In the case of a more senior man, of more experience, it might have been necessary to pass a sentence of dismissal. In the present case, however, we are not disposed to go to that length. We have taken into our consideration the facts that Narindra Singh is a young man who, though he practised for a short time previously as a Mukhtar only commenced practice as a Pleader in 1914, and that he is a member of a family of which some members have apparently rendered good service to Government, and we do not desire to inflict such a sentence as would, even though it is merely one of suspension, have the practical effect of precluding, by reason of its length, the offender from retrieving his character and from future practice as a Pleader.

The sentence which we are about to pass is, however, the least, in our opinion, which can be adequately inflicted in view of the gravity of Narindra Singh's misconduct.

The sentence of the Court is that the certificate of Narindra Singh, Pleader, 2nd Class, be suspended for a period of one year from the date of this order.

Pleader suspended.

KALKA PRASAD *v.* EMPEROR.

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 170 OF 1917.

December 22, 1917.

Present:—Mr. Justice Walsh.

KALKA PRASAD—APPLICANT

versus

EMPEROR—OPPOSITE-PARTY.

Legal Practitioners Act (XVIII of 1879), s. 36—Tout, person proclaimed as—Evidence of general repute, admissibility of—'General repute or otherwise,' meaning of—S. 36 (3), interpretation of—Criminal Procedure Code (Act V of 1898), s. 110.

The evidence which may legitimately be tendered in a case under section 36 of the Legal Practitioners Act, is of general repute, The phrase 'general repute' in the section clearly includes hearsay evidence, which may be tested when admissible by cross-examination just as any other evidence may be tested and challenged. The words 'or otherwise' are clearly intended to include all the ordinary modes of proof known to the law which might otherwise be said to have been impliedly excluded, such as personal observation, evidence of conduct, admissions in conversation and the like, proved by first hand testimony. [p. 125, col. 2; p. 126, col. 1.]

The recognised principles applicable in cases under section 110 of the Criminal Procedure Code apply to cases under section 36 of the Legal Practitioners Act. [p. 125, col. 2.]

Sub-section (3), section 36, of the Legal Practitioners Act means that the exhibition of the copy-list there referred to is necessary to constitute a man a proclaimed tout. A mere removal or failure, however, to keep the list exhibited in the Court of a District Judge has not the effect of cancelling the list altogether, inasmuch as it is to be exhibited in all Courts subordinate to the District Court and its mere removal in one Court out of many does not *per se* cancel the original order. [p. 127, col. 2.]

Civil revision from the order of the District and Sessions Judge, Meerut, dated the 4th May 1917.

Messrs. *A. P. Dube* and *S. C. Mookerji*, for the Applicant.

Mr. *A. E. Ryves*, for the Opposite Party.

JUDGMENT.—These are four applications in revision made by six persons, Abdul Rahim, Iftikhar Husain, Nisar Ahmad, Rup Chand, Abdul Karim and Kalka Prasad, against one order made by the District and Sessions Judge of Meerut on the 4th of May 1917 ordering the names of these persons with others to be posted and put on a list of touts under section 36 of the Legal Practitioners Act. Although the cases of the various applicants are not precisely similar, I propose to deal with all of them in one judgment.

The proceedings were undertaken by the District Judge at the instance of the Bar Association of Meerut, which had sat and considered the matter with great thoroughness and which supported the complaint which they made against the system of touting by a large number of persons with a considerable body of evidence.

The hearing of the case was spread over a considerable period and the learned Judge devoted great pains to the performance of a difficult but highly important task. I have to consider in the case of each applicant to this Court how far he is entitled to complain of the order made against him. Before doing so; however, it is necessary to make one or two general observations. While exercising due care to see that each case is fairly made out by the evidence called, and is established in a hearing according to law, it is desirable to emphasize the great importance of this legislation both to the general public and to the legal profession. The Judge has used language, none too strong, about the pests who perennially infest the Courts, though I doubt whether he is accurate in attributing their success to the technicalities of English Law rather than to those of Indian Legislation. But it is common knowledge that systematic touting is inseparable from a great deal of deception and imposition practised upon poor and ignorant litigants, whose interests are subordinated to those of the needy persons who prey upon their credulity. It is also inseparable from unprofessional conduct on the part of those who employ them. It is only by the vigilant efforts of bodies like the Meerut Bar Association and by strict enforcement of statutory safeguards, that the poorer members of the public and the respectable members of the profession can obtain protection.

The nature of the evidence which may legitimately be tendered in such a case does not really admit of much controversy. The learned Judge has held that the recognised principles applicable in cases under section 110 of the Code of Criminal Procedure, or the "evil livelihood" section, are applicable here. This is clearly right. Indeed it was admitted at the Bar by both sides in this case, which was well and temperately presented. The Statute says "by general reputation or otherwise." The former of those provisions clearly includes hearsay evidence which may be tested, when

admissible, by cross-examination just as other evidence may be tested and challenged. The latter provision "or otherwise" is clearly intended to include all the ordinary modes of proof known to the law which might otherwise be said to have been impliedly excluded, such as personal observation, evidence of conduct, admissions in conversation and the like, proved by first hand testimony. In this case almost every possible kind of evidence was given. I note that none of the alleged touts themselves gave evidence on oath, though I can find nothing in the statute or in the general law to prevent their doing so if they chose. The Code of Criminal Procedure is not applicable and there seems no reason in good sense or in the general law to disentitle them to be heard on oath. It is not to be supposed that direct evidence of a specific case of consideration passing between tout and employer can be forthcoming, except in the rarest cases. The case quoted to me from the Punjab Record is not in point. The only evidence in that case was a letter of introduction which did not suggest remuneration, and might have been perfectly harmless. But it is a reasonable and legitimate inference of fact that if a man is shown to spend the greater portion of his working hours in canvassing and introducing clients to members of the profession, he is not rendering gratuitous service such as a casual friend or acquaintance may do.

In my opinion revision may be entertained in such a case as this. It is "a case in which no appeal lies." I am aware that the contrary view has been expressed by some Judges of this Court in *Madho Ram, In the matter of the petition of* (1). The point taken was that the finding was against the weight of evidence. That is not a ground for revision and, therefore, it was not necessary for the Court to decide more. I do not think that it is necessary to invoke the aid of the superintendence section in the Government of India Act, 1915, though it seems to have been held in *Kedar Nath, In re* (2), that this was one way of questioning orders in this Court. There is no decision binding upon me and I prefer the view taken in *Bavu Sahib* v. *District Judge of Madura* (3), where the High Court interfered in revision in a similar case. The matter has been very fully discussed in *Hari Charan Sarkar* v. *District Judge of Dacca* (4), where it was held that the revisional jurisdiction could only be entertained in the furtherance of justice.

These being the general considerations applicable, I now come to the particular case of each applicant before me. In the cases of Rup Chand, Iftikhar Husain and Abdul Karim there was ample evidence to justify the order. They were constantly seen to be taking clients about, one of them had taken away one case from one of the witnesses, they had been seen to stop clients, hold them in conversation and apparently take charge of them. The evidence as to their general reputation was very strong. It was urged on behalf of Rup Chand, and I think one of the others, that the Judge had erred in refusing to send for files of cases which would have shown that they were legitimately engaged in litigation in which they or members of their family were interested. This might be so, but it would not negative or prove anything inconsistent with the other evidence called against them. The learned Judge was, no doubt, pressed for time to conclude enquiry before going on leave. He took the right view in assuming that these files would prove what they were alleged to show and that it was superfluous to prove them strictly, because they would not alter his view. I see no reason to interfere with the decision in the case of these three applicants and I, therefore, dismiss their applications.

The cases of Nisar Ahmad and Abdul Rahim stand upon a somewhat different footing. I have felt some doubt as to whether I ought to interfere even in their cases. I am not prepared to overrule the findings of the learned Judge on a question of fact of this kind even if I had the power to do so, and it may be that [

(1) 21 A. 181; A. W. N. (1899) 15; 9 Ind. Dec. (N. S.) 825.

(2) 1 Ind. Cas. 143; 31 A. 59; 6 A. L. J. 22; A. W. N. (1908) 279; 9 Cr. L. J. 59.

(3) 26 M. 596; 13 M. L. J. 272.

(4) 6 Ind. Cas. 327; 11 C. L. J. 513; 11 Cr. L. J. 320.

am stretching the powers of this Court in revision somewhat by interfering at all. I only do so because the evidence as recorded in the Judge's note in these two cases is not very strong, and the Judge being admittedly pressed for time and having given reasons in their cases which are not entirley satisfactory, it is just possible that they may have suffered injustice by being, so to speak, swept away in the general current against their co defendants. Abdur Rahim had been in the employment for one year of Mr. Abdul Bari, a Barrister against whom the complainants made no suggestion, but who had been temporarily absent from Meerut. Those who mentioned Abdur Rahim said very little about him. Muhammad Husain in cross-examination (see page 58 of the Judge's English notes) really spoke in his favour and mentioned that he had returned to Mr. Abdul Bari's employment. Gauri Prasad said little or nothing about him Ghasi Ram (see page 21 of the English notes) mistook him altogether for another.

As to Nisar Ahmad two Pleaders were called for the defence. One with over three years' experience spoke of him as being regularly in the employment, and constantly being seen in the company, of Mr. Zamirul-Islam, his employer. Mr. Abdullah Shah had nothing to suggest against the latter (see page 6). Bahal Singh and Ghasi Ram certainly gave positive evidence about his holding clients. Ramji Lal (pages 36-37) on the whole spoke in his favour. In these two cases the learned Judge's reason, namely, that the evidence did not warrant him in rejecting the considered complaint of the Bar Association, is not quite satisfactory. He must form an independent view of his own, though no doubt the opinion of the Bar Association on a matter of general reputation is entitled to very great weight. I am not deciding that his conclusion was wrong. It is a question of fact of which he is a better Judge than I. I merely hold that these two applicants have made out a case for further consideration and I remit their cases to the learned Judge for consideration and for such final order thereon as he, on hearing any further evidence on either side or of the men themselves, sees fit to make. He can, of course, take into account the evidence already given. And in the exercise of my discretion I leave it to the learned Judge to decide whether in the cases of these men he will suspend the operation of the list until he is able to take up the further enquiry. Further than this I decline to interfere,

The last case is the case of Kalka Prasad. This case has caused me some difficulty. The applicant was put upon a list in 1908 by the then District Judge of Meerut, the list which gave rise to the decision in *Kedar Nath, In re* (2). The District Judge reports that he has repeatedly applied to have his name removed as it was impeding his chances of obtaining work in Delhi, but the District Judge, of course, had no material on which to act. The applicant, undoubtedly, wrote to the Court on the 9th of February of this year and received what I may accept as an official reply that no list of touts was then affixed. According to the learned Judge it was also not affixed from the long vacation of 1916 and afterwards. It is clear that the list ought to be exhibited. I think sub-section 3 means that the exhibition of the copy list, there referred to, is necessary to constitute a man a proclaimed tout, though it is not necessary for me to decide that point in this case. But upon further consideration, I have come to the conclusion that the mere removal or failure to keep the list exhibited in the Court of the District Judge of Meerut had not the effect of cancelling the list altogether, inasmuch as it was by the order to be exhibited in all Courts subordinate to the District Court, and its mere removal in one Court out of many would not *per se* cancel the original order of 1908. The form, however, adopted by the learned Judge in this particular case has caused some embarrassment. He might have made a further list supplementary to the existing list of 1908 and merely ordered his officials to restore the list of 1908 to the place from which it should not have been removed. In that event the applicant would have had no grievance. As it is, he has the grievance, technical though it may be, that his name has been included in a new list consisting of the old list and the new names added thereto by the order of the 4th of May, and before that

was done he was given no opportunity of showing cause. In this case again I decline in my discretion to interfere. Though the applicant's name would not be properly upon the new list and ought to be removed, it is not improperly upon the old list. The section gives the Judge the power, from time to time, to alter and amend the list and under the circumstances, inasmuch as the present applicant is desirous of being heard and may be able to satisfy the learned Judge that if he had been given an opportunity of showing cause his name would not have been included in the list of the 4th of May, I think the learned Judge might well allow an application by Kalka Prasad, if he sees fit to make it, to have the list altered or amended by the removal of his name, on the ground that whatever may have been the case in 1908 he is no longer a tout. The result is, though feeling some doubt in the matter, that I dismiss the application of Kalka Prasad.

Application dismissed.

PUNJAB CHIEF COURT.

CRIMINAL FIRST APPEAL No. 1080 OF 1916.

February 10, 1917.

Present:—Mr Justice Chevis.

WADHAWA SINGH—INSOLVENT—APPELLANT

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Provincial Insolvency Act (III of 1907), s. 43 (2)—Omission to enter property in schedule—Offence.

Where an insolvent, not knowing or forgetting that an equity of redemption is a valuable asset, failed to show in his schedule of assets certain land belonging to him but mortgaged with possession to two of his scheduled creditors:

Held, that he was not guilty of an offence under section 43 (2) of the Provincial Insolvency Act.

First appeal from the order of the District Judge, Lyallpur, dated the 12th December 1916, convicting the appellant.

Lala *Hukam Chand*, for the Appellant.

Mr. *D. C. Ralli* for the Government Advocate, for the Respondent.

JUDGMENT.—The appellant has been convicted under section 43 (2) of Act III of 1907, and sentenced to four months' simple imprisonment.

The charge against him is that when applying to be made an insolvent he wilfully made false entries, not showing in his schedule of assets certain mortgaged land.

This land was mortgaged with possession to two of his creditors and I do not think it at all likely that the omission was wilful. Most of the land is *banjar*. The creditors knew of the land, and I do not see what appellant had to gain by not entering the land in the schedule. He could not have hoped to keep it from the knowledge of his creditors. Mr. Ralli suggests that he wanted to arrange matters with the mortgagee to the prejudice of the other creditors, but there is no evidence of any collusion between him and the mortgagees. I should say it is most probable that he knew simply that he had to put all his available property at the disposal of the Court, and did not enter the land in the schedule simply because it was not in his possession, not knowing or forgetting that the equity of redemption was a valuable asset.

I accept this appeal and reversing the conviction and sentence, I acquit the appellant and release him from his bail.

Appeal accepted.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 2674 OF 1914.

May 23, 1917.

Present:—Mr. Justice Scott-Smith and Mr. Justice Leslie Jones.

LAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

GAUHAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Alienation—Proprietary rights acquired by occupancy tenants, effect of.

Where the sons of a Government tenant who acquired occupancy rights in the lands granted to him acquire the full proprietary rights therein, the occupancy rights merge in the proprietary rights and determine absolutely, and the persons who have acquired the proprietary rights are entitled to alienate the lands with or without necessity.

First appeal from the decree of the Senior Subordinate Judge, Lyallpur, dated the 19th August 1914.

Mr. *Gokal Chand*, for the Appellants.

Mr. *Harcharn Das*, for the Respondents.

JUDGMENT.—Manda, grandfather of plaintiffs-appellants, was a Government tenant of the land in dispute and having fulfilled the necessary conditions acquired occupancy rights therein. He was succeeded by his sons, defendants Nos. 1 to 3, who in 1912 by a payment of Rs. 250 acquired full proprietary rights. On 12th May 1913 they sold the land for Rs. 7,150 to defendants Nos. 4 and 5.

The plaintiffs, contending that the land which was acquired by Manda was their ancestral property, sued for a declaration that the sale would not affect their reversionary rights after the death of the vendors.

The Subordinate Judge held that the occupancy rights acquired by Manda had merged in the proprietary rights acquired by the vendors and that, therefore, the land in suit was not the ancestral property of the plaintiffs.

He further held that if the occupancy rights be separated from the proprietary rights and held to be ancestral property of the plaintiffs, even then the suit must fail as it was proved that about Rs. 4,000 had been spent by the vendors on necessary objects. He accordingly dismissed the suit and plaintiffs appeal.

We have not been referred to any decision of this Court on all fours with the present case. The decision in Civil

Appeal No. 765 of 1913, dated the 29th January 1914 (pages 11 and 12 of the paper-book) is distinguishable, because in that case proprietary rights had not been acquired.

The decisions in Civil Appeal No. 1255 of 1906 of 28th November 1907 and in Civil Appeal No. 869 of 1908 of 1st March 1910 are also not in point, because the alienors had obtained yeoman's grants of the land alienated, and a yeoman grantee's status is quite different to that of an occupancy tenant.

It is clear that in the present case the alienors themselves acquired the proprietary rights in the land, and, they were, therefore, authorized to alienate them, whether with or without necessity. Had they not acquired proprietary rights, and had they remained mere occupancy tenants, then according to custom they could not have alienated the occupancy rights except for valid necessity, but the occupancy rights have merged in the proprietary rights and have absolutely determined, and it cannot be said that any portion of the proprietary rights is ancestral *qua* the plaintiffs.

The appeal fails and is dismissed with costs.

Appeal dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEALS NOS. 178 TO 182 OF 1917.

January 17, 1918.

Present:—Justice Sir Ali Imam, KT.

SHEO CHARAN DHOBI AND OTHERS—DEFENDANTS—APPELLANTS

versus

BANSI SINGH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Rent suit—Plaintiff's title negatived in previous suit—Subsequent suit, whether maintainable—Bengal Tenancy Act (VIII B. C. of 1885), s. 60, applicability of.

Plaintiff sued defendants for rent of certain lands as usufructuary mortgagee thereof. The defendants

SHEO CHARAN DHOBI *v.* BANSI SINGH.

pleaded that the plaintiff was not entitled to sue for rent inasmuch as his name had not been registered as mortgagee. The question of his title as mortgagee was also put in issue and was decided against him. He subsequently brought another suit for rent for the same period after registration of his name:

Held, (1) that the subsequent suit was barred by *res judicata*; [p. 132, col. 1.]

(2) that section 60 of the Bengal Tenancy Act had no application to the case, inasmuch as the defendants denied the mortgage in favour of the plaintiff altogether. [p. 132, col. 2.]

Appeal from a decision of the Additional District Judge, Gaya, dated the 16th November 1917.

Messrs. *Nandkaloya* and *Kailaspati*, for the Appellants.

Messrs. *Kulwant Sahay* and *Sivanandan Rai*, for the Respondents.

JUDGMENT.—In this case the plaintiff Bansi Singh sued Mohan Mahton and others for the recovery of rent for the years 1319, 1320, and 1321 basing his claim as usufructuary mortgagee of a share in Mouza Barwa Khurd. He made Acchutanand, a *malik* in the *mouza*, as one of the defendants, alleging him to be his mortgagor. The case went to trial and the evidence on behalf of the plaintiff was recorded and finished, when Acchutanand put in an application praying to be entered as a plaintiff in the case and by an order passed on the 26th April 1916, the learned Munsif directed Acchutanand's name to be entered as such. The case before the Munsif turned on the consideration as to whether the doctrine of *res judicata* applied to the present suit.

It appears that there was an earlier suit instituted by Bansi Singh as against the tenant-defendants in this case for rent of 1319 and 1320 on the very same ground of his having been a usufructuary mortgagee of a share of Acchutanand. In that suit, it appears from Exhibit 8, the judgment in that case, the claim was resisted by the defendants principally on two grounds, firstly, they challenged the right of Bansi Singh to recover rent on the ground that if he was a mortgagee he could not successfully sue for rent unless his claim was registered under the Land Registration Act. In the alternative they also pleaded payment.

The introductory part of the judgment, Exhibit 8, would go to show that in the pleadings of that case the question of the title of Bansi Singh as mortgagee of Acchutanand was not raised. The issues framed in that case show that one of them was in these words: "Is the plaintiff entitled to receive rent from the defendants?" It is evident that the language in which this issue was framed was wide enough to cover not only the *locus standi* of the plaintiff with reference to the registration of his name, but also his title as mortgagee of Acchutanand.

It has been urged before me on behalf of the respondents that the language of this issue, though framed in general terms, could not have been intended to cover the issue affecting the title of the plaintiff as the mortgagee of Acchutanand. On the face of the pleadings as set out in the introductory part of the judgment one would be disposed to take that view, but a glance at that part of the judgment which deals with this issue shows that the Court did not confine itself to the consideration of only that part of the plaintiffs' right to realize rent which referred to the matter of the registration of his name, on the contrary it appears from his judgment that the learned Munsif who tried that case went exhaustively into an examination of the title of the plaintiff resting on the allegation that he was a mortgagee of Acchutanand. After considering the various points relating to this matter of the alleged title of the plaintiff, the learned Munsif in that case concluded his observations on this particular issue in these words: "The *thicca*, therefore, confers no right on the plaintiff (defendant No. 2 in this case) and he cannot in any capacity realize rent from the tenants."

On a proper appreciation of this part of the judgment of the learned Munsif it is obvious that he did go into the question of the title of the plaintiff as mortgagee to sue the defendants and that he gave his decision on that point adverse to the plaintiff. I am, however, invited to consider this part of the judgment of the learned Munsif as a decision on a point which was not before him, as the question of the title of the plaintiff as mortgagee

was never raised in the pleadings. In other words, I am invited to hold that unless and until in the pleadings the issue is raised any decision given must be regarded as a decision that did not arise in the case. There would seem to be some force in this argument were it not that Order XIV, rule 3, of the Code of Civil Procedure clearly lays down that the Court may frame the issues from allegations made on oath by the parties or by any persons on their behalf or made by the Pleaders of such parties. I have endeavoured to find in this case whether the issue regarding the title of the plaintiff as mortgagee of Acchutanand was before the Court and whether the plaintiff had an opportunity to contest the defendants' denial of his title, as it appears it was denied in the judgment of the learned Munsif. With a view to this it was necessary to find from the judgment of the learned Munsif as to whether the consideration of this question of title was sprung upon the plaintiff, when the judgment was given. I find that this was not so, inasmuch as it is clearly laid down in the judgment of the learned Munsif that in the argument before him the plaintiff had full notice of the contention and that he had resisted the contention of the defendants on this point to the best of his ability. I have not the pleadings of that case before me, but taking the introductory part of the judgment to represent what the pleadings were it would appear that this part of the issue was framed, if not on the pleadings, at any rate on allegations of the two parties, namely, the plaintiff and the tenant-defendants in the case. In the circumstances I must hold that the issue on this point framed by the Munsif was an issue which covered the consideration of the question of the title of the plaintiff as mortgagee of Acchutanand. I also hold that the plaintiff was fully cognisant of the meaning of that issue. I also hold that in the argument on his behalf before the learned Munsif the point was gone into and that he contested the point to the best of his ability, and I also hold that after this contest the learned Munsif came to a clear decision adverse to the plaintiff.

These being the facts the question that arises now for consideration is as to whether the judgment in the present case given by the learned Subordinate Judge reversing the order of the Munsif of Aurangabad can be sustained.

The Munsif in this case held that the judgment in the previous case was *res judicata* and barred the claim set up by the plaintiff, Bansi Singh. In doing so I notice that the Munsif did not overlook the fact that the principal ground on which the former suit was resisted was the ground of non-registration of Bansi Singh's name. Having that point before his eyes the learned Munsif has carefully examined the question as to how far the decision of this particular issue in the former case would be a bar. In this connection it is also noticeable that the judgment given by the Munsif in the previous case was accepted by Bansi Singh *sub silentio*. If he realized after the judgment was given that the Munsif had in that case gone out of the scope of the case and delivered a judgment on a point which did not arise, it is expected that Bansi Singh should have taken some steps to remove such disability as might have been placed upon him by that judgment. Bansi Sing did not do so.

The question then is whether with reference to Bansi Singh and the tenant-defendants the doctrine of *res judicata* must be held to apply to this case. The learned Subordinate Judge in his judgment reversing the judgment of the Munsif in the present case says: "Now the law is that a finding can operate as *res judicata* only if it was 'directly and substantially in issue', was alleged by one party, and denied by another" and was raised and decided." "Now the question of validity or invalidity of the *thika* lease was never alleged or denied by any party in the previous suit it was never directly or even indirectly, or substantially in issue and it was raised by none, and the plaintiff had no opportunity of adducing evidence on the point or of meeting it."

For the reasons given above I am unable to agree with the view taken by the learned Subordinate Judge. As I have said, before this issue was raised or else it could not have been contested

one as is apparent from the judgment of the learned Munsif, and I am unable to agree with the learned Subordinate Judge in regarding the decision of the Munsif in the previous case on the question of title as mortgagee as a mere *obiter dictum*. I, therefore, hold that on this point Bansi Singh's case is concluded by the doctrine of *res judicata*.

The learned Vakils appearing on behalf of Bansi Singh and Acchutanand have pressed before me the consideration that should it be held that the question of Bansi Singh's title is concluded by *res judicata*, then I should in that case hold in favour of plaintiff No. 2 Acchutanand. He admittedly was no party to the first suit. I am unable to accept this suggestion, for I look upon Acchutanand in this case as a person who does not appear to have been a *bona fide* plaintiff in the suit. It was not, as I have said before, till after Bansi Singh's case had closed and Acchutanand occupied the position of a defendant that he applied to be made a plaintiff in the case. It seems to me that the contest really has been between Bansi Singh on the one side and the tenant-defendants on the other. I am, therefore, unable to accept this suggestion.

I have also been asked to consider the question of the rent of 1321. It is urged that if the previous judgment is a bar by the doctrine of *res judicata* to the relief claimed by Bansi Singh, then that should be limited to the rent of 1319 to 1320 only and that I should allow Bansi Singh relief in respect of the rent of 1321. I do not agree with this view for the reason that the question of *res judicata*, as I have said before, is not limited to the consideration of Bansi Singh's title to receive rent for 1319 and 1320, rather it goes to the very root of his claim inasmuch as his title as mortgagee of Acchutanand has been rejected by the Munsif in the previous case.

The next point that has been placed before me on behalf of Bansi Singh is that it is not open to the tenant-defendants in this case to plead in defence to the claim set up by Bansi Singh that not he but somebody else is entitled to receive rent. This is advanced on the ground that Bansi Singh has been registered under the Land Registration Act of 1876 and I am asked to hold that section 60 of the Bengal Tenancy Act is an absolute bar to any plea set up by the tenant-defendants denying the right of Bansi Singh to realize rent because of the plea that rent is due to a third person. I do not sympathise with this suggestion, inasmuch as I am unable to think that section 60 of the Bengal Tenancy Act was intended to be of the effect which the learned Vakil on behalf of Bansi Singh invites me to give to it. A reading of that section clearly points out to me that it relates to cases of those who are proprietors, managers or mortgagees of an estate. In the present case the defendants deny the position of Bansi Singh as a mortgagee. Admittedly he is not a manager or a proprietor; if his position as a mortgagee had been admitted I could understand the application of section 60 of the Bengal Tenancy Act, but that has been denied and that very title in the previous case has been held to be not in Bansi Singh. In the circumstances section 60 of the Bengal Tenancy Act has no application to the present case. The decree given in this case by the learned Subordinate Judge must, therefore, be vacated and the order passed by the Munsif dismissing the suit be confirmed. The appeals are allowed with costs.

Appeals allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1265 OF 1915.

May 1, 1917.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Napier.

CHUNDOORU LAKSHMANA SETTY—PLAINTIFF—APPELLANT

versus

DUGGISETTY CHENCHURAMAYYA AND OTHERS—DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), *s.* 17 (1) (b), (2) (xi)—*Relinquishment of portion of mortgage debt, agreement for—Registration—'Interest,' meaning of.*

An agreement by which a mortgagee agrees to relinquish a portion of the mortgage debt is one which 'purports to limit or extinguish interest' in immoveable property and requires registration. [p. 133, col. 2; p. 135, col. 2.]

CHUNDOORU LAKSHMANA SETTY *v.* DUGGISETTY CHENCHURAMAYYA.

Shidlingapa v. *Chenbasapa*, 4 B. 235; 5 Ind. Jur. 143; 2 Ind. Dec. (N. S.) 664, *Kailash Chandra Nath* v. *Sheikh Chhenu*, 30 Ind. Cas. 804; 42 C. 546, distinguished.

Per *Napier, J.*—A receipt for money paid in discharge of a mortgage debt is an instrument which operates to extinguish the mortgage within the meaning of section 17 (*b*) of the Registration Act. Extinction by receipt applies to the right, title and interest and thereby makes the amount covered by the security an 'interest' within the meaning of clause (*b*). Where the effect of the document is to 'limit', the same meaning must be applied to the word 'interest' and it must be read as applying to the amount of money secured. [p. 135, col. 1.]

Second appeal against the decree of the District Court of Nellore, in Appeal Suit No. 70 of 1913, preferred against the decree of the Court of the Additional District Munsif, Nellore, in Original Suit No. 87 of 1912, (Original Suit No. 625 of 1911 on the file of the Court of the Principal District Munsif, Nellore).

The Hon'ble the Advocate General and Mr. *K. Rajah Iyer*, for the Appellant.

Mr. *Krishnaswami Aiyar* for Mr. *T. V. Venkatarama Aiyar* and Mr. *A. Rajagopala Aiyar*, for the Respondents.

JUDGMENT.

ABDUR RAHIM, J.—The only question we have to deal with in this appeal is whether Exhibit V, which is in these words, 'Now if you will pay Rs. 3,000 towards the debt due by you on the two documents we shall receive the money and return the documents,' is admissible in evidence having regard to the provisions of section 17 of the Registration Act.

On the date of Exhibit V more than Rs. 3,000 was due, and the balance which the plaintiff agreed to relinquish under Exhibit V amounted to more than Rs. 100. We do not think, though the question under consideration has been argued very elaborately before us, that the matter admits of any real doubt. Section 17, clause (*b*), says that "other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of Rs. 100 and upwards, to or in immoveable property" must be registered. The exception which, it is argued, applies to Exhibit V is dealt with in clause (*xi*) of sub-section 2, which lays down that "any endorsement on a mortgage-deed acknowledging the payment of the whole or any part of the mortgage money, and any other receipt for payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage" need not be registered. It seems to me that an agreement by which the mortgagee agrees to relinquish a portion of the debt is one which "purports to limit or extinguish interest in immoveable property". It was argued by the learned Vakil for the respondent that, in considering what the interest is, we are not to take into consideration the amount of money payable under the mortgage, but only the security apart from the amount due. Such a construction seems to be opposed to the language of the section, for in clause (*b*) the Legislature says that an instrument has to be registered if the interest or right affected by it is of the value of Rs. 100 or upwards. Now, that would indicate that the interest of a mortgagee cannot be computed without taking into consideration the amount for which the property is made security. Then, clause 11 of sub-section 2, in exempting from the operation of that clause receipts purporting to extinguish the mortgage, tends to support the same view. Though clause (*c*) was also referred to in the course of the argument I do not think that it has any application to this case. It seems to me, also, that the question is concluded by authority. In *Abdullah Khan* v. *Basharat Hussain* (1) the question arose with reference to an agreement come to between the mortgagee and the mortgagor as to the mode in which the profits of the property which was usufructuarily mortgaged were to be dealt with, and their Lordships of the Privy Council held that a document like that was inadmissible by reason of the provisions of the Registration Act.

It is difficult to see how that case can be distinguished from the present case. I take it that the *rukka* which introduced a new mode of paying off the mortgage money was held to be inadmissible, on the ground that it was an instrument purporting to limit or extinguish interest in

(1) 17 Ind. Cas. 737; 35 A. 48; 17 C. W. N. 233; 13 M. L. T. 182; (1913) M. W. N. 131; 17 C. L. J. 312; 15 Bom. L. R. 432; 25 M. L. J. 91; 40 I. A. 31 (P. C.).

immoveable property' within the meaning of clause (*b*) of section 17. In *Durga Prasad Singh* v. *Rajendra Narayan Bagchi* (2) their Lordships affirmed the judgment of the Calcutta High Court reported as *Durga Prosad Singh* v. *Rajendra Narain Bagchi* (3), in which it was held that a subsequent unregistered agreement for reduction of rent payable under a registered lease was inadmissible for want of registration.

In *Tika Ram* v. *Deputy Commissioner of Bara Banki* (4) the agreement which was held by the Judicial Committee to be inadmissible was on the part of the mortgagee to pay a higher rate of interest. It is difficult to understand how agreements of the above character could be substantially distinguished from the agreement in question in this case.

The exact point was decided in *Gobardhan Sahi* v. *Jadunath Rai* (5), where it was held that an "agreement executed by a mortgagee after the date of the mortgage whereby he relinquished a certain part of the principal and all interest, past and future, in the mortgage in lieu of certain services rendered by the mortgagor to the mortgagee was a document which required registration to make it admissible in evidence, and it could not be said to be an acknowledgment of payment within the meaning of the exception contained in section 17, clause (*n*), of the Indian Registration Act, 1877, which corresponds to clause 11 of sub-section 2 of the present Act.

On the other hand, Mr. Krishnaswami Ayyar for the respondent referred us to two cases, one of which is reported as *Shidlingapa* v. *Chenbasapa* (6). That was a case under the old Registration Act. The question raised there was whether certain receipts for payment of money were inadmissible for want of registration; and it was held that they were not. I do not think that this decision really throws much light upon the uestion we have to deal with here. There is a decision, however, in *Kailash Chandra Nath* v. *Sheikh Chhenu* (7) which does support the respondents' contention. The learned Judges say, "we can find nothing in the law or in any authority which would require such waiver to be registered," the waiver alluded to being that of the right to compound interest. We do not find that any of the decisions to which we have referred are alluded to in the judgment or in the summary of the arguments at the Bar. Nor does it appear from the judgment that section 17, clause (*b*), of the Registration Act was discussed, and the learned Judges refer only to section 92 of the Evidence Act which requires that such an agreement must be in writing.

I hold, therefore, that Exhibit V is inadmissible in evidence.

The appeal will be allowed with costs and there will be the usual mortgage decree for the full amount due under Exhibit H. Time for payment six months from the date of the decree.

NAPIER, J.—I entirely agree with my learned brother that this matter is covered by authority of the Privy Council. I would only add a few words on the construction of the section of the Act itself. It would hardly be possible to find words of wider import than we have in clause (*b*) of section 17, sub-section 1, of the Registration Act "which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest." If words of that extremely wide character are not sufficient to cover a case where a mortgage debt is by agreement of parties largely reduced, it seems to me difficult to find words which will have that effect. Then there is this further reason, namely, that the language of the clause (*b*) actually imports into the consideration of the necessity for registration the question of the value of the interest, for it speaks of the right, title or interest *being of the value of Rs.* 100 *and upwards*, and it is a little difficult to see how, if no question with regard to the amount is, as argued by Mr. Krishnaswami Ayyar, a question "affecting any

(2) 21 Ind. Cas. 750; 41 C. 493; 18 C. W. N. 66; (1914) M. W. N. 1; 15 M. L. T. 68; 19 C. L. J. 95; 26 M. L. J. 25; 16 Bom. L. R. 42; 40 I. A. 223 (P. C.).

(3) 4 Ind. Cas. 713; 37 C. 293; 10 C. L. J. 570.

(4) 26 C. 707; 26 I. A. 97; 3 C. W. N. 573; 1 Bom L. R 692; 7 Sar. P. C. J. 520; 13 Ind. Dec. (N. S.) 1052 (P. C).

(5) 19 Ind. Cas. 449; 35 A 202; 11 A. L. J. 253.

(6) 4 B. 235; 5 Ind. Jur. 143; 2 Ind. Dec. (N. S.) 664.

(7) 30 Ind. Cas. 804; 42 C. 546.

interest", the amount can be a test for limiting the application of the section. There is, to my mind, further, a complete answer to the argument to be found in the amendment introduced by the Act of 1886 and now incorporated in the present Act of 1908. The language of clause (*b*), as I have pointed out, contains the words 'limit or extinguish' and turning to sub-section 2 which is the amendment, we find this, "Nothing in clause (*b*) applies to" . . . . . then clause (*xi*) "any endorsement on a mortgage-deed acknowledging the payment of the whole or any part of the mortgage money, and any other receipt for payment of money due under a mortgage when the receipt does not purport to *extinguish* the mortgage."

Now here clearly we have a case of "extinction;" so a receipt for the money must be an instrument which operates to extinguish within the language of clause (*b*). The same meaning must, of course, be attached to the words "right title and interest" when you are dealing with the question of limitation as when you are dealing with the question of extinction, and if extinction by receipt applies to the right, title and interest and thereby makes the amount covered by the security an 'interest' within the meaning of that clause, it necessarily follows, it seems to me, that where the effect of the document is to 'limit', you must also apply the same meaning to the word 'interest' and read it as applying to the amount of money secured. One result of holding that the words 'limit or extinguish' the interest do not apply to words that limit the amount of money to be recovered in future would be that, whereas under this proviso "any other receipt for payment of money due under a mortgage" is only exempted from registration when it does not purport to *extinguish* the mortgage, if this view was to be upheld, that limitation and extinction do not apply to the amount of money, it would be absolutely immaterial whether a receipt for money did or did not purport to extinguish the mortgage, because on that reading of clause (*b*) the document itself would not be necessarily registrable under clause (*b*), so that that portion of sub-section 2, clause (*xi*) which takes such receipts out of the operation of clause (*b*) and also that part which leaves them within it would neither of them have any operation on the reading suggested by Mr. Krishnaswamy Ayyar, as there would be no 'interest' to be extinguished and so the whole of clause (*xi*) would be meaningless.

I am, therefore, clear that clause (*b*) must be given the meaning which the cases show has been applied to it, with the result that this agreement falls within its mischief.

The appeal must, therefore, be allowed, with the result as stated in my learned brother's judgment.

Appeal allowed.

M. C. P.

PUNJAB CHIEF COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 2782 OF 1915.

December 6, 1917.

Present:—Mr. Justice Shah Din and Mr. Justice Scott-Smith.

DEBI SAHAI—DEFENDANT—APPELLANT

versus

TARA CHAND AND OTHERS—PLAINTIFFS—RESPONDENTS.

Partition—Decree for partition, effect of—Rights of co-sharers—Remand for fresh enquiry "so far as appellants are concerned"—Suit, whether can be dismissed in toto.

The property in suit belonged to three brothers one of whom *N.* alienated part of it and in 1903 another brother *T.* brought a suit against his co-sharers for his one-third share and joined the alienees also as defendants. This suit was decreed even against the alienees, two of whom preferred appeals which having been accepted, the case was remanded for fresh enquiry "so far as the appellants were concerned". After remand a final decree was passed by which the whole suit was dismissed. An application for execution of the first decree having been made, the widow of the third brother demanded her share of the property and sought relief against the alienees:

Held, (1) that the original decree stood as between the plaintiff and those defendants who did not appeal and could not be treated as having been set aside as a whole; [p. 137, col. 2.]

(2) that inasmuch as every co-sharer is entitled to obtain possession of the share allotted to him under a decree for partition, whether he be the plaintiff or the defendant, the widow of the third brother in this case being herself a defendant was entitled to take advantage of the decree passed in favour of the plaintiff and to claim a one-third share under it. [p. 137, col. 2.]

DEBI SAHAI *v.* TARA CHAND.

Wasdeo v. *Rup Chand*, 23 P. R. 1905; 13 P. L. R. 1905, followed.

Miscellaneous first appeal from the order of the Subordinate Judge, 1st Class, Delhi, dated the 23rd April 1915, directing that the property in possession of the appellant be divided.

ORDER.

LeRossignol, J.—(*March* 3, 1917.)—The property in dispute originally belonged to the three sons of Lallu Misr. Nathu Parshad, one of the sons, alienated much of the joint property and in 1903 Tara Chand, another son, brought a suit against his co-sharers for his one-third share of the whole property, and he joined the alienees as defendants, among them appellant.

The decree of July 1905 which is the subsisting decree as between the parties decreed Tara Chand's claim even against the alienees, and in execution *Musammat* Bhuri, widow of the third son of Lallu Misr, also demands partition of her share and is seeking relief against the alienees thus attempting to take advantage of the decree favouring Tara Chand.

The case has become very complicated from the circumstance that two of the alienee-defendants Nos. 9 and 11 preferred appeals to this Court against the District Judge's decree of 28th July 1905 and this Court accepting those appeals remanded the case for fresh enquiry *so far as the appellants were concerned*. The final decree passed after that remand is that of Lala Damodar Das of 29th October 1907 by which he, apparently oblivious of the fact that this Court had accepted the appeal and ordered a fresh inquiry regarding the claims of only two of the alienees, dismissed the whole suit.

That decree, however, as the decree shows, is a decree between the plaintiff Tara Chand and defendants Nos. 9 and 11 only.

The result is that concerning this property of Lallu Misr we have two conflicting decrees, one holding that the private partition of 1898 between Nathu Parshad the plaintiff and Bhola Nath, sons of Lallu Misr, was bad and that plaintiff was entitled to one-third of the whole estate of his father even against the alienees, the other holding that the partition was valid and that plaintiff had no right to a share in the bulk of what had been allotted in the partition of 1898 to Nathu Parshad.

His share under that partition consisted of—

No. in list:—

A.

1. Katra value Rs. 6,250 purchased by defendant No. 9.

2. Plot of land Idgah Kubna value Rs 600 purchased by defendent No. 11.

3. Nimwala house value Rs. 600 purchased by defendant No. 11.

13. Five plots Paharganj value Rs. 523 purchased by Shimbu Umrao Singh, who did not appeal.

Thus the practical effect of the appeal of defendants Nos. 9 and 11 was that the partition of 1898 was upheld.

This appeal is concerned with properties Nos. 4 and 7 which in the 1898 partition did fall to the share of Tara Chand and Bhola Nath, but which are now in the possession of Debi Sahai.

The points for decision are whether Debi Sahai who now holds properties Nos. 4 and 7 has a right to more than one-third in them and whether Bhuri the widow of Bhola Nath can claim her share in execution as against Debi Sahai.

Bhuri is now said to have contracted a *liaison* with Tara Chand. She never challenged the right of the alienees and I do not think that she can take advantage of Tara Chand's decree which comprised (1) a declaration, (2) an order for possession by partition.

The point is one on which I should like the opinion of another Judge. So I refer the case to a Division Bench. Early date.

Lala *Moti Sagar*, R. S., for the Appellant.

Dewan *Mehr Chand*, for the Respondents.

JUDGMENT.—The facts of the case out of which the present appeal arises appear sufficiently from the order of the lower Court and from that of LeRossignol, J., dated the 3rd March 1917, referring the case to a Division Bench, and from the judgment of Mr. Clifford, dated the 2nd November 1916, from whose decision Appeal No. 170 of 1917 has been lodged. The present judgment disposes of Civil Appeal No. 2782 of 1915 and Civil Appeal No. 170 of 1917.

The main point raised by Rai Moti Sagar in arguing Debi Sahai's Appeal No. 2782 of 1915 is that this Court by its order dated the 30th January 1907 in Civil Appeal No. 1178 of 1905 set aside the decree for partition in plaintiff's favour dated the 28th July

1905 as a whole and that consequently plaintiff's suit for partition was dismissed by Lala Damodar Das by his order of the 29th October 1907 and that, therefore, there is no subsisting decree in his favour which can be executed. This point does not appear to have been taken by Debi Sahai in the lower Court nor is it raised in the grounds of appeal, and in the circumstances we should not have been inclined to allow it to be raised in arguments before us, had it not been raised in Abdul Ahad's case from the decision of which Appeal No. 170 of 1917 has been instituted. Mr. Clifford by his order of the 2nd November 1916 has held that there is no subsisting decree in Tara Chand's favour which can be executed and, therefore, it it necessary for us to decide the point.

It is quite clear from the record that only those alienees who purchased in the insolvency proceedings the share in the family property which fell to Nathu Parshad in the partition of 1898 appealed to this Court. They were original defendants Nos. 9—11; the other defendants in the suit were apparently satisfied with the decree and did not appeal. The appellants in the appeal to this Court were obviously interested in maintaining the partition of 1898, for if it were maintained then their rights in the property bought by them would be preserved. They did appeal and their appeals were accepted, but this Court did not set aside the decree as a whole. It merely accepted the appeals before it and remanded the case to the lower Court for fresh inquiry so far as the various appellants were concerned. The case after remand came before Lala Damodar Das, who eventually held that the partition of 1898 was a fair one and dismissed the suit. The parties to that decree were those who had appealed to the Chief Court or their representatives-in-interest. It is, therefore, clear that the original decree of 1905 stood as between Tara Chand and those defendants who did not appeal. Under Order XLI, rule 4, Civil Procedure Code, the appellants might perhaps have appealed from the whole decree, but as a matter of fact they only appealed from so such of it as concerned that part of the property in which they were interested, and therefore the order of this Court only affected that part. We hold therefore, that there is no force in the objection that the decree of 1905 was set aside as a whole. On the contrary it is still subsisting and Mr. Clifford's order of the 2nd November 1916, therefore, cannot stand.

Musammat Bhuri was a defendant in the case and she like Tara Chand plaintiff is entitled to a one-third share. She has, therefore, been allotted a share in the partition proceedings. It was urged, however, that she could not take advantage of the decree which was passed in Tara Chand's favour. As regards this objection it is sufficient to refer to *Wasdeo* v. *Rup Chand* (1), in which it was laid down that "as a decree for partition is a joint declaration of the rights of all the co sharers interested in the property of which partition is sought, each co-sharer is entitled to obtain possession of the share allotted to him under the decree whether he may be the plaintiff or a defendant." *Musammat* Bhuri, therefore, is entitled to claim her share under the decree.

It was pointed out by Rai Moti Sagar that in 1905-06 the plaintiff mortgaged his one-third share in the whole property to Jangli Mal, though he knew at that time that the share allotted to Nathu Parshad in the partition of 1898 had been sold in insolvency proceedings. That is so, but we do not see how it affects the present dispute and Counsel was unable to show how it did so.

The next point urged is that the plaintiff was given a decree for one-third in every item of the joint property and that if certain items have disappeared he cannot have his share made up out of others as there was no provision of this sort in the decree. We are unable to accept this argument. If a partition decree be given for a share in a number of different joint properties, it is not necessary that a share in each and every item should be allotted to every co-sharer. It frequently happens that actual possession is given effect to and that co-sharers are allotted the property of which they have long been in possession, the shares of others being made up out of other items of the property. Thus when at the actual partition it is found that one co-sharer has alienated portions of the joint property, those portions are taken into consideration in the allotment of shares and the shares of other co-sharers are made up out of those portions of the property which have not been alienated. In

(1) 23 P. R. 1905, 13 P. L. R. 1905.

the present case the share of Nathu Parshad, which was allotted to him at the partition of 1898, has been sold to certain persons in the insolvency proceedings and there is a decree binding on the plaintiff that the property thus sold cannot be touched. He is, therefore, entitled to have his one-third share made up out of other property and so is *Musammat* Bhuri. What the lower Court, therefore, has done is to allot the plaintiff and *Musammat* Bhuri each a half share in the rest of the property. There can be no doubt that this order is a perfectly equitable one, for the enquiry made by Lala Damodar Das shows that the share which Nathu Parshad got at the partition of 1898 was probably considerably more than an actual one-third share in the whole property. One-third of the property has been transferred to Debi Sahai appellant by mortgage and sale and the plaintiff has no claim thereto. Out of the remaining two-thirds, half has been allotted to *Musammat* Bhuri and one sixth to Tara Chand plaintiff. In this way the latter's half share is made up. We see no reason to interfere with the lower Court's order in Debi Sahai's case and we dismiss his appeal with costs.

Appeal No. 170 of 1917 is accepted and the order of Mr. Clifford being set aside, the case is remanded under Order XLI, rule 23, Civil Procedure Code, to the District Judge of Delhi for re-decision of the appeal in accordance with law. Stamp in this Court will be refunded and other costs will be costs in the case.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

MISCELLANEOUS CIVIL APPEAL No. 69 OF 1916.

November 27, 1916.

Present:—Sir Charles Fox, KT., Chief Judge, and Mr. Justice Ormond.

MA SHAN MA BYU—APPELLANT

versus

MA CHIT SAW—RESPONDENT.

Probate and Administration Act (V of 1881), ss. 13, 23, 41—Object of Act—Letters of Administration, to whom may be granted—S. 41, applicability of.

The object of proceedings under the Probate and Administration Act is to determine only the question of representation of the deceased for the purpose of administering the estate, and not for the purpose of determining any question of inheritance. [p. 138, col. 2; p. 139, col. 1.]

Jagannath Prasad Gupta v. *Runjit Singh*, 25 C. 354 at p. 369, 13 Ind. Dec. (N. S.) 237, followed.

Any decision on questions such as adoption in administration proceedings is not final and would not operate as *res judicata* in any subsequent suit in which the party dissatisfied with the decision might raise the same question. It is not desirable, therefore, that such questions should be gone into in administration proceedings. [p. 139, col. 1.]

Section 13 of the Probate and Administration Act forbids Letters being granted to a minor. [p. 139, col. 1.]

Where a sister applied for Letters of Administration to the estate of her deceased brother who had no children of his body, and the father of the minor respondent acting as her guardian set up that she had been adopted by the deceased and his wife, and the District Judge finding that the adoption had taken place rejected the application:

Held, that *prima facie* the sister was a person under section 23 of the Probate and Administration Act to whom Letters might be granted, but that even if she might as the result of litigation turn out to have no right to any part of the estate in consequence of the minor having been adopted with right of inheritance, she was a person to whom Letters of Administration might be granted under section 41 of the Act. [p. 139, col. 1.]

Mr. *Ko Ko Gyi*, for the Appellant.

Mr. *Isral Khan*, for the Respondent.

JUDGMENT.—This case illustrates the inconvenience which may be caused by a District Judge not bearing in mind the object of proceedings under the Probate and Administration Act.

A sister applied for Letters of Administration to the estate of her deceased brother. He had no children of his body, but the father of the minor respondent acting as her guardian set up that she had been adopted by the appellant's brother and his wife. The District Judge framed one issue, "was Ma Chit Saw the adopted daughter of U Nge and Ma Saung?"

He found in the affirmative and rejected the application.

There were debts due to the deceased, the documents relating to which were apparently in the appellant's possession. As matters stand no one can sue to recover those debts and some of them may have become barred by limitation.

As stated in *Jagannath Prasad Gupta* v. *Runjit Singh* (1), the object of proceedings

(1) 25 C. 354 at p. 369; 13 Ind. Dec. (N. S.) 237.

under the Probate and Administration Act is to determine only the question of representation of the deceased for the purpose of administering the estate, and not for the purpose of determining any question of inheritance.

In *Ma Tok* v. *Ma Thi* (2) a Bench of this Court warned District Courts against entering into questions of adoption in proceedings under the Act, pointing out that the rulings up to that time were to the effect that any decision on such a question under the Act was not final and would not operate as *res judicata* in any subsequent suit in which the party dissatisfied with the decision might raise the same question.

The later case of *Lalit Mohan Das* v. *Radha Raman Saha* (3) is to the same effect.

A decision in such proceedings being practically ineffective, it is waste of time and labour to take evidence about the adoption.

The present case was a simple one. The applicant was admittedly a sister of the deceased, and nothing against her character was alleged.

Section 13 of the Act forbids Letters of Administration being granted to a minor, and there being no Will and consequently no residuary legatee, Letters could not have been granted to the guardian of the minor even if he had applied for them.

Prima facie the sister was a person under section 23 of Act to whom Letters might be granted, but even if she might as the result of litigation turn out to have no right to any part of the estate in consequence of the minor having been adopted with right of inheritance, she was a person to whom Letters of Administration might have been granted under section 41 of the Act.

The order of the District Judge is set aside. He will issue Letters to the applicant in the case on her filing the proper Court-fee and furnishing security. The respondent's guardian must pay the costs of the appellant on this appeal two gold *mohurs* allowed as Advocate's fee.

Appeal accepted.

(2) 3 Ind. Cas. 719; 5 L. B. R. 78.
(3) 10 Ind. Cas. 434; 15 C. W. N. 1021; 13 C. L. J. 547.

PUNJAB CHIEF COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 2880 OF 1916.

December 8, 1916.

Present:—Mr. Justice Shadi Lal.

Raj Kumar GIRJA NANDAN SINGH AND OTHERS—APPELLANTS

versus

NATIONAL INSURANCE AND BANKING COMPANY, LTD., IN LIQUIDATION—RESPONDENT.

Companies Act (VII of 1913), s. 246, r. 53, forms Nos. 34, 35—Liquidation—Call, order for · Procedure—Notice, form of.

Every application by the liquidators of a Company to the Court to make a call upon the contributories must be made by a petition, and notice in form No. 34 must be served four clear days before the date of the hearing on each contributory, unless the Judge directs that personal service be dispensed with and advertisement in form No. 35 be substituted therefor. Where the latter course is adopted, the contributories must be given sufficient time to appear and show cause against the order being made. [p. 140, col. 2; p. 141, col. 1.]

Miscellaneous first appeal from the order of the Adititonal Judge, Lahore, dated the 19th August 1916.

Mr. *Nihal Chand*, for the Appellant.

Mr. *Herbert*, for the Respondent.

JUDGMENT.—This appeal and the connected Appeals Nos. 3120 and 3121 of 1916 are against an order of the Additional Judge, Lahore, dated the 19th August 1916, making a general call of Rs. 65 per share on the contributories of the National Insurance and Banking Company, Limited, now being wound up subject to the supervision of the Court, and may be disposed of by one judgment. I have listened to elaborate arguments advanced by the learned Pleaders for the appellants and to the reply made by the learned Advocate for the liquidators, and reached the conclusion that the procedure adopted by the lower Court does not comply with the requirements of the law in essential particulars and that the order in question must be set aside.

It will be observed that a call of Rs. 35 per share was made before the commencement of the winding up, and that the proposed

call of Rs. 65, which represents the maximum amount remaining unpaid on the shares, would bring in a sum of six and a half lacs of rupees, if all the contributories meet the demand made upon them. The magnitude of the claim made by the liquidators and the fact that a very large number of persons resident in various Provinces of India are affected thereby emphasize the necessity of strict compliance with the provisions of the Indian Companies Act, VII of 1913, and the rules framed thereunder and of a careful scrutiny of the assets and the liabilities of the Company.

Now, what are the facts and circumstances of the present case? It appears that on the 4th of August 1916, the liquidators placed before the Additional Judge an affidavit with a brief schedule showing the estimated assets and liabilities, and that the latter thereupon signed a copy of a notice in form No. 34 calling upon the contributories to attend the Court on the 19th August, fixed for the hearing of "an application" on the part of the liquidators that a call to the extent of Rs. 65 per share should be made upon all the contributories of the Company. The liquidators did not, however, serve the notice on each contributory affected by such call as required by rule 53, but instead published it in some of the newspapers. Realising the mistake one of the liquidators wrote on the 12th of August a letter to the Judge asking him to sign an advertisement in form No. 35 and stating that he (liquidator) intended to publish it in certain newspapers, but not in the Punjab Gazette "inasmuch as the next issue would be published on the 18th instant and would thus not give the period of advertisement prescribed in rule 53." Upon this letter there is an order of the Court, dated 15th August 1916, in the following terms:—"Signed and returned." The liquidators then published a notice in form No. 35 by advertisement in newspapers, and the copies of the "Tribune" and the "Desh," dated the 15th August, containing the said advertisement have been placed upon the record to prove the publication of the notice. On the 19th August the order appealed against was passed requiring the contributories to pay Rs. 65 to the liquidators in respect of each share held by them.

Now, a perusal of rule 53 leaves no doubt whatever that every application to the Court to make a call upon the contributories must be made by a petition, and it is clear that no such petition was ever presented in this case. Mr. Herbert feeling this difficulty has asked me to regard the affidavit made by one of the liquidators as a petition, but I cannot accede to this suggestion. The document may supply the evidence necessary to establish a case for a call, but cannot take the place of the petition referred to in the rule. In fact the form prescribed for a general order for a call (*vide* form No. 36) clearly contemplates both an application and an affidavit; and the learned Judge himself refers in his order making the call not only to an affidavit but also to an application, though it is beyond doubt that no application in accordance with rule 53 was ever presented to him. Further, the law requires that every petition to the Court must bear a Court-fee stamp, unless an exemption can be claimed under the provisions of the Court Fees Act; and it is manifest that the affidavit in question does not satisfy this test.

There can be little doubt that the very foundation for making an order for a general call does not exist in this case and the superstructure must, therefore, fall to the ground. But the matter does not rest here. It is admitted by Mr. Herbert that rule 53 requires notice in form No. 34 to be served four clear days before the date of the hearing on each contributory, unless the Judge directs that the personal service be dispensed with and advertisement in form No. 35 be substituted therefor. Upon the record there is no indication of this direction and as observed already, the only thing we find in this connection is a typed notice in form No. 34 signed by the Judge on the 4th of August and the letter of the liquidator, dated 12th August, bearing the order "signed and returned" followed by the initials of the Presiding Officer of the Court. It may be that this was a fit case for substituted service, but there is nothing to show that the Court applied its mind to the matter and gave the direction dispensing with personal service.

The result is that personal service has not been effected, and that the notice in

form No. 35 prescribed for public notification was published for the first time in the "Tribune" and the "Desh" on the 15th August. It is alleged, and the allegation has not been challenged by the respondents, that a large number of the contributories reside in Burma, Bengal, Bihar and Orissa and other Provinces; and it was physically impossible for many of them to come to Lahore in response to the general notice and show cause on the 19th August. This fact has been strongly relied upon by the appellants, and has not been seriously contested by the respondents.

The appellants have also urged *inter alia* that the assets are sufficient to meet the liabilities; that the liquidators have made no real effort to realise either the arrears of calls (about Rs. 1,65,037) made before the winding up or the large sums of money due from the debtors of the Company; and that they have improperly spent money in defending P. L. Rajpal, the late Managing Director of the Company, and have incurred very heavy expenditure on establishment, etc. These and other matters to which my attention has been drawn have an important bearing upon the question whether a call should be made, and, if so, to what extent; and they will, no doubt, receive due consideration from the Additional Judge.

In view of the fact that the proceedings taken so far are wholly defective and that the contributories, who have not been afforded any opportunity to show cause against the grant of the liquidators' prayer, have been materially prejudiced, I am of opinion that the proper course to adopt is to quash the proceedings and refrain from making a pronouncement upon the merits of the matters relating to assets and liabilities.

For the aforesaid reasons I accept the appeal and quash the order of the lower Court making a call upon the contributories. This decision will not debar the liquidators from making a proper application to the Court for the exercise of its functions. The respondent must pay the costs incurred by the appellants in both the Courts.

Appeal accepted.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 272 OF 1912.

May 12, 1915.

Present:—Mr. Justice D. Chatterjee and Mr. Justice Chapman.

GURU PADA HALDAR—DECREE-HOLDER—APPELLANT

versus

TARIT BHUSAN ROY CHOWDHURY AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 182 (2)—Partition suit—Consent decree by High Court, directing valuation—Supplementary decree by trial Court, set aside—Execution—Limitation, commencement of.

In a partition suit the High Court on appeal passed a consent decree directing that the plaintiff do pay to the defendant the price to be ascertained by the Court of first instance within one month from the date of the valuation being made, and upon such payment being made the defendant do convey her share to the plaintiff. The case then went back to the Court of first instance, which made the valuation and passed a supplementary decree in the terms of the High Court decree. On revision the High Court held that no supplementary decree should have been passed and that the only decree in the case was the consent decree passed by the High Court. The defendant then applied for execution of the decree offering to execute the conveyance and agreeing to recover from the plaintiff as much as she could out of the valuation fixed by the Court of first instance:

Held, (1) that the decree was capable of execution; [p. 142, col. 1.]

(2) that limitation under Article 182 (2), Schedule I, of the Limitation Act began to run from the date on which the High Court set aside the supplementary decree passed by the Court of first instance. [p. 142, col. 2.]

Appeal against the order of the Subordinate Judge, at Alipur, of 24-Perganahs, dated the 25th of March 1912.

Dr. *Rash Behary Ghosh* and Babu *Monmotha Nath Mookerjee*, for the Appellant.

Mr. *S. R. Das*, Dr. *D. N. Mitter* and Babu *Baikuntha Nath Mitra*, for the Respondents.

JUDGMENT.—At the hearing of an appeal from an original decree in a partition suit the dispute between the parties was settled by the plaintiffs agreeing to purchase the share of the defendant No. 1, at a price to be fixed by the Court of first instance. By consent of parties a decree was made to the following effect:—"The plaintiffs do pay to the defendant No. 1 the price so ascertained within one month from the date of the valuation being made and upon such payment being made the defendant No. 1 do convey her share to the plaintiff." This order was made on the 4th of June 1903 in this Court. The case then went

back to the Subordinate Judge, who fixed the value at Rs. 26,290 and on the 12th of December 1905 passed a supplementary decree directing the plaintiffs to pay that amount and the defendant No. 1 to execute a conveyance. There was an appeal to this Court and it was held that no appeal lay as no supplementary decree should have been passed and that the only decree in the case was the decree of the High Court, dated the 4th of June 1903, which became capable of execution one month after the making of the valuation. This order was passed on the 14th of June 1909. The defendant No. 1 then applied for the execution of the decree on the 23rd of August 1911, and was opposed by the plaintiffs who contended, *first*, that the decree was incapable of execution, and *secondly*, that it was barred by limitation.

As regards the first point it was argued that when the plaintiff failed to make the payment, the defendant could not force them to take a conveyance as there was no such direction in the decree and if the full amount could not be realized from them the defendant could not be forced to execute a conveyance for any lesser amount that could be realized. They contended that the defendants must bring a fresh suit for the specific performance of the contract embodied in the consent decree. The contract having been embodied in the decree the defendant could perhaps have brought a suit on the basis of the decree. In such a suit he would have to offer to make the conveyance for the amount of value fixed, for which he could only obtain a money decree which he might or might not succeed in fully realizing. That would not improve his position in any degree or that of the respondents. As he offers to make a conveyance and takes the risk of realising what he can from the plaintiffs, we do not see the necessity of a fresh suit on the decree. The consent decree supplemented by the valuation is quite sufficient as a decree which would give the same remedy to the defendant without going through the circuit of a fresh suit. The learned Vakil who represented the defendant in the Court below did not give an undertaking to make the conveyance for whatever he could realize from the plaintiffs, but the learned Vakil who represents him here has intimated to us the readiness of his client to execute the conveyance and realize the value or whatever portion of it he could from the plaintiffs. We think this is a reasonable solution of the difficulty raised by the first objection.

As regards limitation it is contended that the application should have been made within 3 years from the 12th of January 1905, *i. e.*, one month after the valuation made by the supplementary decree. It is contended that as the High Court held that the decree appealed against ought not to have been passed and interfered by way of revision, Article 182, clause 2, of the First Schedule to the Limitation Act has no application, and reliance is placed on the decision of the Judicial Committee of the Privy Council in the case of *Batuk Nath* v. *Munni Dei* (1), There the appeal was filed but not prosecuted and by the rules of the Privy Council the appeal stood dismissed without any order to that effect. There was, therefore, no order of the Appellate Court to commence the counting of limitation from. Here there was an appeal as well as an order of the Appellate Court which terminated the existence of the appeal. In the case of *Akshoy Kumar Nundi* v. *Chunder Mohun Chathati* (2) it was held that the clause applied even if the appeal was rejected as filed out of time. In the case of *Wazir Mahton* v. *Lulit Sing* (3) it was held that the clause would apply even if the appeal was rejected as incompetent. In this case the appeal was filed by the plaintiffs mainly on the question of valuation and after contest was rejected as incompetent, but an order was made which superseded the decree of the Court below.

We think the application was within time.

In this view of the case we allow the appeal and direct the Court below to proceed with the execution upon the defendant executing a conveyance of his share as agreed and binding himself to be satisfied with whatever part of the value

(1) 23 Ind. Cas. 644; 18 C. W. N. 740; 12 A. L. J. 596; 19 C. L. J. 574; 16 Bom. L. R. 360; 27 M. L. J. 1; 16 M. L. T. 1; 36 A. 284; 1 L. W. 729; (1914) M. W. N. 437; 41 I. A. 104 (P. C.).

(2) 16 C. 250; 8 Ind. Dec. (N. S.) 165.

(3) 9 C. 100; 4 Ind. Dec. (N. S.) 718

he could realise by execution against the vendees. The appellant not having agreed to give any undertaking in the Court below we make no order as to costs in this appeal.

Appeal allowed.

PATNA HIGH COURT.
SECOND CIVIL APPEAL No. 1047 OF 1917.
August 14, 1917.
Present:—Mr. Justice Roe.
Mahanth MUKHLAL GIR—PLAINTIFF APPELLANT
versus
RAMDHEYAN RAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Court Fees Act (VII of 1887), s. 17, applicability of —Alternative reliefs—Court-fees payable.

Section 17 of the Court Fees Act applies to cases in which two different reliefs may be applied simultaneously to the wrong done to the plaintiff; it does not apply to cases where alternative reliefs are asked for. Where alternative reliefs are sought Court-fee must be paid on the relief which appears to be of the higher value.

FACTS.—Defendant No. 2 mortgaged his property to defendant No. 3 in 1898. On the basis of the mortgage a decree was obtained in 1902 which was assigned to the plaintiff in 1906. The plaintiff executed the decree, purchased the property himself and obtained delivery of possession. Subsequently he applied for registration of his name, but his application was opposed by defendant No. 1 on the allegation that he was in possession by virtue of an earlier mortgage of 1897 executed by the defendant No. 2 in his favour upon which he had obtained a decree, in execution whereof he had purchased the property for Rs. 90. The plaintiff's application for registration of his name was, therefore, refused. The plaintiff thereupon brought the present suit for possession of the property and for mesne profits after a declaration that he was the purchaser of the property and was thus entitled to it. In the alternative the plaintiff sued for redemption of the property on payment of Rs. 90. The suit was valued at Rs. 90 for purposes of jurisdiction but the Court-fee was paid only on ten times the Government Revenue. The plaintiff's

suit was dismissed by both the Courts below and he preferred a second appeal. The Stamp Reporter relying on *Musammat Fatima Begam* v. *Muhammad Zakaria* (1) and *Hashmat-un-Nissa Begam* v. *Muhammad Abdul Karim* (2) submitted that the two alternative reliefs claimed by the plaintiffs were two distinct subjects within the meaning of section 17 of the Court Fees Act, and that plaintiff, therefore, should have paid Court-fees on Rs. 90, the greater of the two reliefs claimed.

The Taxing Officer agreed with the Stamp Reporter but thinking it to be an important matter referred it to the Taxing Judge for order.

Mr. *Baikunth Nath Mitra*, for the Appellant.

JUDGMENT.—Section 17 applies to cases in which two different reliefs may be applied simultaneously to the wrong done to the plaintiff; it does not apply to cases in which alternative reliefs are asked for. Where alternative reliefs are sought a Court fee must be paid on the relief which appears to be of the higher value, in this case the amount for which the appellant seeks to redeem the property.

Order accordingly.

(1) 96 P. R. 1895.
(2) 29 A. 155; A. W. N. (1907) 4; 4 A. L. J. 127.

CALCUTTA HIGH COURT.
APPEAL FROM ORDER No. 213 OF 1916.
August 17, 1917.
Present:—Mr. Justice Fletcher and Mr. Justice N. R. Chatterjea.
JOY CHANDRA DAS—CLAIMANT No. 5—APPELLANT
versus
MAHAMED AMIR—INSOLVENT—RESPONDENT.

Insolvency proceedings—Court, power of, to hold summary proceedings for discovering properties of insolvent—Creditor, remedy of, where insolvent conceals property.

The Provincial Insolvency Act contains no section corresponding to section 27 of the Bankruptcy Act. An Insolvency Court has, therefore, no jurisdiction to hold summary proceedings for the purpose of summoning before it and examining persons in order to

discover whether any portion of the insolvent's property has been concealed by him by having vested it in a *benamdar* and thereupon directing the *benamdar* to transfer to the Official Receiver the property so vested in him,

When a scheduled creditor in an insolvency proceeding has a *prima facie* case that a portion of the insolvent's property has been concealed by the insolvent by having vested it in a *benamdar*, his remedy is to apply to the Court to direct the Official Receiver to institute a suit against the *benamdar* to recover the property in question on condition that the creditor so applying shall put the Official Receiver in funds and properly indemnify him against the costs in the suit. [p. 144, col. 2.]

Appeal against the order of the District Judge, Zillah Dacca, dated the 1st June 1916.

Babus *Sarat Chandra Basak* and *Bepin Chandra Bose*, for the Appellant.

Babu *Rupendra Lal Roy*, for the Respondent.

JUDGMENT.

FLETCHER, J.—This is an appeal by a scheduled creditor in an insolvency proceeding. The appeal is preferred against an order made by the learned District Judge in whose Court the insolvency proceedings are pending refusing to examine certain persons and the insolvent and his wife with reference to a portion of the property of the insolvent, which is alleged to have been concealed by the insolvent by having vested the same in the name of his wife. The case has been argued before us that the Court must have inherent jurisdiction to hold summary proceedings which section 27 of the Bankruptcy Act of 1883 authorizes—to which there is a corresponding section in the Presidency Towns Insolvency Act. We cannot assume that any such summary powers are given. The case must turn on the sections of the Act itself. The Provincial Insolvency Act contains no section corresponding to section 27 of the Bankruptcy Act. The Court has, therefore, as the learned Judge remarks, no jurisdiction to summon before it the wife of the insolvent and to examine her and direct her to transfer to the Official Receiver the property vested in her name, if it proves to be the property of the insolvent. The learned Judge's order that this is not a proper proceeding is right. But the course that he has suggested that the appellant should adopt is not accurate. His view is that the appellant can maintain a suit to recover the property. It is quite clear that he cannot. The usual order that is made in a case of this nature is that the creditor should apply to the Court to direct the Official Receiver to institute and continue a suit against the wife of the insolvent to recover the property in question, making it a condition precedent that the creditor so applying that the Official Receiver shall institute such a suit does put the Official Receiver in funds and properly indemnifies him against the costs in the suit. That is obviously the proper course for the appellant to take. He must apply to the learned District Judge, if he has a *prima facie* case, as the report of the Official Receiver suggests that there is a *prima facie* case, that the Official Receiver be directed to institute a suit against the wife of the insolvent on these terms namely, that the creditor should put the Official Receiver in funds and indemnify him against the costs of the suit, and if he fulfils those conditions, the Official Receiver should bring a suit to recover this property from the wife of the insolvent. The suggestion that this can be done in the course of the insolvency proceedings by a summary proceeding is not supported by the terms of the sections of the Provincial Insolvency Act. The present appeal, therefore, so far as the main question, is concerned, must stand dismissed. As I have already stated, the creditor is entitled to make that application to the learned Judge with reference to a suit being instituted by the Official Receiver for recovery of this property. As the respondent is an insolvent and is supposed not to have any money except the tools necessary to carry on his trade and the necessary bedding and clothing for himself and his family, although he is quite able to indulge in engaging eminent lawyers to conduct his case, we do not make any provision for the costs of this appeal.

CHATTERJEA, J.—I agree.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 346 OF 1917.

January 14, 1918.

Present:—Mr. Justice Richardson and Mr. Justice Beachcroft.

PRASANNA DEB RAIKAT—PLAINTIFF—APPELLANT

versus

DARPA NARAYAN SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O XLIII, r. 1 (m), O. XII, r. 6, O. XXIII, r. 3—Appeal from order rejecting petition asking for judgment and decree on defendants' admission, maintainability of.

Orders rejecting separate petitions filed by the plaintiff and the defendants, by which the plaintiff prays for judgment and decree against the defendants and the defendants state that they consent to a decree being made against them, are not appealable under the Civil Procedure Code, unless such petitions are presented and dealt with in the Court on the footing that they taken together amount to a lawful agreement or compromise within the meaning of rule 3 of Order XXIII, Civil Procedure Code. [p. 146, col. 1.]

Appeal against the order of the Subordinate Judge, Darjeeling, dated the 18th May 1917.

FACTS material to the report are as follows:—

The plaintiff instituted a suit for the ejectment of the defendants on the ground that their tenancy had been determined by a notice to quit. The defendants admitted the plaintiff's claim in full and consented to a decree being passed against them. In the meantime a Receiver was appointed to the estate of the defendants in a certain mortgage suit against them; that Receiver made an application to be made a party to the present suit and that application was subsequently granted. Before any order, however, had been passed by the Court on the application of the Receiver, two petitions were separately filed by the plaintiff and the defendants and the Court rejected both of them. The two petitions and the Court's order are given below:—

"The humble petition of the plaintiff above named ... ...

Showeth:—

(1). That according to admission of facts made by the defendants to-day, the petitioner is entitled to judgment in his favour at once.

(2). That the defendants have admitted in full the plaintiff's claim in the suit.

The petitioner prays for a judgment and decree in full with costs being passed in his favour to-day, the defendants having also consented to such judgment and decree practically. And the petitioner shall, as in duty bound, ever pray.

Darjeeling.

The 18th May 1917."

"The petition is filed after my order to put up written statement on date fixed. It appears to be a mere trick to get judgment before the application for the appointment of a Receiver in S. J. Suit No. 10 of 1916 has been heard. That application has been fixed for to-morrow and the defendant in this suit (Darpa Narayan) admits that he has received the application to show cause. Order II, rule 6, permits the Court a discretion and I am of opinion that it would not be just to pass judgment in this suit to-day.

L. Burrows, Sub-Judge, Darjeeling.
May 18th, 1917."

"The humble petition of the defendants Nos. 1 and 2 above named ... ...

Most respectfully showeth:—

(1). That according to the written statement filed to-day by the petitioners in the aforesaid suit, they consent to a decree being passed against them with costs to-day in favour of the plaintiff in this suit.

And your petitioners as in duty bound shall ever pray.

Darjeeling.

The 18th May 1917."

"This petition is filed on my ordering the written statement to be put up on the date fixed for its filing, *i.e.*, 21st May 1917. I do not intend to take any action on it for the reasons stated in my order on the similar petition filed by the plaintiff. I may add that to-morrow (19th May 1917) was deliberately fixed for the hearing of the application in S. J. Suit No. 10 of 1916 regarding a Receiver, in order that that application might be heard before this suit came on for hearing. It appears to me therefore that this attempt to obtain judgment to-day is an attempt to defeat the ends of justice.

L. Burrows, Sub-Judge, Darjeeling.
The 18th May 1917."

Babus *Dawarka Nath Chakrabuty* and *Upendralal Roy*, for the Appellant.

Mr. *S. N. Banerjee* and Babu *Tara Keshor Pal Chowdhury*, for the Respondents.

JUDGMENT.—This is an appeal from two orders of the Subordinate Judge of Darjeeling both dated the 18th May 1917. It appears that the suit in which these orders were made was instituted by the plaintiff, the appellant before us, on the 23rd April 1917, to eject the defendants from certain lands on the footing that having been tenants under the plaintiff their tenancy had been determined by a notice to quit. On the 18th May 1917 the defendants filed written statements by which they confessed judgment. It further appears that the same defendants were the mortgagor defendants in a suit previously instituted by the mortgagee on his mortgage in 1916. In that suit the question arose whether a Receiver of the property should be appointed, a question which was decided in the affirmative. In the present suit, an application was made on behalf of the Receiver on the 21st May 1917, that he should be added as a party defendant. Meanwhile on the 18th May 1917, the day on which the written statement was filed, the plaintiff and the defendants in this suit filed separate petitions by which the plaintiff prayed for judgment and decree against the defendants and the defendants stated that they consented to a decree being made against them. The present appeal is from the orders made on those petitions, and a preliminary objection is taken that these orders rejecting the petitions are not orders from which an appeal lies under the Code of Civil Procedure. It is suggested on behalf of the appellant that the petitions taken together amount to a lawful agreement or compromise within the meaning of rule 3 of Order XXIII. In the Court below, however, the matter does not appear to have been presented or dealt with on that basis. The learned Subordinate Judge in one of the orders in question referred to rule 6 of Order XII, and in our opinion the substance of the matter is merely this, that the learned Subordinate Judge was moved by the parties to make a decree on the footing that the defendants had admitted the facts stated in the plaint and confessed judgment. In that view of the matter no appeal lies and this appeal must be dismissed with costs. We assess the hearing fee at 2 gold *mohurs*. The costs of the paper-book prepared by the respondents will be borne by the appellant after being assessed by the office.

Appeal dismissed.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 399 OF 1915.

January 31, 1918.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Mullick.

KRISHNA LAL JHA—DEFENDANT —APPELLANT

versus

Babu NANDESHWAR JHA—PLAINTIFF —RESPONDENT.

Hindu Law—Mithila School—Partition—Grandmother, whether entitled to share—Stridhan—*Devolution of property assigned to grandmother on partition—Minor member, whether can express intention to separate—Institution of suit, whether sufficient indication of intention to separate—Patna High Court, decisions of Calcutta High Court, whether binding upon.*

According to the Mithila School of Hindu Law a paternal grandmother is entitled to a share on partition of the joint property between her son and grandson. Such share, however, is not her *stridhan* and on her death goes back to the estate from which it came. [p. 149, col. 2; p. 150, col. 1.]

The mother or grandmother's share on partition is taken in lieu of maintenance and on her death reverts to the general estate and does not cease to be ancestral property. [p. 150, col. 1.]

The institution of a suit for partition of joint family property is a sufficient indication to separate, so that the birth of a member subsequent to the institution of the suit does not affect the share which the plaintiff is entitled to receive. [p. 150, col. 1.]

A minor can either himself or through his guardian express an intention to do that which is clearly not against his own interest. The institution of a suit by a minor member of a joint Hindu family for partition of the family property may, therefore, amount to the indication of an intention to separate. [p. 151, col. 1.]

The decisions of the Calcutta High Court, which until recently exercised jurisdiction in the Province of Bihar and Orissa, although they do not prevent the Patna High Court from exercising an independent judgment, are entitled to the greatest respect and should not be departed from without cogent reasons. [p. 148, col. 1.]

Appeal from a decision of the District Judge, Darbhanga, dated the 4th August 1915.

Messrs. *Lakshmi Narain Singh* and *L. K. Jha*, for the Appellant.

Messrs. *Soroshi Charan Mittra* and *Murari Prashad*, for the Respondent.

JUDGMENT.—This is an appeal from a judgment of the District Judge of Darbhanga in a suit for partition brought by one of the members of a joint Hindu family governed by the Mithila School of Law. The family consisted of Krishna Lal Jha, his mother Girija Ojhain, his two wives Jaimangla Ojhain and Aina Ojhain and his son Nandeshwar Jha by his first wife Jaimangla. The suit was instituted on the 11th August 1913 by the son Nandeshwar Jha against his father and the other members of the family as defendants. At that time the plaintiff was a minor and in his plaint made certain charges against his father of mismanagement of the family property and preferential treatment of his step-mother to the detriment of himself and his mother Jaimangla. Since the institution of the suit and before the date of the judgment appealed from the plaintiff attained his majority and those charges then ceased to be material and were not dealt with in the judgment. The plaintiff claimed an eight-annas share in the family property. The defendants, the father, step-mother and grandmother of the plaintiff, opposed the partition and each claimed in the event of partition one-fifth part as their respective shares. The defendant the mother of the plaintiff supported the partition and claimed one-fourth part as her share. The plaintiff's father also claimed that several of the properties set out in the schedule were his self-acquired property and not part of the family estate. Judgment was delivered in the Court below on the 4th August 1915. The learned District Judge decided that each of the members of the family including the plaintiff's grandmother Girija was entitled to one-fifth share and that the properties claimed by Krishna Lal Jha the plaintiff's father were not his separate property but formed part of the family estate. From this decision the defendant Krishna Lal Jha presented an appeal on the 2nd September 1915, on the ground that the properties claimed by him were wrongly found to have been joint family property. The plaintiff entered a cross-appeal on the 10th November 1915, on the ground that his mother and step-mother were wrongly awarded a share and that his grandmother should have been allowed maintenance only and further that proper directions were not given either for ascertaining the properties which might be ascertained to be liable to partition before passing the final decree or for taking accounts.

Since the date of the judgment now under appeal two events have happened which complicate the issues between the parties and the final adjustment of their rights. On the 21st November 1915 a son was born to Aina Ojhain the plaintiff's step-mother and on the 5th August 1916 Girija Ojhain his grandmother died. It was agreed between the parties that these events should be taken into consideration by this Court and that the legal consequences resulting therefrom, in so far as they affect the shares which the parties are now entitled to, should be determined and given effect to in our judgment.

The points argued by the defendant were (1) that on the evidence the Judge wrongly decided that the properties claimed by him in schedule *kha* of his written statement were joint family property; (2) that he was entitled to succeed by inheritance to his dead mother's one-fifth share apportioned to her by the judgment, on the ground that it devolved on him as her *stridhan* property to which he was sole heir or as her deceased husband's property of which he was also heir; (3) that the after-born son of his wife Aina Ojhain was entitled to a share, he having been conceived before the partition took place though born afterwards.

The plaintiff contended (1) that his grandmother was not entitled to a share at all according to the Mithila Law on a partition between her son and grandson and that in any case the grandmother's share, if any, was not her *stridhan* but family property allotted to her by way of maintenance and after her death went back to the estate and was divisible in equal shares amongst the co-parceners; (2) that the after-born son was not entitled to a share, on the ground that the partition must be regarded as taking place not later than the 11th August 1913 when the plaint was filed

and the son was not born until more than two years later.

The point that his mother and step-mother were not entitled to share under the Mithila Law was not pressed.

As to the question of fact whether the disputed property belonged to the defendant, we have been referred to the evidence and the learned Judge's reasons for the findings at which he arrived and we have no hesitation in coming to the conclusion that those findings were amply justified. There were no separate accounts of the alleged self acquired property produced, nor is there any reliable evidence to show how the defendant could have himself acquired the funds necessary to purchase properties worth nearly Rs. 24,000 except by recourse to the ancestral property. On the other hand, there is evidence from which the inference is almost irresistible that the family funds were employed in paying for the properties claimed. This part of the appeal must, in our opinion, fail.

The next question is whether Girija Ojhain the grandmother of the plaintiff and mother of the defendant Krishna Lal Jha was entitled to a share on partition. Upon this point divergent views have been expressed by the High Courts of Calcutta and Allahabad, The decisions of the Calcutta High Court which until recently exercised jurisdiction in this Province, although they do not prevent this Court from exercising an independent judgment, are entitled to the greatest respect and should not be departed from without cogent reason. In *Badri Roy* v. *Bhugwat Narain Dobey* (1) it was decided by Mitter and Maclean, JJ., that in a partition between a father and son at the instance of the son both the mother of the latter and his paternal grandmother were entitled to share equally with him and his father. That was a case of a Mitakshara family and the Mitakshara together with the Vivada Ratnakara and the Vivada Chintamani is the leading authority recognised by the Mithila School. In the case of *Sheo Narain* v. *Janki Parshad* (2) a Full Bench of the Allahabad High Court on the other hand held that in a partition between a father and his sons the father's mother is not entitled to a share according to the Benares School of the Mitakshara Law. The latter case appears to be based mainly upon the consideration that whilst the author of the Mitakshara expressly recognises the right of the wife of the father to share equally with the sons when distribution is made during the lifetime of the father no mention is made of the father's mother, although after the father's death, if the sons separate, the mother is mentioned as entitled to an equal share with the sons. The passage relied on is found in section VIII of the Mitakshara and reads as follows in Colebrooke's translation:—"When a distribution is made during the life of the father the participation of his wives, equally with his sons, has been directed." (If he make the allotments equal his wives must be rendered partakers of like portions). The author now proceeds to declare their equal participation when the separation takes place after the demise of the father: "Of heirs dividing after the death of the father let the mother also take an equal share." It seems fairly clear that Vijnaneswara in the passage just referred to is considering the claim of the same person, *first*, as a wife of the head of a joint family when a partition takes place and *secondly*, as the widow of the late head of the family when the sons themselves are seeking separation, and in either case she is awarded a share equal to that of a son. In the case now under appeal if the defendant Krishna Lal Jha had had a brother alive and unseparated from him, it would appear that on a partition taking place between them their mother would be entitled to share with them the ancestral property, they being "the heirs dividing after the death of the father", in which case the Mitakshara provides "let the mother also take an equal share". The fact that either or each of the brothers had issue living would not, we apprehend, affect the rights of the mother although in such a case she might with equal accuracy be described as a grandmother concerning whom the Mitakshara is silent. How then ought her claim to be considered when the partition takes place, not between her

(1) 8 C. 649; 11 C. L. R. 186; 6 Ind. Jur. 636; 4 Ind Dec. (N.S.) 417.

(2) 16 Ind. Cas. 88; 9 A. L. J. 749; 34 A. 505 (F. B.).

sons as heirs of her deceased husband, but between her only son who is undoubtedly an heir and her grandson? On referring to the text of Yajnawalkaya it also appears that where the father in his lifetime makes an equal distribution among his sons, his wives to whom no *stridhan* has been allotted take like portions and where after his death the sons separate their mother takes a share equal to that of a son. Separation between a father and an only son does not appear to be contemplated by Yajnawalkaya nor is it in terms referred to in the text of the Mitakshara. It is not improbable that at the time when the Mitakshara was written a partition between a father and an only son at the instance of the latter was seldom if ever resorted to. However this may be, the propriety of such a proceeding could hardly be challenged at the present day. It is not easy to see on what principle of justice or equity the mother of an only son on a partition between him and his heirs should be excluded, when if two or more of her sons as co parceners were dividing the family property she would be entitled to share equally with them. It was argued as a reason for leaving her unprovided that her maintenance should properly fall after partition as a charge upon her son's share. This argument appears to us to have little to recommend it. Before partition he would have control of the whole of the family property from which to provide for his mother's maintenance. After partition that control would cease and his resources would be limited in proportion to the number of sharers with whom he divided. It could be urged with equal force that on partition between sons after the death of a father the mother should have no portion as her maintenance should fall on the eldest son or any other, but in such a case she is in fact allotted a full share equal to that of her sons. But as the Mitakshara makes no express provision for the case now under consideration, we should have some difficulty in coming to a decision not expressly authorised by the great commentator if the Mitakshara were the only authority recognised by the Mithila School. The Vivada Ratnakara and the Vivada Chintamani, which are authorities of at least equal weight amongst the followers of the Mithila School, both quote a text of Vyasa which says: "But the sonless wives of the father are pronounced equal sharers and all grandmothers also are pronounced equal to mother". The above quotation occurs in Chapter IV 31 of Golapchandra Sarkar's translation of the Vivada Ratnakara. In Tagore's translation of the Vivada Chintamani the passage is rendered: "Even childless wives of the father are pronounced equal sharers and so are all the paternal grandmothers who are declared equal to mothers". It has been argued before us that the quotation from Vyasa should be treated as applying only to cases of partition amongst brothers, as in the Vivada Ratnakara it occurs in a Chapter dealing with partition among brothers and in Vivada Chintamani it forms one of the paragraphs under the heading "grandsons of different fathers." We can see no reason for so restricting its application and we are supported in this view by the decision of the Calcutta High Court in the case of *Badri Roy* v. *Rhugwat Narain Dobey* (1) already referred to. If we are right in supposing that in Vijnaneswara's day a separation between a father and an only son was not an established practice, this may account for the fact that no mention is made in the Mitakshara of the father's mother in such a case. It would not, however, account for the case of a separated brother as the head of a new line of descent partitioning with his sons in the lifetime of his mother. But such a case *ex hypothesi* supposes an earlier separation between the present head of the family and his brothers, in which case his mother would have already been provided for by her share in the earlier partition. There is no evidence that the grandmother had been so provided for in the present case. This does not exhaust all possible cases where the question could arise, but other cases would necessarily be of rare occurrence. In any case the claim of the grandmother is distinctly recognised in two out of three of the leading authorities governing the Mithila School and although we have great hesitation in view of the Full Bench decision of the Allahabad High Court in arriving at a conclusion in favour of the grandmother's claim, we think that such a claim should be recognised

amongst those governed by the Mithila Law.

The next question for consideration is whether the share allotted to the plaintiff's grandmother on partition is to be regarded as her *stridhan* and if not, how it should now be dealt with. If it constitutes her *stridhan*, there being no daughter or other nearer heir in the line of inheritance applicable to such property, her son the defendant Krishna Lal Jha would succeed. In *Debi Mangal Prosad Singh* v. *Mahadeo Prasad Singh* (3) it was decided by the Judicial Committee that the share which the mother in a joint Hindu family governed by the Mitakshara Law obtains on partition of the family property is not her *stridhan* and on her death does not devolve upon her *stridhan* heirs but goes back to the estate from which it came. It is sufficient to say that in our opinion that case is not distinguishable from the present.

A further point was taken but not pressed that the defendant Krishna Lal Jha was entitled to the whole share of his deceased mother to the exclusion of the other co-sharers, on the ground that it reverted to him as the heir of her deceased husband and that a partition having been effected before the mother's death the other co-sharers ceased to have any interest in the property. We think the proper view is that the mother's share is taken in lieu of maintenance and on her death reverts to the general estate and does not cease to be ancestral property. Moreover in the present case the partition has not been finally carried out, the decree being a preliminary one, and the mother had had no separate enjoyment and no actual allotment had been made at the time of her death and if the property has not lost its character of ancestral property, it would remain subject to partition in the present proceedings. The case of *Sheo Dyal Tewaree* v. *Judoonath Tewaree* (4) would appear to support this view. In that case a partition took place between several co-sharers including an uncle and nephew and the mother of the former. The last named died pending an appeal in the partition suit and after the preliminary decree a claim was made to her share by a person alleging herself to be her devisee. Mitter, J., in delivering judgment said:—"It is quite clear that the share which ought to have been allowed to Golaba (the mother) was merged in the general estate.... But the mother or grandmother (as the case may be) can never be recognised as the owner of such a share until the division has been actually made. She has no pre-existing vested right in the estate except a right of maintenance." In our opinion the share of the defendant's mother Girija Ojhain should be divided amongst the co-sharers as part of the ancestral property.

The next point is whether the after-born son of Aina Ojhain is entitled to a share as against the plaintiff. This depends upon whether the date of the preliminary decree or the date of the institution of the suit must be taken as the time when the plaintiff's interest became severed from that of the other members of the family, for it is conceded that if the after-bron son was conceived before the partition he is entitled under the Mitakshara Law to a share in the estate. The case of *Girja Bai* v. *Sadashiv Dhundiraj* (5), which is the latest pronouncement of the Judicial Committee on this question, appears to conclude the matter in favour of the plaintiff. In that case the plaintiff's husband one Harihar, a member of a joint Mitakshara family, having previously expressed his intention to effect a separation instituted a suit for that purpose. The defendants did not dispute the right which he claimed to a third share in the family property, but after some attempts at a compromise and before any decree in the suit was made Harihar died and his widow applied for substitution as heir and legal representative of her deceased husband. The defendants claimed Harihar's share by right of survivorship on the ground that no partition had taken place at the date of his death. Mr. Ameer Ali in delivering their

(3) 14 Ind. Cas. 1000; 34 A. 234; 9 A. L. J. 263; 11 M. L. T. 217; 16 C. W. N. 409, (1912) M. W. N. 324; 14 Bom. L. R. 220; 15 C. L. J. 344; 22 M. L. J. 462; 39 I. A. 121 (P. C.).

(4) 9 W. R. 61.

(5) 37 Ind. Cas. 321; 20 C. W. N. 1085; 14 A. L. J. 822; 20 M. L. T. 78; 12 N. L. R 113, (1916) 2 M. W. N. 65; 18 Bom. L. R. 621; 4 L. W. 114; 24 C. L. J. 207; 31 M. L. J. 455; 43 C. 1031; 43 I. A. 151 (P. C.).

Lordships' judgment referred to the earlier case of *Suraj Narain* v. *Iqbal Narain* (6), where it was laid down that "a definite and unambiguous indication by one member of an intention to separate himself and to enjoy his share in severalty may amount to separation. But to have that effect the intention must be unequivocal and clearly expressed." He then proceeded: "It would probably be enough for the determination of this appeal to say that nothing could be more unequivocal or more clearly expressed than the conduct of Harihar in indicating his intention to separate himself and enjoy his share in severalty by the notice of the 1st October 1908 coupled with this suit and that these acts amounted to a separation with all its legal consequences." It is true that there was no denial in that case of the plaintiff's right, but it is clear from the rest of the judgment that the principle upon which their Lordships' decision was based was not confined to cases of agreement between the parties. A passage in the judgment of Dwarkanath Mitter, J., in *Musammat Deo Bunsee Kooer* v. *Dwarkanath* (7) in which that learned Judge says, "It is settled law that every member of a joint undivided family has an indefeasible right to demand a partition of his own share. The other members of the family must submit to it whether they like it or not", was referred to with approval. And in referring to the judgment of the Board in *Appovier* v. *Rama Subba Aiyan* (8), Mr. Ameer Ali says: "Some of the Courts in India have supposed Lord Westbury's expressions to imply that the severance of status can take place only by agreement. Their Lordships have no doubt that this is a mistaken view." We think that the plaintiff in the present case unequivocally and unmistakably manifested his intention to separate himself from the defendants at the latest on the 12th August 1913, the date when he instituted the suit. The other material dates are 4th August 1915 when the preliminary decree was made, and the 21st November 1915 when the son was born. It was contended that as the plaintiff was a minor when the suit was instituted, he was incapable of expressing any intention at that date, but no argument was adduced in support of this contention nor were any authorities referred to and we are unable to accede to the proposition that under Hindu Law a minor cannot express either himself or through his guardian an intention to do that which is clearly not against his own interest. We think, therefore, that the plaintiff's share in the family property should not be diminished by reason of the birth of another member of the family more than two years after the time when he must be deemed to have separated from the joint family.

The result of this decision will be that the plaintiff will receive one-fifth of the whole property in the first instance, the remaining four-fifths being distributed between the four defendants and the after-born son, the female members taking in lieu of maintenance only. These shares will be one-fifth of four-fifths or four-twenty-fifths of the whole. Girija Ojhain's share will then be distributed between the three male members of the family, including the after-born son who was born before the death of Girija. They will, therefore, each receive in addition to their original shares one-third of four-twenty-fifths, that is, four-seventy-fifths. This works out in the following proportions: The plaintiff nineteen-seventy-fifths, his father sixteen-seventy-fifths, the after-born son sixteen-seventy-fifths and the two surviving females twelve-seventy-fifths. The decree will direct partition of the property moveable and immoveable which belonged to the joint family at the date of the institution of the suit and of any property acquired subsequently by employment of the joint family funds and for that purpose the Commissioner will take the usual accounts.

As neither party in this case has succeeded in his appeal there will be no order as to costs.

Ordered accordingly.

(6) 18 Ind. Cas. 30; 40 I. A. 40; 17 C. W. N. 333; 13 M. L. T. 194; (1913) M. W. N. 183; 11 A. L. J. 172; 17 C. L. J. 288; 24 M. L. J. 345; 35 A. 80; 15 Bom. L. R. 456; 16 O. C. 129 (P. C.).

(7) 10 W. R. 273; 8 B. L. R. 363 *note*.

(8) 11 M. I. A. 75; 8 W. R. (P. C.) 1; 1 Suth. P. C. J. 657; 2 Sar. P. C. J. 218; 20 E. R. 30.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 176, 436, 574, 906 TO 914 AND 2403 TO 2410 OF 1913.

December 7, 1917.

Present:—Mr. Justice Teunon and Mr. Justice Newbould.

DHARANI KANTA LAHIRI CHAUDHURI AND OTHERS—APPELLANTS

versus

AMIR SHEIKH AND OTHERS —RESPONDENTS.

Bengal Tenancy Act (VIII B C. of 1885), ss. 105, 109A —Appeal against decision of Settlement Officer—Schedule directed to be prepared by judgment—Limitation, commencement of.

Where a Settlement Officer, in an order on an application for settlement of fair rents under section 105, Bengal Tenancy Act, arrived at certain findings and laid down certain principles, in accordance with which fair rents were to be ascertained and entered in a schedule directed to be prepared by the order:

Held, that limitation for preferring an appeal against the decision of the Settlement Officer began to run from the date on which the schedule was signed by the Settlement Officer, and not from the date on which the order was made, inasmuch as the schedule settling the rents was clearly a part of the decision and in fact read with the order was the decision. [p. 152, col. 2; p. 153, col. 1.]

Appeals against the decrees of the Special Judge of Mymensingh.

Babu *Jogesh Chandra Roy*, Babu *Bepin Behary Ghose* for Sir *Rash Behary Ghose* and Babus *Dwarka Nath Chackravarty*, *Sasanka Jiban Roy* and *Ramani Mohan Chatterjee*, for the Appellants.

Babu *Charu Chandra Bhattacharjee*, Dr. *Naresh Chandra Sen Gupta* and Babus *Mukunda Nath Roy* and *Madhub Gobinda Roy*, for the Respondents.

Babu *Biraj Mohun Majumdar*, for the Deputy Registrar.

JUDGMENT.

IN S. A. No. 176 OF 1913.

In this case it appears that the landlord appellant made an application under section 105 of the Bengal Tenancy Act for the settlement of fair rents in the case of each of a large number of tenants. The application came on for hearing before the Settlement Officer and judgment was delivered on the 23rd August 1912. At the close of the judgment the Settlement Officer says this :—" It is now necessary to prepare schedules on the basis of the findings and in accordance with the directions given above for all the tenancies of those cases except the tenancies regarding which the claim was withdrawn. Office to prepare the schedules and to put them up. The schedules will show the fair rent settled." In accordance with that order a schedule was prepared, approved and signed by the Settlement Officer on the 14th September 1912. Then followed the Civil Court vacation. On the re-opening day, the 12th November 1912, the plaintiff-landlord presented an appeal against the fair rents settled in the cases of 148 of the tenants whose tenancies were included in the schedule, to which reference has been made. The learned Special Judge dismissed that appeal on the ground that it was barred by limitation.

It is not contested before us in this appeal that if time is to be taken as running from the 23rd August 1912, the date of the judgment, the appeal to the District Judge was barred ; but it is contended that in taking that date as the starting point and not the 14th September 1912, the date on which the schedules were prepared and signed, the learned Judge has fallen into error. On behalf of the respondents it is not suggested that if 14th September be taken the appeal to the District Judge is within time. Thus the one question for our determination is whether time should be taken as running from the 23rd of August, the date of the judgment, or from the 14th of September, the date of the schedule. The learned District Judge says that the 23rd August, must be taken because by section 109A of the Act the appeal lies not against a decree or a schedule but against a decision of the Revenue Officer and the schedule in his opinion forms no part of that decision.

Now when we turn to section 105 we find that what the Revenue Officer is required to do is to settle fair rent in respect of the land held by the tenant, that is to say, by each tenant. No doubt in his judgment of the 23rd August 1912 the Revenue Officer did arrive at certain findings and did lay down certain principles in accordance with which fair rents were to be ascertained, but it is clear that until the fair rent to be thus calculated had been ascertained, there was in fact no decision in the case of any one of the tenants and no settlement of the rent which he had to pay. The schedule settling the rents is clearly a part of the decision

and in fact read with the judgment is the decision.

If any doubt can possibly remain on this point, it would be removed by a reference to the statutory rules framed by the Bengal Government under the provisions of sections 39, 61, 134 and 189 of the Bengal Tenancy Act. Rule 63 of those rules to be found in part III, which deals with the settlement of fair rents, says in its sub-rule (9): "it shall not be necessary for the Revenue Officer to draw up a separate decree with regard to fair rent settled but the entry in his decision or schedule attached thereto with regard to the fair rent settled shall be held to be a decree." That rule reproduces rule 62 (9) of Chapter VI of the Rules framed by the Government of Eastern Bengal and Assam under the provisions of the sections already referred to on the 24th August 1909, which in the years 1912 to 1914 were in force in the District of Mymensingh.

When we next turn to Schedule III of the Bengal Tenancy Act, Part II, we find that for appeals to the Court of the District Judge or Special Judge the period of limitation is 30 days from the decree or order under the Act. From this also it would appear that the schedule is in effect the decree.

Whether, however, the schedule be or be not a decree, it is clear that without the schedule the decision remains incomplete and uncertain in the case of each tenant and the schedule is thus an essential part of the decision.

For these reasons we set aside the order of the Special Judge in this case and return the appeal to be presented to him in order that it may be heard and disposed of on the merits in accordance with law.

IN S. A. NOS. 436, 574 AND 2403 TO 2410 OF 1913.

These appeals are governed by the judgment just delivered in S. A. No. 176 of 1913. The order of the Special Judge in each of those cases is set aside and the appeals returned to him in order that they may be heard and disposed of on the merits in accordance with law.

IN S. A. NO. 906 TO 914 OF 1913.

These appeals are also governed by the judgment just delivered in S. A. No. 176 of 1913. True it is that the dates are somewhat different, but when due allowance is made for the time requisite for taking copies and for the days in which the Courts were closed those appeals were well within time, taking time as running from the date on which the schedules were prepared and signed. The order of the Special Judge in each of these cases is set aside and the appeals returned to him in order that they may be heard and determined on the merits.

The applications connected with these Appeals Nos. 176, 436, 574, 2403 to 2410 and 906 to 914 of 1913 are all rejected. Costs in all the above appeals will abide the result. We assess the hearing fee in each of the appeals valued at sums not exceeding Rs. 200 at one gold *mohur* and in each of the other appeals at two gold *mohurs*.

Orders set aside; Cases remanded.

PATNA HIGH COURT.

LETTERS PATENT APPEAL NO. 13 OF 1916.

January 29, 1918.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Mullick.

Shaikh MOHAMAD HANIF—APPELLANT

versus

MOORAT MAHTON AND ANOTHER—RESPONDENTS.

Zarpeshgi ijara *construction of—Mortgagor and mortgagee—Interest and rent.*

No general rule can be laid down as to the effect of a *zarpeshgi* transaction. Every case must depend upon its own facts. [p. 145, col 2.]

Plaintiff executed a *zarpeshgi ijara* in favour of defendant, which stipulated that in the event of the plaintiff's failure to re-pay the *zarpeshgi* money the defendant would be entitled to retain the land till re-payment. It further stipulated that out of the annual consolidated *jama* of the property transferred to the possession of the defendant, estimated at Rs. 112-8-0, the defendant was entitled to retain a certain sum on account of interest, revenue, cesses and irrigation charges and that the balance should be paid to the plaintiff:

Held, that the intention of the parties was to create the relationship of mortgagor and mortgagee, and that the amount advanced to the plaintiff could not be viewed as an advance of the rent fixed upon the land. [p. 155, col. 1.]

Appeal from a decision of Mr. Justice Roe, dated the 22nd March 1916.

Mr. *Muhamad Ishaq*, for the Appellant,

Mr. *Kulwant Sahai*, for the Respondents.

JUDGMENT.—The suit out of which this appeal arises was instituted on the 22nd September 1910. The plaintiff is the proprietor of Mouza Chak Amanulla and on the 14th March 1896 he executed a document, which is called a *zarpeshgi ijara*, in favour of defendant No. 1 and Jitan Mahton, husband of defendant No. 1. The interest of Jitan Mahton has been transferred to defendant No. 3. The *zarpeshgi ijara* stipulated among other things that an annual sum of Rs. 35-10-8 was payable to the plaintiff by the defendants or their predecessors and the present suit is brought for the years 1311 to *F. S.* 1317 in respect of this sum of Rs. 35-10-8 with interest. The trial Court and the Court of first appeal found that the defendants' contention that the plaintiff was not competent to recover more than the amount due for three years was not sustainable. The defendants also contended that in July 1896, that is, about three months after the *zarpeshgi ijara*, the plaintiff borrowed by three simple bonds a total sum of Rs. 300 from defendant No. 1 and Jitan Mahton and that it was stipulated in these bonds that the interest payable thereon, namely, a sum of Rs. 18 per year should be credited towards the payment of the money due to the plaintiff upon the *zarpeshgi ijara*. It is necessary to observe that the period of the *zarpeshgi ijara* and of the three bonds was five years. The *zarpeshgi ijara* also stipulated that in the event of failure to pay the sum of Rs. 700, which was the loan taken by the plaintiff on that transaction, the defendants should be competent to retain the land till the re-payment of the *zarpeshgi* money. It also stipulated that the annual consolidated *jama* of the property transferred to the possession of the defendants by the *zarpeshgi ijara* was estimated at Rs. 112-8-0, and that out of this amount the sum of Rs. 42 should be retained by the defendants as interest upon the *zarpeshgi* money, that a sum of Rs. 23-2-8 should be paid on account of revenue, road and *dak* cess, and a sum of Rs. 11-9-8 on account of irrigation charges, leaving a balance of Rs. 35-10-8 payable on account of *haq-ajri* to the plaintiff. On appeal to this Court Mr. Justice Roe held that the relationship created by the *zarpeshgi ijara* was not one of mortgagor and mortgagee but of landlord and tenant and that under the Bengal Tenancy Act the plaintiff was not entitled to recover more than three years' rent. The plaintiff had a cross-appeal before the learned Judge as to the deduction of the yearly interest of Rs. 18. He contended that the defendants were not entitled to make any deduction for the years in suit, but the learned Judge of this Court was against the plaintiff on this point with the result that he gave the plaintiff a decree for three years only for the principal sum of Rs. 17-10-8 per year.

This matter now comes before us in Letters Patent Appeal and the first question that has been argued is, what is the relationship created by the *zarpeshgi ijara*. Now it is impossible to lay down any general rule as to the effect of a *zarpeshgi* transaction. Every case must depend upon its own facts, and in this particular case we must determine upon a construction of the document whether or not we can accept the contention of the defendants that a relationship of landlord and tenant subject to the provisions of the Bengal Tenancy Act was created. On a careful examination of the terms of the document it seems to be clear that the intention of the parties was to create the relationship of mortgagor and mortgagee and that this is not a case in which the amount advanced to the owner of the land is to be viewed as an advance of the rent fixed upon the land. In *Nidha Sah* v. *Murli Dhar* (1) their Lordships had before them the case of a plaintiff, who in consideration of advances which had been made to him by the defendant executed what purported to be a mortgage of certain villages with possession to the defendant for 14 years, the deed providing that on "the expiration of the term the mortgagor shall come into possession of the mortgaged villages without settlement of account, that on the expiration of the term the mortgagee shall have no power whatever in respect of the said estate which, after the expiration of the term of the mortgage-deed, shall be returned to the

(1) 25 A. 115; 30 I. A. 54; 5 Bom. L. R. 111; 7 C. W. N. 289; 8 Sar. P. C. J. 435 (P. C.).

mortgagor without his paying the mortgage money secured under this document." In regard to this document their Lordships observed as follows:—

"The instrument, though it is called a mortgage, and though it will be convenient to follow the nomenclature used in the document itself and in the pleadings and judgments ni the Courts below, is not a mortgage in any proper sense of the word. It is not a security for the payment of any money or for the performance of any engagement. No accounts were to be rendered or required. There was no provision for redemption expressed or implied. It was simply a grant of land for a fixed term free of rent in consideration of a sum made up of past and present advances."

That case is a very different case from that before us here. Here there is a distinct provision for interest upon the sum advanced and we see no difference between the nature of this document and that which was before their Lordships of the Privy Council in the *Bengal Indigo Co.* v. *Roghoubur Dass* (2) and where their Lordships observed that the real question was whether the main object of the instrument was to provide security for the loan. The same principle was followed in *Ram Khelawan Roy* v. *Sambhoo Roy* (3). In that case a sum of one rupee per year was reserved as rent to be paid to the debtor and the creditor was to remain in possession until the payment of the *zarpeshgi* money. Their Lordships held that the proper intention to be inferred from the document was that the land was hypothecated for a term of years as security for the payment of the loan. Upon a consideration of all the facts in this case and the document itself, it is impossible to say that the contention of the plaintiff is not correct and that the intention of the parties was not to create the relationship of mortgagor and mortgagee but that of simple landlord and tenant. The document being a registered instrument the amount payable to the plaintiff will be governed by Article 116 of the Limitation Act, the period of which is 6 years from the date on which the cause of action accrued and not 3 years as provided in the schedule attached to the Bengal Tenancy Act.

The next question is whether the defendants are entitled to credit the sum of Rs. 18 per year for the years in suit. Now the Courts below have proceeded on the assumption that the stipulation in the three bonds of 1896 was that the defendants were entitled to pay themselves the sum of Rs. 18 per year so long as the *zarpeshgi ijara* remained in force. The bonds themselves do not appear to make any such stipulation and if anything is to be inferred from the conduct of the parties, all that appears to be established is that up to the year 1901 the plaintiff gave a receipt to the defendants acknowledging payment of Rs. 17-10-8 per year and allowing the defendants credit for the sum of Rs. 18. The learned Vakil for the plaintiff-appellant before us has admitted in the course of the argument that he continued to allow the defendants to make this deduction up to the year 1903. This being so, the defendants would be under the operation of section 20, sub-clause (1), of the Indian Limitation Act entitled to sue upon their bonds for three years after the last payment of Rs. 18, and if they were entitled to sue it follows that they would also be entitled to credit themselves with the sum of Rs. 18 by way of interest up to that period. Therefore, the defendants are entitled to credit for the sum of Rs. 18 and interest thereupon up to the end of the year 1906. That means that for the year 1311 the defendants will be entitled to Rs. 18 and interest which amounts roughly to Rs. 6-4-0, for 1312 they will be entitled to the same sum and interest amounting to Rs. 5-3-8 and for 1313 they will be entitled to the same sum with interest which amounts to Rs. 4-3. The total of these sums will have to be deducted from the total claim of Rs. 293-10-2 and for the balance the plaintiff will be entitled to a decree with interest at 6 per cent. from the date of the institution of the suit till the date of realisation. The result, therefore, is that the appeal will be decreed in this modified manner and the plaintiff will be entitled to his costs in all Courts below calculated proportionately to his success. The defendants will be entitled to their pro-

(2) 24 C. 272; 1 C. W. N. 83; 23 I. A. 158; 7 Sar. P. C. J. 94; 12 Ind. Dec. (N. S.) 848.

(3) 2 C. W. N. 758.

portionate costs. We make no declaration here as to what proportion of the principal sums is to be paid by defendant No. 3 and also as to what proportion of the costs is to be paid by or realised by him.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 321 OF 1917.

January 25, 1918.

Present:—Mr. Justice Teunon and Mr. Justice Newbould.

RUDRA NARAYAN JANA—JUDGMENT-DEBTOR—APPELLANT

versus

NABA KUMAR DAS AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47—Execution—Decree-holder ordered to furnish security—Order accepting security offered, whether appealable—Security accepted without enquiry into sufficiency—Court, duty of.

An order by which security proffered by the decree-holder for getting delivery of possession of the property forming the subject-matter of the decree is accepted and delivery of possession is directed to be made to the decree-holder is appealable, inasmuch as the order directing delivery of possession is a final order and not an interlocutory or intermediate one. [p. 156, col. 2.]

In an appeal by a judgment-debtor to the High Court it was ordered that on the decree-holder furnishing security in immoveable property, he should be at liberty to proceed with the execution. In accordance with the order the decree-holder proffered securities to which the judgment-debtor took various objections, but the executing Court without entering into the question of the sufficiency of the securities offered accepted the securities and ordered delivery of possession in execution of the decree:

Held, that the executing Court was wrong in accepting the securities without holding any enquiry into their sufficiency and that the case must go back to the executing Court for making the necessary enquiries. [p. 156, col. 2; p. 157, col. 1.]

Appeal against the order of the Subordinate Judge, 3rd Court, 24-Parganas, dated the 24th of August 1917.

Babus *Satish Chandra Ghose*, *Lalit Mohan Banerjee* and *Apurba Charan Mukerjee*, for the Appellant.

Babus *Joytish Chandra Hazra* and *Santimoy Mazumdar* for Babu *Sarada Charan Maiti*, for the Respondents.

JUDGMENT.

TEUNON, J.—In this appeal it appears that on a previous application to this Court by the judgment-debtor-appellant it was directed by an order, dated 19th December 1916, that on the decree holder furnishing security to the extent of Rs. 50,000 in immoveable property the decree-holder should be at liberty to proceed with execution.

The present appeal by the judgment-debtor is directed against an order accepting the proffered security and directing delivery of possession to the decree-holder of the property forming the subject-matter of the decree. A preliminary objection is taken that against this order no appeal lies and in support of this contention we have been referred to the cases reported as *Saraswati Barmonya* v. *Moti Barmonya* (1), *Srinivas Prosad Singh* v. *Kesho Prosad Singh* (2) and to the decision of this Court in Appeal from Order No. 5 of 1916. But these cases in fact show that though against the interlocutory orders or intermediate steps leading up to the final order an appeal may not lie, yet against the final order, in this case the order directing delivery of possession, an appeal will lie. For this proposition there is also authority in *Luchmeeput Singh* v. *Sita Nath Doss* (3).

The judgment-debtor took a number of objections to the sufficiency of the security and the learned Subordinate Judge has made the orders referred to above without making any inquiry into the said objections. He was of opinion that for the purposes of the inquiry before him it was unnecessary to enter into "interminable questions of title" and other like matters

In this view he has clearly erred. Property in which the surety cannot show a *prima facie* title is obviously of no value for the purpose of securing the judgment-debtor and the value may again be seriously affected by questions of transferability.

The properties pledged have been described in 7 lots or parcels.

The last 2nd and 6th lots of the 1st report and the additional lands in the supplementary report have been valued on the footing that

(1) 20 Ind. Cas. 72; 41 C. 160; 17 C. W. N. 1240.
(2) 12 Ind. Cas. 745; 14 C. L. J. 489.
(3) 8 C. 477; 10 C. L. R. 517; 4 Ind. Dec (N S.) 305.

they are *raiyati* holdings at a fixed rate of rent. The judgment-debtor contended that they are ordinary occupancy holdings not transferable by local custom or usage.

If there are reasonable grounds for thinking that the rent is or may be liable to enhancement or that the landlord's consent to a transfer has to be obtained, the valuation will obviously have to be revised. Moreover, as regards the additional properties there appears to be a controversy as to the extent of the interest at least of the proposed sureties.

In the 4th and 5th lots there is a question regarding the extent of the surety's share. In the 4th lot the surety says he has a half share, while the judgment-debtor says that the surety has and can pledge only a 1/5th share, the question raised apparently being whether the property descended from the surety's father, grandfather or great-grandfather. The 5th property stands in the name of the surety's wife who does not join in the transaction, and the question is whether the property is hers or belongs to the husband and wife in equal shares.

The 3rd item is described as *debattar* and the proposed surety is a co-sharer *sebait*. The surety says that the *sebaits* have mortgaged on previous occasions, but these transactions may represent merely breaches of trust and if the land in question is the absolute property of the *thakur*, obviously it cannot be accepted as a valid security for the personal debts of the *sebait*. It has been said that this *debattar* property has not been taken into account but that does not appear to be the case. Without this property the valuation does not exceed Rs. 49,000.

In respect of the 2nd item a further question arises. Of the six securities who are brothers two are minors. The eldest brother who is their guardian *ad litem* has been permitted to execute the security bond on their behalf. In granting this permission the Subordinate Judge appears to have overlooked the fact that default on the part of any of the major co-decree-holders will bring liability upon the properties of the minors and it will be for his consideration whether the 1/3rd share of the minors in properties not the subject-matter of the litigation should be accepted as a valid security.

For the foregoing reasons we set aside the orders complained of and direct that before accepting the security proffered the Subordinate Judge do make inquiry into the objections taken by the judgment-debtors.

The property of which possession has been given, it appears, to the decree-holder-respondents will now be restored to the possession of the judgment debtor-appellant. Costs of this hearing will be costs in the case. We assess the hearing fee at three gold *mohurs*.

The record will be sent down without delay.

NEWBOULD, J.—I agree.

Orders set aside.

CALCUTTA HIGH COURT.

ORIGINAL CIVIL SUIT No. 831 OF 1915.

June 11, 1917.

Present:—Mr. Justice Greaves.

ELIAS JOSEPH SOLOMON AND OTHERS —PLAINTIFFS

versus

JYOTSNA GHOSHAL—DEFENDANT.

Civil Procedure Code (Act V of 1908), ss. 132, 183—Hindu lady of high family appearing in public, whether can be compelled to appear in witness-box.

An old Hindu lady belonging to a high family, who has abandoned entirely the protection of the *purdah* and who has no intention of resuming it, ought not to be compelled, having regard to her social position and the feelings of her class, to appear in the witness-box but should get the privilege of being examined on commission, the cost of such commission being costs in the cause. [p. 158, col 2; p. 159, col. 1.]

Section 132, Civil Procedure Code is wide enough to cover the case of such a lady. [p. 159, col. 1.]

Mr. *P. L. Buckland*, for the Plaintiffs.

Mr. *B. L. Mitter*, for the Defendant.

JUDGMENT.—This is an application to examine on commission the defendant in the suit and the mother of the defendant. So far as the defendant is concerned, it appears on the evidence that he probably cannot get leave to come to Calcutta, and that he is not likely to come to Calcutta for the period of one year. He is at present serving in the Bombay Presidency. The plaintiffs undertake not to bring on this case before February next, and under these circumstances the defendant at the

same time undertakes that in the event of his coming to Calcutta before February next he will apply to be examined in Court *de bene esse*. Under these circumstances it seems to me that the best course is that this application should stand over, so far as the defendant is concerned, until the re-opening of the Courts after the Xmas vacation, and if before that time the defendant comes to Calcutta he will in accordance with his undertaking apply to be examined *de bene esse*, but if up to that time he is unable to come to Calcutta and still satisfies the Court that he will be unable to come before the trial of the action takes place, then, I think, the commission should issue. Under these circumstances the only order that I propose to make now is that so far as the defendant is concerned, the mutual undertakings being given, that I have already mentioned, this application is to stand over until the re-opening of the Court after the Xmas vacation.

So far as the defendant's mother is concerned, it appears on the evidence that she is a lady who appears in public. The evidence that I have before me on her behalf consists of an affidavit of Jogendranath Banerjee, a clerk in the employ of the defendant's solicitors. He states "that the lady is an old Hindu lady belonging to a high family, and according to the practices prevailing in the community a lady of her station in life does not appear in any Court of law, and the defendant apprehends that unless a commission is issued to examine her it will not be possible to have her evidence." The evidence on behalf of the plaintiff is contained in an affidavit of Sassoon Jacob Cohen, Manager of the estate of Mrs. Azeeza Joseph Solomon Joseph deceased, which estate is represented by the plaintiffs in this suit. He states in paragraph 6 that he is well acquainted with the lady and that she is not a *pardanashin* lady, on the other hand she is a cultured and educated lady of various accomplishments and freely appears in public and goes about in society and talks freely to Europeans and others face to face according to the manners and customs of European ladies. In paragraph 8 he states, that in October 1915 she came in an open carriage to their office at No. 6, Bentinck Street, and in paragraph 9 he states "that in December 1916 she personally called at the house of Mr. Satyendra Nath Sen, an Attorney, in Indian Mirror Street, and met the deponent and one of the plaintiffs, and talked to them in Mr. Sen's presence." Under these circumstances I have got to decide whether I shall compel the lady to appear in Court to give her evidence. She does not fall within the provisions of section 133 of the Code of Civil Procedure, which, Counsel for the plaintiffs admits for the purposes of this application, extends as well to the wives of the persons named therein as to the persons themselves. Accordingly the only section which is applicable is section 132, which provides that women, who according to the customs and manners of the country ought not to be compelled to appear in public, shall be exempt from personal appearance in Court. On behalf of the plaintiffs it is said that as the lady has taken advantage of such privileges as attach to the abandonment of the *parda* system, she is not now entitled to claim the privilege of exemption from appearing in the witness-box which is provided by section 132, and it is suggested that section 132 applies exclusively to *pardanashin* or quasi-*pardanashin* ladies, and that it was designed for persons who observe the *parda* system. On behalf of the defendant it is said that although she does appear in public to a considerable extent, yet according to the customs and manners of the class and community to which she belongs she could not appear to give her evidence in the witness-box in Court. I do not think that the lady, who, I am satisfied on the evidence, has abandoned entirely the protection of the *parda*, and who, upon the evidence before me, I cannot see, has any intention of resuming it, ought to be compelled, having regard to the feelings of her class, to appear in the witness-box and I am not prepared to force her to do so, because I think, that the Indian point of view, which I think should be respected, would be that although the lady has abandoned the *parda* for the purposes to which I have already referred, it would be something in the nature of an outrage if I were to compel her, having regard to her social position, to appear in the witness-box to give evidence in Court. Under these circumstances I think it would

be unfortunate if I am forced, which I do not think I am, by the words of the section to compel her to come to Court to give her evidence, as I think that section 132 is wide enough to cover her case. I feel some considerable doubt whether, having regard to the position she has adopted, I ought not to make her pay the costs of the privilege which she claims. On the whole I think I ought not to do so, having regard to the terms of the section and the reasons which I have already stated and which have induced me not to force her to come into the witness-box. The result will be that so far as she is concerned. I grant the commission asked for and the costs of this commission will be costs in the cause. Mr. H. K. Mitra, Barrister-at-law, will be the Commissioner. The commission to be returnable a month after the issue of the writ.

Order accordingly.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1924 OF 1915.

August 6, 1916.

Present:—Justice Sir Ashutosh Mookerjee, KT., and Mr. Justice Beachcroft.

GIRISH CHANDRA BIT AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

BIPIN BEHARI KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Pleadings—Inconsistent pleas in different suits, whether can be allowed.

It is an elementary rule based on the most obvious grounds of justice, equity and good conscience that parties litigants cannot be allowed to take up inconsistent positions in Court to the detriment of their opponents. [p. 160, col. 2.]

In 1906 plaintiff sued *K.* for recovery of possession of land on declaration of title. *K.* objected to the plaintiff's claim for recovery of possession on the ground that a lease granted by the plaintiff to *S.* was in existence at the date of the suit. *K.'s* objection was given effect to and though plaintiff's title was declared, his claim for recovery of possession was disallowed on the ground that the lease in favour of *S.* was in force at the date of suit. Subsequently in 1913 plaintiff brought the present suit for recovery of possession against *K.* and *S.* The suit was opposed by *K.* on the ground that it was not maintainable inasmuch as the plaintiff could and should have made the same prayer for possession against *S.* in the previous suit since the lease in favour of *S.* had terminated before the institution of the previous suit:

Held, that the plaintiff was entitled to succeed on proof that no sub-tenancy created by him existed at the date of the institution of the present suit. [p. 160, col. 2.]

Held, further, that it would be manifestly unjust, if the defendants were allowed to defeat the present claim on proof that, contrary to their previous allegation; a decree for recovery of possession might and should have been made in favour of the plaintiff in the previous suit. [p. 160, col. 2.]

Appeal against the decree of the District Judge, Bankura, dated the 10th May 1915, reversing that of the Munsif, 1st Court at Bishnupur, dated the 7th April 1914.

Babu *Karunamoy Bose*, for the Appellants.

Babus *Dwarka Nath Chackerbutty* and *Bijoy Kumar Bhattacharjee*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiffs in a suit for recovery of possession of land on declaration of title. The disputed land is claimed by the plaintiffs as situated within their village Bhuluk Khulla and by the Khan defendants as comprised within their village Sriramanipur. The Courts below have found that the title of the plaintiffs has been established, and the only question in controversy is whether the plaintiffs are entitled to a decree for recovery of possession.

There are two sets of defendants, the Khans and the Sheikhs. There was a previous suit between the plaintiffs and the Khans, which was instituted on the 13th September 1906 and terminated on the 29th April 1912. The plaintiffs in that suit claimed possession of the land now in dispute. The suit was dismissed by the Court of first instance, but, on appeal, was decreed by the Subordinate Judge. On second appeal to this Court Mr. Justice Coxe remanded the case to the Subordinate Judge for trial of two issues. The defendants at the time urged before Mr. Justice Coxe that even if the title of the plaintiffs was established and was found not to have been extinguished by limitation, they were not entitled to actual possession, inasmuch as a lease granted by them to the Sheikhs was still in force. Mr. Justice Coxe gave effect to this contention and ruled upon the authority of the decision in *Gulzar Singh*

v. *Kalyan Chand* (1) that the plaintiffs could obtain not actual possession but only declaration of their title. When the case went back to the Subordinate Judge, the plaintiffs offered to give evidence to show that the Sheikhs had relinquished their tenancy and that they themselves were consequently entitled to recover actual possession on establishment of their title. The Subordinate Judge held that the judgment of the High Court on the point was conclusive and that it was not competent to him to hold that the lease in favour of the Sheikhs had terminated before the institution of the suit. On the merits he found that the disputed land was within the village whereof the plaintiffs were the admitted proprietors. As regards possession he found that the plaintiffs were in occupation up to 1891, that in 1892 they let out the land to one Harbansa and that the tenant had possession till he was dispossessed by the Khans in 1898. Subsequently, in 1901, the plaintiffs purchased the holding of Harbansa at a sale in execution of a decree for arrears of rent. The Subordinate Judge finally held that the plaintiffs became entitled to recover possession, only when they purchased the holding in 1901. But as the lease granted to the Sheikhs in 1892 had not yet terminated, the plaintiffs were not entitled to recover actual possession The result was that on the 29th April 1912 a declaratory decree was made in favour of the plaintiffs. On the 5th April 1913 the plaintiffs instituted this suit against the Khans and the Sheikhs for recovery of possession. The Court of first instance decreed the suit against both. The Sheikhs did not appeal, but on the appeal of the Khans the District Judge has dismissed the suit as against both sets of defendants. He has held in substance that there is no new cause of action for this suit and that the plaintiffs cannot now sue for a relief which they could and should have obtained in the previous litigation. In our opinion this position cannot possibly be supported.

The Khans now contend that the lease granted by the plaintiffs to the Sheikhs had terminated prior to the commencement of the previous suit. This is inconsistent with the allegation which the Khans made in the previous litigation. It is an elementary rule, based on the most obvious grounds of justice, equity and good conscience, that parties litigants cannot be allowed to take up inconsistent positions in Court to the detriment of their opponents. The plaintiff and the Khans are both equally bound by the decision of Mr. Justice Coxe that the lease in favour of the Sheikhs was in force at the time of the institution of the previous suit, and presented an effective bar to the recovery of actual possession by the plaintiffs. The plaintiffs are now entitled to succeed on proof that on the date of institution of this suit there was not in existence a sub-tenancy created by them which could bar a decree for recovery of possession in their favour. It would be manifestly unjust, if the defendants were allowed to defeat the present claim on proof that, contrary to their previous allegation, a decree for recovery of possession might and should have been made in favour of the plaintiffs in the prior suit. In this view the decree of the District Judge cannot be supported.

But it has been very inconsistently argued that the plaintiffs cannot succeed in this litigation unless they prove affirmatively that the lease granted by them in favour of the Sheikhs in 1902 had terminated before the 5th April 1913. There is abundant evidence to show that the Sheikhs gave up their tenancy in 1905. The suit is thus in time, whether the time is taken to run against plaintiffs from the date of the decree in the previous litigation or from the date of the accrual of the cause of action as determined in the previous litigation, namely, May 1901

The result is that the appeal is allowed, the decree of the District Judge set aside and that of the Court of first instance restored. This order will carry costs both here and in the Court of Appeal below.

Appeal allowed.

(1) 15 A. 399; A. W. N. (1893) 170; 7 Ind. Dec. (N. S.) 975.

CALCUTTA HIGH COURT.

RULE No. 543 OF 1917.

January 11, 1918.

Present:—Mr. Justice Fletcher and Mr. Justice Smither.

HAZRA SARDAR AND OTHERS —APPELLANTS—PETITIONERS

versus

KUNJA BEHARI NAG CHOUDHURY —RESPONDENT—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XLVII, r. 1—Review—Mistake of law, whether ground for review —Any other sufficient reason.

A mere mistake of law is not in itself a sufficient mistake or error apparent on the face of the record so as to form a ground for review of judgment. [p. 161, col 2]

Where the mistake arises from the conduct of the applicant for review, the mistake cannot even be pleaded as "any other sufficient reason" within the meaning of Order XLVII, rule 1, Civil Procedure Code [p. 162, col. 1.]

The defendants in a partition suit preferred an appeal against the preliminary decree and the plaintiff preferred cross-objections to the same. The appeal was dismissed and the cross-objections were allowed. The defendants then applied for a review on the ground that their appeal was incompetent under section 97, so that the cross-objections of the plaintiff should not have been allowed:

Held, that the discretion of the Court to grant a review should not be exercised in this case inasmuch as owing to the applicants' own negligence, their appeal was argued and the cross-objections were allowed. [p. 162, col. 1.]

Application for a review of the judgment of this Court, dated the 25th March 1917, passed in Appeal from Appellate Decree No. 1342 of 1915, reported as 40 Ind. Cas. 271, being an appeal from the decree of the Additional District Judge, 24-Parganahs, passed in Title Appeal No. 173 of 1913 and dated the 6th March 1914, affirming that of the Munsif, 1st Court, Basirhat, passed in Title Suit No. 22/1195 of 19.3 and dated the 30th January 1913.

Babu *Bejoy Kumar Bhattacharjee*, for the Appellants.

Sir *Rash Behari Ghose*, Babus *Mohendra Nath Roy*, *Bepin Behari Ghose* II, *Norendra Chandra Bose* and *Bhupendra Nath Bose*, for the Opposite Party.

JUDGMENT.

FLETCHER, J.—This is a Rule obtained by the defendants calling on the opposite party, the plaintiff, to show cause why the judgment of this Court should not be reviewed "as regards the cross-objection." By those words, when I issued the Rule, I meant on ground No. 9 specified in the application for review preferred to this Court. The case is a peculiar one. The present petitioners, the defendants, appealed to this Court against the preliminary decree granted by the Court of the District Judge of the Twenty-four Perganahs. The appeal was argued by an experienced and learned Vakil and it was argued before the Court, it is not denied, as if it was a competent appeal which the Court was entitled to entertain. The Court was occupied, we are informed, for two days in hearing the appeal and, after this, not a small portion of the Court's time, the petitioners' appeal failed. In that appeal the opposite party, the plaintiff, had preferred cross-objections and on hearing those cross-objections we decided in favour of the view of the plaintiff. Then comes this application for review of judgment and the ground is that it is a case coming within Order XLVII, rule 1, Code of Civil Procedure, because under the terms of section 97 of the Code no appeal lay against the preliminary decree as the final decree in the suit had been passed. There is no statement made before the Court as to what was the view of the learned gentleman who conducted the appeal when we heard it originally, and I do not think that we can take it that an experienced Vakil was unaware of the fact that appeal did not lie against the preliminary decree, after the passing of the final decree. In fact, he invited our decision on the materials placed before the Court. It seems to me that in a case like that the Court ought not to exercise the discretion that it has in any case to review the judgment unless it is satisfied that a real mistake was made. It is no use changing one's legal advisers and getting them to put forward a case for review of judgment on this ground.

Another ground why this review of judgment should not be granted is that I do not think that this case comes within the terms of Order XLVII, rule 1. It is not a case of mistake or error apparent on the face of the record but it is a case where a mistake of law has been made, namely, that an appeal was argued without objection where apparently no appeal lay from the preliminary decree. The appeal was preferred at the instance of the persons who are the present petitioners. I do not think that a mere mistake of law is in itself a sufficient mistake or error apparent on the face of the record for us

to interfere by way of review. Then, is there any other sufficient reason shown why the review should be granted? It is quite clear that there is no other sufficient reason where the whole mistake had arisen from the conduct of the petitioners themselves. They ought to have satisfied themselves that the appeal was a competent one, and if on account of their negligence the appeal was argued and the cross-objections were allowed, they have got only themselves to thank.

I think the present Rule should fail and must be discharged with costs, five gold *mohurs*.

SMITHER, J.—I agree.

Rule discharged.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 211 OF 1914.

May 25, 1917.

Present:—Mr. Shah Din, Chief Judge, and Mr. Justice LeRossignol.

Musammat BHARI—DEFENDANT—APPELLANT

versus

KHANNU AND OTHERS—PLAINTIFFS—RESPONDENTS.

Punjab Courts Act (III of 1914), s 41 (3)—Custom—Burden of proof, whether question of law or of custom—Appeal, second—Certificate, necessity of—Certificate refused on wrong ground, effect of—Possession suit for—Some of several heirs, whether can sue for whole estate.

The question of *onus probandi* in a custom case is not a pure question of law unconnected with custom. On the other hand, it is not, under all circumstances, a question relating to the validity or existence of a custom except in so far as, in proving or disproving the validity or existence of a custom, a party to a suit may be held to be entitled to an initial presumption in his favour on the strength of a generally accepted rule of custom as laid down by judicial decisions or otherwise. [p 163, col 2; p. 164, col. 1.]

Where the lower Appellate Court, holding that the parties were governed by custom, decided that the defendant, the sister of the last male holder, on whom the onus lay of establishing that she was entitled to succeed to the property of her deceased brother in preference to his collaterals, had failed to discharge the onus:

Held, that the question of *onus probandi* in this case was one relating to the existence of a custom governing the succession to the property of the deceased, and that, therefore, a certificate under section 41 (3) of the Punjab Courts Act was necessary to the institution of a second appeal regarding the said question. [p. 164, col. 1.]

Where some only out of several collaterals of a deceased proprietor bring a suit for possession of the property left by him, they can recover possession only of the shares to which they are entitled and not of the whole estate. [p. 164, col. 1.]

Second appeal from the decree of the Divisional Judge, Jhelum Division, dated the 8th November 1913.

Mr. *Oertel*, for the Appellant.

Mr. *Ganga Ram*, for the Respondents.

JUDGMENT.—One Gaman, a Siviya *Jat* of Mauza Siviya, Tahsil Kharian, in the Gujrat District, who owned 488 *kanals* of land, died some years ago leaving an unmarried daughter, *Musammat* Hasni, and a married sister, *Musammat* Bhari. *Musammat* Hasni succeeded to her father's land but died towards the end of 1911; and soon after *Musammat* Bhari entered into possession of the land left by her. In January 1912 thirty proprietors of Mauza Siviya, who are collaterals of Gaman in the 9th degree, brought a suit for possession of 488 *kanals* of land against *Musammat* Bhari alleging that they, as collaterals of Gaman, deceased, were entitled to succeed to the land in question to the exclusion of his sister *Musammat* Bhari. In answer to the plaintiffs' claim *Musammat* Bhari put forward several pleas, the nature of which is clear from the following issues that were drawn by the Subordinate Judge:—

"(1) Whether the land in suit was ancestral, *i. e.*, whether it was once occupied by Bhola, the common ancestor?

(2) Whether plaintiffs, collaterals in the 9th degree, are better heirs by custom than the sister of Gaman?

(3) Whether mortgage debts of Kanshi Ram, Karm Din, and Nur Siraj were paid by defendant No. 1 from the earnings of the ancestral estate and cannot be claimed by her?

(4) Whether plaintiffs can be allowed to sue for absentees? What was plaintiffs' (who were present) share if they cannot so sue?"

The Subordinate Judge held that the land in dispute was not proved to be the ancestral property of Gaman *qua* the plaintiffs; that no definite custom had been proved which governed a case of disputed succession such as the present between the sister of the last male proprietor and his remote collaterals; and that in the absence of a definite custom on the point the personal law of the parties should furnish the rule of decision. Under the Muham-

madan Law *Musammat* Bhari, as sister of Gaman, took a half share in the land in dispute, and the other half devolved upon the plaintiffs as residuaries of the fourth class. The Subordinate Judge decreed possession of half the land in favour of the plaintiffs accordingly, conditional on their paying certain mortgage debts which had been liquidated by *Musammat* Bhari. As regards the objection taken by *Musammat* Bhari that since the plaintiffs did not represent the whole body of Gaman's reversioners, they could only claim possession of the land in dispute to the extent of their own shares, the Subordinate Judge held that such of the collaterals of Gaman as had not joined with the plaintiffs in bringing the suit could subsequently claim their share from the plaintiffs, and that the latter were entitled to take possession of the whole of the land to which all the collaterals of Gaman were entitled to succeed.

Both parties appealed to the Divisional Judge. The learned Judge agreed with the Subordinate Judge in holding that the land in suit was not the ancestral property of Gaman and the plaintiffs; but he was of opinion that the onus lay on *Musammat* Bhari of proving that she, as sister of Gaman, was entitled by custom to succeed to the land left by him to the exclusion of the plaintiffs who were his collaterals in the 9th degree. He further held that since *Musammat* Bhari had not proved that she had paid off the mortgage debts charged on certain portions of the land in suit out of her own pocket, the plaintiffs were not liable to her for any sums expended by her on redemption. Upon these findings he rejected *Musammat* Bhari's appeal, and accepting that of the plaintiffs, decreed their claim in full.

Musammat Bhari has filed a second appeal in this Court urging *inter alia* —

(1) that the lower Appellate Court was wrong in throwing on her the onus of proving that she was entitled to succeed to the non-ancestral property of her brother Gaman in preference to his collaterals in the 9th degree; and

(2) that the lower Appellate Court had overlooked the plea of *Musammat* Bhari to the effect that the plaintiffs could not sue for possession of the shares of certain absentees, who were collaterals of Gaman, and of the shares of other collaterals who had not joined with the plaintiffs in bringing the suit.

In regard to the first point, it has been urged by the respondents' Pleader that the question whether or not in this case the onus lay on *Musammat* Bhari of proving that by custom she excluded her brother's collaterals of the 9th degree from succession to the land in dispute was a question of custom and not one of law, and that, therefore, no second appeal lay to this Court regarding the existence of the alleged custom without a certificate under section 41 (3) of the Punjab Courts Act. After hearing Counsel for the appellant on this point, we are of opinion that the question of *onus probandi* which arises in this case is not a question of law, pure and simple, but a mixed question of law and custom, and that a second appeal is not competent to this Court unless a certificate is granted by the lower Appellate Court under section 41 (3) of the Punjab Courts Act. In the case of *Arura* v. *Imam Bakhsh* (1) it was held in effect by a learned Judge of this Court that the question as to the incidence of the burden of proof in a case involving a question of custom is a question which cannot be argued in second appeal without a certificate being first obtained under the Punjab Courts Act, and this view was approved by the late learned Chief Judge in *Allah Din* v. *Salam Din* (2). The matter is not altogether free from difficulty; but, after giving it our best consideration, we are of opinion that the question of the *onus probandi* in the present case is so indissolubly connected with the question of the existence of custom regulating the succession to the land left by Gaman that a certificate under sub-section (3) of section 41 of the Punjab Courts Act must be obtained from the lower Appellate Court before the question can be raised in second appeal in this Court. It seems to us that the question of *onus probandi* in a custom case is not a pure question of law unconnected with custom; and that, on the other hand, it is not, under all circumstances, a question relating to the validity or the existence of a custom except

(1) 23 Ind. Cas. 352; 4 P. W. R. 1914; 28 P. L. R. 1914.

(2) 31 Ind. Cas. 497; 96 P. R. 1915; 169 P. W. R. 1915.

in so far as, in proving or disproving the validity or existence of custom, a party to a suit may be held to be entitled to an initial presumption in his favour on the strength of a generally accepted rule of custom as laid down by judicial decisions or otherwise. Considered in this light, the question of *onus probandi* in this case must be regarded as one relating to the existence of custom governing the succession to Gaman's land; and therefore a certificate under section 41 (3) of the Punjab Courts Act was necessary to the institution of a second appeal regarding the said question.

The learned Counsel for the appellant called our attention to the order of the Divisional Judge, dated the 13th January 1914, by which he refused to grant a certificate to the appellant under section 41 (3) of the Punjab Courts Act. The refusal was based upon the ground that the question as to the burden of proof that arises in this case is a question of law and not one of the existence or validity of a custom, and that, therefore, under the Punjab Courts Act a certificate cannot be given. As we have said above, this view is erroneous; and it is still open to the learned Judge of the lower Appellate Court to re-consider whether, in view of our finding that the question of *onus probandi* in this case is a question of custom, he would be prepared to grant a certificate for second appeal.

Apart from the question of custom involved in this case, it is clear that the plaintiffs, who are only some among the collaterals of Gaman, deceased, cannot sue for more than their own shares in the land in dispute, and the Subordinate Judge was, therefore, in error in giving them a decree for the share to which the whole body of Gaman's reversioners would be collectively entitled. The learned Divisional Judge overlooked this point altogether, and holding that by custom applicable to the parties the plaintiffs as collaterals of Gaman, deceased, excluded his sister from inheritance, he has decreed their claim in full. Assuming that *Musammat* Bhari is excluded from inheritance by the collaterals of Gaman, the plaintiffs clearly cannot get the shares of such of the collaterals as are absentees or of those collaterals who have not joined with the plaintiffs in bringing the present suit. The question as to what share of the land in dispute the plaintiffs are entitled to in their own right cannot be decided on the present record; and under Order XLI, rule 25, Civil Procedure Code, we remand the case to the District Judge of Gujranwala for a finding on this point. A return should be made within three months. The District Judge will also consider and decide the question of the grant of a certificate to the appellant, *Musammat* Bhari, under section 41 (3) of the Punjab Courts Act.

Case remanded.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 13-B OF 1917.

October 11, 1917.

Present:—Mr. Mittra, A. J. C.

SAKHARAM—PLAINTIFF—DECREE-HOLDER—APPELLANT

versus

BHIVRABAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s 47, O. XXIII, r. 3, O. XXXII, rr. 6, 7—Adjustment of decree—Agreement to adjust by minor, enforceability of—Minor, suit against—Compromise by guardian without leave of Court, validity of—Contract by guardian, whether binding on minor—Specific performance—Mutuality.

It is not within the competence of the guardian of a minor to bind the minor or his estate by a contract for purchase of immoveable property and specific performance of such a contract cannot be decreed even at the instance of the minor for want of mutuality. [p. 166, col. 1.]

Under Order XXXII, rule 7 (2), of the Civil Procedure Code an agreement or compromise entered into by the guardian of a minor without leave of the Court is voidable against all parties other than the minor. [p. 165, col. 1.]

Order XXIII, rule 3, of the Civil Procedure Code which relates to a compromise of a suit is inapplicable to execution proceedings. [p. 165, col. 2.]

Plaintiff obtained a decree for possession of a field and for mesne profits against a minor defendant. He subsequently agreed to sell the field to the minor judgment-debtor at a certain price, but the transfer was not completed:

Held, (1) that this did not amount to an adjustment of the decree but was only an agreement to adjust; [p. 165, col. 2.]

(2) that there being nothing to show that the decree-holder gave up his rights under the decree

upon the mere execution of the agreement, the contract was an executory one and was not capable of being specifically enforced by the minor for want of mutuality. [p. 165, col. 2; p. 166, col. 1.]

Appeal from the order of the District Judge, East Berar, Amraoti, dated the 9th February 1917.

Mr. *V. V. Chitale*, for the Appellant.

Mr. *M. Chuckerbutty*, for the Respondents.

JUDGMENT.—This appeal arises out of an application for execution of a decree obtained by the appellant for possession of a field and for mesne profits and costs. The respondent Jairam who is a minor pleaded through his guardian that the case had been compromised and in support of his plea put in a document which is described as *Isarpatti*. The parties admit that there was an agreement for the transfer of the field to the minor but the transfer has not yet been completed. They differ as regards the details of the consideration and other points. For the minor respondent it was urged that the terms of the compromise were fully set out in the *Isarpatti*. Objection was taken to the decree-holder's allegations varying the terms of that document. It was also pleaded that this document was intended to extinguish the decree unconditionally. The decree-holder on his part pointed out that sanction or leave of the Court was not obtained by the guardian before entering into the compromise; and the agreement, it was pleaded, was, therefore, void under Order XXXII, rules 6 and 7. It was also urged that the judgment debtor was barred by the provisions of Article 174 of the Limitation Act. The first Court held that the agreement could not be enforced as the sanction of the Court was not obtained. It held on the authority of *Virupakshappa* v. *Shidappa* (1) that Order XXXII, rules 6 and 7, applied to execution proceedings. On these findings the decree-holder's application was allowed. On appeal the District Judge correctly pointed out that under Order XXXII, rule 7, sub-section 2, the agreement or compromise entered into without leave of the Court is voidable against all parties other than a minor. The case has been remanded for further inquiry into the alleged adjustment. Against this order the decree-holder has filed this appeal.

(1) 26 B. 109; 3 Bom. L. R. 565.

It is contended on behalf of the appellant that the lower Appellate Court's view that there has been an adjustment within the meaning of Order XXI, rule 2, is erroneous, but it is argued for the respondent that the rule does not apply to a decree for possession. There is a conflict of opinion as to whether this rule applies to a decree other than a decree under which money is payable. The argument of the respondent is supported by *Sankaran Nambiar* v. *Kanara Kurup* (2), which limits the application of the rule to decrees for money.

On the other hand, the High Court of Calcutta has taken the opposite view: *Baba Mohamed* v. *Webb* (3), *Iswar Chandra Dutt* v. *Haris Chandra Dutt* (4). The Calcutta view has been followed in the Punjab, *Lachu* v. *Kishen Lal* (5). In the present case the decree was partly for money. It is unnecessary to decide in this case which view should be followed. But even upon the Calcutta view there has been in this case no adjustment of the decree, but only an agreement to adjust it: *Jatindra Nath Roy* v. *Chandra Nath Banerjee* (6). It is also clear that there has been no satisfaction of the decree within the meaning of section 47, Civil Procedure Code. Order XXIII, rule 3, which relates to compromise of a suit, is inapplicable to execution proceedings as laid done in Order XXIII, rule 4.

Whether the plea of the judgment-debtor is an adjustment within the meaning of Order XXI, rule 2, or a satisfaction within the meaning of section 47 in either case his plea fails as a complete answer to the application.

The *Isarpatti* filed by the defendant provides that a sale-deed should be executed for Rs. 500 within the 20th March 1916. There is nothing in that document to suggest that the decree-holder gave up his rights under the decree upon the mere execution of the document. The decree-holder was willing to give up his rights provided he received the balance of his consideration money within the time stipulated. The

(2) 22 M. 182; 8 M. L. J. 175; 8 Ind. Dec. (N. S.) 129.

(3) 6 C. 786; 8 C. L. R. 36; 3 Ind. Dec. (N. S.) 509.

(4) 25 C. 718; 2 C. W. N. 247; 13 Ind. Dec. (N. S.) 470.

(5) 44 P. R. 1906; 82 P. L. R. 1907.

(6) 16 Ind. Cas. 972; 16 C. L. J. 101.

contract was an executory one. It was not capable of being specifically enforced for want of mutuality. It is not within the competence of the guardian of a minor to bind the minor or his estate by a contract for the purchase of immoveable property and specific performance of such a contract cannot be decreed even at the instance of the minor for want of mutuality [*Mir Sarwarjan* v. *Fakhruddin Mahomed* (7)].

If a deed of conveyance had been executed and registered, it could not have been impeached by the decree-holder for want of sanction under Order XXXII, rule 6. But where no such deed has been completed, a minor for want of mutuality cannot force a decree-holder to accept or give him such a deed, since the decree-holder, in the absence of the sanction of the Court to the agreement, cannot specifically enforce it. This follows from the principle of mutuality laid down in the above case by the Privy Council.

I note that the alleged tender of Rs. 525 has not been followed by a deposit in Court, as it should have been, for the District Judge's view that if the tender is proved the application for execution should be dismissed is erroneous.

There is no allegation of fraud which prevented the guardian from applying under Order XXI, rule 2 (2). The guardian did not take steps within the time allowed by Article 174. The recent Bombay case cited by the lower Appellate Court [*Hansa Godhaji* v. *Bhawa Jegaji* (8)] even if correctly decided, is easily distinguishable. There fraud was admitted inasmuch as the money under the decree had been paid out of Court. In this case there is no allegation of payment but only of a tender. A breach of contract is all that has been pleaded. The decree-holder is willing to give credit for Rs. 25 received as earnest money. I can, therefore, see no fraud of the kind contemplated in the Bombay judgment so as to justify the Court in not giving effect to the plain provisions of Order XXI, rule 2 (3).

The result is that the judgment-debtor is not entitled to enforce the contract alleged. The adjustment was not certified to the Court within time and cannot be recognised by the executing Court. Moreover, the facts alleged do not amount to an adjustment or satisfaction of the decree.

The order of the Divisional Judge is set aside and that of the first Court restored. Costs in both the Appellate Courts are to be paid by the respondents. The first Court will now dispose of the application for execution according to law. I fix Rs. 15 as Pleader's fee in this Court.

Order set side.

(7) 13 Ind. Cas. 331; 39 C. 232; 16 C. W. N. 14; 21 M. L. J. 1156; 11 M. L. T. 8, (1912) M. W. N. 22; 15 C. L J. 69; 14 Bom. L. R. 5; 9 A. L. J. 33; 39 I. A. 1 (P. C.).

(8) 33 Ind. Cas. 232; 40 B. 333; 18 Bom. L. R. 22.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 447 OF 1915.

January 16, 1918.

Present:—Mr. Justice Fletcher and Justice Sir Shamsul-Huda.

Srimati SUSHILABALA DASI—DEFENDANT—OBJECTOR—APPELLANT

versus

ANUKUL CHANDRA CHOWDHURY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Probate and Administration Act (*V of* 1881), *s.* 5—"*Deposited in a Court of competent jurisdiction*," *meaning of—Properly authenticated copy, what is.*

Section 5 of the Probate and Administration Act does not require that the Will should have been deposited once and should have remained in Court for all time. The words in the section "when a Will has been proved and deposited in a Court of competent jurisdiction" do not mean "continues to remain in deposit." It is quite sufficient if the Will had in fact been deposited in a foreign Court of competent jurisdiction and that Court had before it the original Will at the time it made a judicial pronouncement as to the validity of the Will [p. 167, col 2.]

The copy of the Will, which has to be produced in a Court in British India under section 5 of the Probate and Administration Act for the issue of Letters of Administration with a copy of the Will annexed, does not necessarily mean a copy authenticated under the seal of the foreign Court; a copy authenticated by the notarial seal of a notary as provided for by the judicial process of a foreign Court is a properly authenticated copy within the meaning of the section.[p. 167, col. 2.]

Appeal against the decree of the Additional District Judge, Hooghly, dated the 7th October 1915.

Babu *Mohendra Nath Roy* (with him Babus *Dasarathi Sanyal, Debendra Nath Bhattacharjee, Panna Lal Chatterjee* and *Probhat Chunder Dutt*), for the Appellant.

Dr. *Dwarka Nath Mitter* and Babu *Debendra Nath Mandal*, for the Respondents.

JUDGMENT.

FLETCHER, J.—This is an appeal by th

objector from the decision of the learned Additional District Judge of Hooghly dated the 7th October 1915. The proceedings out of which the present appeal arises related to an application by the respondents for the grant of Letters of Administration with a copy of the Will annexed to the estate of one Kali Churn Bhur, who died at Chandernagar—the territory of the French Republic—on the 2nd January 1914. The application was for a grant having regard to the provisions of section 5 of the Probate and Administration Act. Kali Churn Bhur died, as I have stated, on the 2nd January 1914. On the 1st January 19 4, it appears from the proceedings of the Tribunal of first instance at Chandernagar that Kali Churn Bhur had sent for a notary and in his presence and in the presence of six witnesses had made what is called in the French Code a mystic Will. On the 15th January 1914, Indubhushan De, a general legatee under the Will, applied to the Court of first instance at Chandernagar to have the Will deposited. The Will was brought in the Court at Chandernagar by the notary and certain proceedings were taken before the President of the Tribunal and the President judicially recognized the Will and committed it to the care of a French notary Sadhu Churn Mukherjee, with power to give copies to the parties. That appears to have been the procedure before the French Court. The Judge in the lower Court had expert evidence before him. He had before him the notary Sadhu Churn Mukherjee who was a qualified practitioner in these matters and, according to the evidence of Sadhu Churn Mukherjee, this was a proper judicial recognition of the Will of the deceased Kali Churn Bhur. The fact that the Will has been committed to the custody of a notary seems, so far as I can gather from the text books, to be a practice that does obtain in certain foreign Courts. It is mentioned in Mortimer on Probate and a similar case is mentioned, I understand, in Mr. Justice Henderson's book on the Indian Succession Act. The question, therefore, is "does this case come within section 5 of the Probate and Administration Act"? Section 5 of the Probate and Administration Act says, "when a Will has been proved and deposited in a Court of competent jurisdiction." It has been argued that this Will was not deposited because the words "has been deposited" mentioned in section 5 mean continues to remain in deposit. On the other hand, it is said that the fact that the Will was deposited in Court and the Court had before it the original Will at the time it made a judicial pronouncement as to the validity of the Will under the French Law was a sufficient deposit within the meaning of section 5. I think the latter view is correct. The section does not require that the Will should have been deposited once and remain in Court for all time. It is quite sufficient if the Will had, in fact, been deposited in a foreign Court of competent jurisdiction.

The next argument raised on section 5 of the Probate and Administration Act is that the copy of the Will, which has got to be produced in the Court in British India before Letters of Administration with a copy of the Will annexed can be issued, means a copy authenticated under the seal of the foreign Court. Of course, it may be so in many cases but it is not necessarily so in all cases. The books show that copies authenticated by notaries have been accepted not only by this Court but also by the Courts of England, and the judicial process that took place when the French Court at Chandernagar recognized the Will of Kali Churn Bhur expressly provided that Sadhu Churn Mukherjee, the notary who was a witness in this case, was the person who should give notarial copies. I think we must take it that, the Court at Chandernagar having so provided, a copy authenticated by the notarial seal of Sadhu Churn Mukherjee as provided for by the judicial process is a properly authenticated copy within the meaning of section 5, obviously authenticated in the manner directed by the Court at Chandernagar. I think the copy in this case that was produced before the Court was one on which the Court was entitled to act under section 5 of the Probate and Administration Act. That being so, the Court was entitled, if it thought fit, to make the grant of Letters of Administration with the Will annexed without any further evidence at all. It was a Will recognized by the French Court and the lower Court was entitled to act upon it.

Then it is said that this mystic Will executed, no doubt, according to the French Law is not under the terms of the law in Birtish India capable of passing certain immoveable properties that belonged to the deceased in British India. That is not a matter which we need enquire into in the present case. It is quite clear that, in any view, there are considerable assets of moveable property within the limits of British India to which a grant of Letters of Administration with a copy of the Will annexed must be made. Before the executors can get hold of these properties in British India, in any event, a grant of Letters of Administration must be made to them.

In the result, I see no reason to differ from the conclusion arrived at by the learned Judge of the Court below. The present appeal, therefore, fails and must be dismissed with costs, Rs. 250.

SHAMSUL HUDA, J.—I agree.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 545 OF 1915.

January 4, 1918.

Present:—Mr. Justice Richardson and Mr. Justice Beachcroft.

JUGALPADA DUTT—APPELLANT

versus

GANESH CHANDRA PAL AND OTHERS—RESPONDENTS.

Provincial Insolvency Act (III of 1907), s. 36—Annulment of transfer—Notice to transferee, form of—Notice to prove debt, whether sufficient.

When a question arises whether a transfer should or should not be annulled under section 36 of the Provincial Insolvency Act, it is requisite that the transferee should have proper notice that proceedings are contemplated under that section and a proper opportunity to put his case before the Court. [p. 169, col. 1.]

The question of proof of a debt under the Provincial Insolvency Act is different from the question of annulling a mortgage under section 36. [p. 169, col. 1.]

Appeal against the order of the District Judge, Burdwan, dated the 4th of September 1915.

FACTS appear from the judgment.

Babu *Baranasibasi Mukherjee*, for the Appellant.—The respondent No. 1 applied to be adjudged an insolvent. His application was granted, and usual notices were given to the creditors mentioned in the list attached to his application. Upon that notice the appellant, who was a secured creditor, filed his mortgage bond and an affidavit in support of it. Subsequently, another creditor Hridoy Nath applied to the District Judge praying for annulment of the mortgage in favour of the appellant. Upon this, the District Judge issued a general order on creditors whose debts had been contested to prove their debts. But no notice as contemplated by section 36 of the Provincial Insolvency Act was given to the appellant requiring him to show cause why his mortgage should not be annulled. The order of the District Judge to prove the contested debts was a general order, and in deciding the question of proof of the debts the learned District Judge lost sight of the distinction between secured and unsecured creditors. So far as the appellant is concerned, the result of the lower Court's decision is the annulment of the mortgage under section 36 of the Provincial Insolvency Act, although the procedure for annulment of a transfer under section 36 was not followed. Consequently the order should be set aside.

Babu *Bankim Chandra Mukerjee*, for the Respondents.—The appellant had proper notice of the proceedings. He was called upon to prove his debt, and he failed to prove his rights as a secured creditor, consequently the Court below is right in holding that the debt alleged to be due to the appellant has not been proved. Even if there was any irregularity in the service of notice, it was not such a material irregularity as would render the order of the District Judge liable to be set aside.

JUDGMENT.—This appeal arises out of an order made in the course of insolvency proceedings. One Ganes Chandra Pal was on his own application adjudged an insolvent on the 10th January 1914. On the 11th May 1915 notices were issued to the creditors to prove their claims within a month. The creditors were those mentioned in the list attached to the insolvent's application. Among the creditors was the appellant Jugalpada Dutta. He claimed to be a secured creditor and it appears that in response to the notice to which I have referred, he filed in proof of his claim the mortgage bond executed by the insolvent.

in his favour together with an affidavit. On the 12th June 1915, another creditor Hridoy Nath Pal presented an application to the District Judge in which he prayed *inter alia* that the mortgage in favour of the appellant should be annulled under section 36 of the Provincial Insolvency Act, at any rate that is how we understand the prayer in question. Upon that the District Judge appears to have issued a general order upon the creditors whose debts had been contested to prove them. It does not appear from the order-sheet that any special notice was issued to the appellant calling upon him to show cause why his mortgage should not be annulled. Apparently the matter in which the appellant was interested with other matters came before the District Judge on the 28th August 1915. One witness was examined on behalf of the creditor Hridoy Nath Pal. The learned District Judge made his order from which this appeal is preferred on the 4th September 1915. He first dealt with certain other matters and then coming to the appellant's mortgage bond he says:—"In the case of Jugal though there are two witnesses named one is illiterate." Then he adds referring to Jugal's debt and the debt of another creditor: "It is noticeable that the affidavits are written by the insolvent's Pleader or by his clerk. Those debts, therefore, cannot be said to have been proved." It is obvious that the learned Judge regarded the question before him merely as a question of the proof of the debt though, in the result so far as the appellant is concerned, the order has been treated as in effect an order annulling the mortgage under section 36. The distinction which the Act makes between secured and unsecured debts was lost sight of. The materials before the learned Judge were not sufficient to justify him in making an order under section 36; and unless the order is treated as an order under that section, then in relation to a secured debt it has no meaning. We must add that when a question arises whether a transfer should or should not be annulled under section 36, it is requisite that the transferee should have proper notice that proceedings are contemplated under that section and a proper opportunity to put his case before the Court. In the present case the proceedings were of an extremely summary character and no one seems to have realized either at their inception or during their progress that any question under section 36 was involved. In the circumstances and on the materials on this record we are of opinion that this order cannot be allowed to stand.

The result is that the order appealed from will be set aside so far as the appellant is concerned; but at the same time we must leave it open to the District Judge, if occasion should arise for so doing, to deal with the matter according to law under section 36 of the Act. In the meantime it will be open to the appellant to take what steps he may be advised to take in order to realise his security. The appellant himself was in some respects to blame for not bringing before the learned District Judge and not insisting upon his own rights as a secured creditor. We shall, therefore, make no order as to costs.

Order set aside.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1621 OF 1914.

May 30, 1917.

Present:—Mr. Shah Din, Chief Judge, and Mr. Justice LeRossignol.

CHOTHA RAM—PLAINTIFF—APPELLANT

versus

Musammat KARMON BAI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 95—Execution—Sale—Suit by auction-purchaser decree-holder for possession, maintainability of.

A decree-holder who purchases at a sale held in execution of his decree property belonging to his judgment-debtor is in the same position as would be any other purchaser at an auction sale held in execution of a decree. If after confirmation of the sale in his favour such an auction-purchaser fails to obtain from the judgment-debtor possession of the property purchased, he may claim possession not only by an application under Order XXI, rule 95 of the Civil Procedure Code, but also by suit. Section 47 of the Code is not a bar to such a suit and does not apply to such an application. The subject-matter of such a suit does not relate to the "execution, discharge or satisfaction of the decree" within the meaning of section 47. [p. 171, col. 2.]

The summary remedy provided for by rule 95 of Order XXI of the Code is concurrent with a remedy by separate suit, and either the one or the other can

be availed of by the aggrieved party as the circumstances of a particular case may require It does not follow that because the summary remedy provided for by rule 95 of Order XXI can be given to the decree-holder purchaser by the executing Court, if he fails to avail himself of that remedy or seeks it, but is unsuccessful, he is precluded from seeking the alternative remedy by regular suit which is open to other auction-purchasers, simply because he happened at one time to be the holder of a decree against the opposite party. [p. 173, col. 1.]

Second appeal from the decree of the Additional Divisional Judge, Multan, dated the 2nd April 1914.

The Hon'ble Mr. *Muhammad Shafi*, for the Appellant.

Mr. *Hargopal*, for the Respondents.

JUDGMENT.

SHAH DIN, C. J.—The facts of this case as given in the judgment of the Divisional Judge are not disputed. On the 27th June 1891 Chotha Ram obtained a decree for Rs. 9,690-14-0 against Topan Lal and Asu Lal in the Court of the District Judge of Shikarpur in Sindh. The greater part of the decretal amount was realized in Shikarpur, and in respect of the balance Rs. 1,178-9 6, the decree was transferred to the Muzaffargarh District in the Punjab; and as both the judgment-debtors had meanwhile died execution was taken out against their widows, namely, *Musammat* Karmon Bai and *Musammat* Lalo Bai, who were duly brought on the record as the legal representatives of their deceased husbands. A residential house which is situate in village Khangarh in the Muzaffargarh District was attached in execution of the decree. The house in question was already mortgaged to certain mortgagees for Rs. 1,200; the mortgagees objected to the attachment, and on the 15th December 1900 their objections were allowed and the house was ordered to be sold in execution of Chotha Ram's decree subject to the mortgage just mentioned. At the auction sale the house was purchased by the decree-holder with the permission of the Court, and the sale was confirmed by the Court on the 11th January 1901. The certificate of sale was granted to the decree-holder on 26th February 1901.

One of the judgment-debtors, *Musammat* Karmon Bai, filed an objection praying for reservation of her rights in the house in question; but her objection was disallowed on the 16th February 1901. She then brought a regular suit to establish her right of residence in the house, but the suit was dismissed on 19th January 1903 on the ground that it was barred by section 244 of the Civil Procedure Code, Act XIV of 1882. Thereafter on the 31st August 1906 Chotha Ram, decree holder, applied to be put in possession of the house. To this application objections were raised by *Musammat* Karmon Bai, and Chotha Ram's application was rejected on the 22nd October 1906; he appealed from the order of rejection, but his appeal was dismissed on the 7th March 1907.

On the 16th November 1912 Chotha Ram brought the suit which has given rise to the present appeal, for recovery of possession of the house on the strength of the auction sale dated the 11th January 1901. *Musammat* Karmon Bai resisted the suit on several grounds, one of which was that since the plaintiff was himself the decree-holder he could seek his remedy only in the executing Court and could not bring a regular suit to recover possession of the house in question. The District Judge held, following the Full Bench decision of the Allahabad High Court in *Bhagwati* v. *Banwari Lal* (1), that the plaintiff's suit was maintainable; and he decreed the suit accordingly conditional on plaintiff paying a certain sum of money to *Musammat* Karmon Bai. On appeal the Divisional Judge was of opinion, in view of certain observations contained in two of the judgments of this Court, *Musammat Har Devi* v. *Ramjiwan* (2) and *Than Singh* v. *Kazim Ali* (3), that the plaintiff's suit was barred by section 47 of the Civil Procedure Code. He accepted the appeal of *Musammat* Karmon Bai accordingly, and dismissed the plaintiff's suit.

A second appeal has been preferred to this Court by the plaintiff Chotha Ram; and the question which we have to decide is, as to whether section 47 of the Civil Procedure Code is a bar to the suit brought by him to recover possession of the house which was sold to him in execution of his decree in 1901. The following authorities

(1) 1 Ind. Cas. 416; 31 A. 82; 6 A L. J. 71; 5 M L. T 185 (F. B.).
(2) 14 P. R. 1893.
(3) 92 P. R. 1893.

were cited in the course of the arguments before us: *Sabhajit* v. *Sri Gopal* (4), *Ghulam Shabbir* v. *Dwarka Prasad* (5), *Moti Lal* v. *Makund Singh* (6), *Bhagwati* v. *Banwari Lal* (1), *Mahabir Pershad Singh* v. *Macnaghten* (7), *Madhusudan Das* v. *Gobinda Pria Chowdhurani* (8), *Sariatoolla Molla* v. *Raj Kumar Roy* (9), *Ram Narain Sahoo* v. *Bandi Pershad* (10), *Bhimal Das* v. *Musammat Ganesha Koer* (11), *Mahomed Mesraf* v. *Habil Mia* (12), *Hari Charan Dutt* v. *Mon Mohan Nandy* (13), *Sevu* v. *Muttusami* (14), *Kasinatha Ayyar* v. *Uthumansa Rowthan* (15), *Kattayat Pathumayi* v. *Raman Menon* (16), *Sandhu Taragonar* v. *Hussain Sahib* (17), *Sultan Sahib Marakayar* v. *Chidambaram Chettiar* (18), *Sadashiv Mahadu* v. *Narayan Vithal* (19), *Bhaga Shah* v. *Bura Shah* (20) (page 144, 1st paragraph), *Musammat Har Devi* v. *Ramjiwan* (2) and *Than Singh* v. *Kazim Ali* (3), *Musammat Lal Devi* v. *Karim Bakhsh* (21).

We have carefully read all these authorities: but we consider it unnecessary to discuss them in detail, as the question involved in this case has been very carefully considered by the Full Bench of the Allahabad High Court in *Bhagwati* v. *Banwari Lal* (1), and our own view entirely coincides with that propounded by the majority of the Full Bench in that case. There it was held by the majority of the learned Judges that a decree-holder, whether holding a decree for sale on a mortgage or a simple money decree, who purchases at a sale held in execution of such decree property belonging to his judgment-debtor is in the same position as would be any other purchaser at an auction sale held in execution of a decree. If after confirmation of the sale in his favour the auction-purchaser fails to obtain from the judgment-debtor possession of the property purchased, he may claim possession not only by an application under section 318 or section 319 of the Code of Civil Procedure (of 1882), but also by suit; section 244 of the Code is not a bar to such suit and does not apply to such an application.

Section 47 (1) of the present Civil Procedure Code, which has been relied on as a bar to the present suit, runs as follows:—"All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit." The question for decision in the present case, therefore, is whether the relief sought by the plaintiff against the defendant, *Musammat* Karmon Bai, involves a question arising between the parties to the suit in which the decree was passed, or their representatives, and "relating to the execution, discharge or satisfaction of the decree;" for it is obvious that if the question arising between the parties does not relate to the execution, discharge or satisfaction of the decree, the mere circumstance that it arises between the parties to the suit in which the original decree was passed, or their representatives, is not sufficient of itself to bar the present suit under the provisions of section 47 (1) of the Code. A reference to the execution record in this case shows that the house in suit was purchased by the decree-holder, Chotha Ram, with the permission of the executing Court in January 1901, and that on the 16th February 1901 the Court entered up satisfaction of the decree in part and filed the record of the execution proceedings. It also appears from the record that the decree-holder paid into Court Rs. 50, being five per cent. of

(4) 17 A. 222; A. W. N. (1895) 61; 8 Ind. Dec. (N. S.) 467.
(5) 18 A. 36; A. W. N. (1895) 149; 8 Ind. Dec. (N. S.) 729.
(6) 19 A. 477; A. W. N. (1897) 117; 9 Ind. Dec. (N. S.) 303.
(7) 16 C. 682; 16 I. A. 107; 13 Ind. Jur. 133; 5 Sar. P. C. J. 345; 5 Ind. Dec. (N. S.) 451 (P. C.).
(8) 27 C. 34; 4 C. W. N. 417; 14 Ind. Dec. (N. S.) 23.
(9) 27 C. 709; 4 C. W. N. 681; 14 Ind. Dec. (N. S.) 466.
(10) 31 C. 737.
(11) 1 C. W. N. 658.
(12) 6 C. L. J. 749.
(13) 20 Ind. Cas. 874; 18 C. W. N. 27.
(14) 10 M. 53; 11 Ind. Jur. 19; 3 Ind. Dec. (N. S.) 787.
(15) 25 M. 529; 12 M. L. J. 1.
(16) 26 M. 740; 13 M. L. J. 237.
(17) 28 M. 87; 14 M. L. J. 474.
(18) 1 Ind. Cas. 993; 32 M. 136; 4 M. L. T. 350; 19 M. L. J. 224.
(19) 11 Ind. Cas. 937; 35 B. 452; 13 Bom. L. R. 661.
(20) 58 P. R. 1888
(21) 18 P. R. 1904.

the purchase-money (which was Rs. 1,000) as commission on the amount of the purchase-money; and that the balance of the purchase-money was set off against the amount due on the decree. This was done under Order XXI, rule 72 (2), Civil Procedure Code, which runs as follows:—"Where a decree-holder purchases with such permission (*i. e.*, the express permission of the Court) the purchase-money and the amount due on the decree may, subject to the provisions of section 73, be set off against one another and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly." In this connection we may also refer to rule 84 (2) of Order XXI which lays down that —"Where the decree-holder is the purchaser and is entitled to set off the purchase-money under rule 72, the Court may dispense with the requirements of this rule," *i. e*, the auction-purchaser's obligation to pay, immediately after he has been declared purchaser of the property of the judgment-debtor, a deposit of 25 per cent. on the amount of his purchase money to the officer conducting the sale. Under rule 85 the full amount of the purchase-money payable has to be paid by the purchaser into Court within fifteen days from the date of the auction-sale; but if the auction-purchaser is the decree-holder, in calculating the amount to be so paid into Court, he can have the advantage of any set-off to which he may be entitled under rule 72. Rules 72 (2), 84 (2) and 85, when read together, make it clear that the auction-purchaser who happens to be the decree-holder is entitled to certain concessions, as compared with an ordinary auction-purchaser, in so far as he is not required (*a*) to pay a deposit of 25 per cent. on the amount of his purchase-money under rule 84 (1), and (*b*) to pay into Court the full amount of the purchase money that remains to be paid under rule 85, and is entitled under rule 72 (2) to set-off the purchase-money against the amount due on his decree. As soon as the set off referred to in rule 72 (2) has been allowed, the Court executing the decree is bound to enter up satisfaction of the decree, in whole or in part, according as the set-off has the effect of wiping off the whole amount of the decree or only a portion of it. It follows from the provisions just referred to that the legal effect of the concessions made by the Code of Civil Procedure in favour of the decree-holder who purchases at a Court sale the property of his judgment-debtor with the express permission of the Court, is precisely the same as if the decree-holder had made to the officer conducting the auction sale a deposit of 25 per cent. on the amount of his purchase-money under rule 84 (1) and thereafter paid into Court, the balance of the purchase-money as required by rule 85, but had subsequently received from the Court the amount due on his decree, in whole or in part, and the Court had entered up satisfaction of the decree accordingly. It is exceedingly difficult to see how the position of a decree-holder who has purchased with the permission of the Court property belonging to the judgment-debtor, which is sold in execution of his decree, is (barring the special concessions above referred to which are made in his favour simply and solely as a matter of convenience) different from the position of an ordinary auction-purchaser, more specially after his decree has been executed in whole or in part and the executing Court has, as required by rule 72 (2), entered up satisfaction of the same accordingly. Where the whole of the decretal amount has been set off against the purchase-money, the decree has been fully discharged or satisfied, and it follows that the execution proceedings have come to an end and the executing Court is *functus officio*. In such an event the proper procedure is to enter up full satisfaction of the decree and to consign the execution record to the record room. The same procedure must apply to a case in which only a portion of the decretal amount is set off against the purchase-money, for there also the decree being satisfied *pro tanto* the Court executing the decree must enter up satisfaction of the decree in part and file the execution proceedings so far as they relate to the sale of the judgment-debtor's property in part satisfaction of the decree.

If, therefore, after the Court executing the decree has entered up satisfaction of the decree in whole or in part, a dispute arises between the *quondam* decree-holder in his new capacity of auction-purchaser

and the *quondam* judgment-debtor, or their representatives, regarding the possession of the property sold at the public auction held in execution of the decree, the dispute cannot properly be said to relate to "the execution, discharge or satisfaction of the decree", which under section 47 of the Civil Procedure Code can only be determined by the executing Court. It is no doubt true that under Order XXI, rule 95, of the Civil Procedure Code the executing Court is empowered, on the application of the auction-purchaser who may also be the decree-holder, to order delivery of possession of the immoveable property of the judgment-debtor which has been sold at a public auction; but this summary power has been conferred on the executing Court in the interests of the auction-purchasers (including the decree-holder purchasers) and the judgment-debtors in order to save expense and trouble incidental to litigation. The summary remedy provided for by rule 95 is concurrent with a remedy by separate suit [*Musammat Har Devi* v. *Ramjiwon* (2) and *Than Singh* v. *Kazim Ali* (3)] and either the one remedy or the other can be availed of by the aggrieved party as the circumstances of a particular case may require. But it does not by any means follow that because the summary remedy provided for by rule 95 can be given to the decree-holder purchaser by the executing Court, if he fails to avail himself of that remedy or seeks it, but is unsuccessful, he is precluded from seeking the alternative remedy by regular suit, which is clearly open to other auction-purchasers, simply because he happened at one time to be the holder of a decree against the opposite party. There is no reason in principle why his character as decree-holder should persist, even after his decree has been satisfied in full, by reason of his having purchased property belonging to his judgment-debtor, and why the questions arising between him and the *quondam* judgment-debtor regarding the possession of the property purchased by him should be considered as questions relating to the execution, discharge or satisfaction of his decree.

Turning now to the authorities, we find that the majority of the Judges composing the Full Bench of the Allahabad High Court in *Bhagwati* v. *Banwari Lal* (1) have held that, in the circumstances stated above, the decree-holder who purchases at an auction sale with the permission of the executing Court occupies precisely the same position as any other auction-purchaser; that a question arising between him and the judgment-debtor, whose property has been sold, as to the possession thereof, after the confirmation of the sale, is not a question relating to the execution, discharge or satisfaction of the decree; and that the decree-holder is not precluded by the provisions of section 47 of the Civil Procedure Code from bringing a separate suit to recover possession of the property purchased by him. We have carefully read the judgments of the learned Judges who differ from the view of the majority; but with the greatest possible respect to them, we venture to think that the arguments adduced by them in support of their conclusion are less convincing than those advanced by the majority and which have been so lucidly expressed in the judgment of Mr. Justice Banerji. So far as the Calcutta High Court is concerned, there is a conflict of opinion among the learned Judges of that Court On the one hand there are the cases reported as *Madhusudan Das* v. *Gobinda Pria Chowdhurani* (8) and *Sariatoolla Molla* v. *Raj Kumar Roy* (9), *Ram Narain Sahoo* v. *Bandi Pershad* (10) and *Hari Charan Dutt* v. *Mon Mohan Nandy* (13), which support the view propounded by the dissentient minority in *Bhagwati* v. *Banwari Lal* (1); while, on the other hand, the decision of the majority in the Allahabad Full Bench case receives support from *Bhimal Das* v. *Musammat Ganesha Koer* (11) and *Mahomed Mosraf* v. *Habil Mia* (12).

The Madras High Court has in a series of recent decisions held the same view as has been held by the dissentient minority in *Bhagwati* v. *Banwari Lal* (1); *Kasinatha Ayyar* v. *Uthumansa Rowthan* (15), *Kattayat Pathumayi* v. *Raman Menon* (16) and *Ram Narain Sahoo* v. *Bandi Pershad* (10). But it will be observed that in *Kattayat Pathumayi* v. *Raman Menon* (16) the learned Judges in the course of their judgment say:—"The appellant's Vakil

contends that this action is barred by section 244, Civil Procedure Code. If the question were not already settled by more decisions than one of this Court, and of the Calcutta High Court, we should entertain considerable doubt as to whether proceedings taken by a purchaser to obtain possession of the property purchased could be regarded as relating to the execution, discharge or satisfaction of the decree within the meaning of section 244, Civil Procedure Code, when such proceedings could not possibly affect the execution, discharge or satisfaction of the decree." This shows that if the matter were *res integra*, the learned Judges would have taken the same view as has been held by the majority of the Full Bench of the Allahabad High Court. Similarly in *Sandhu Taraganar* v. *Hussain Sahib* (17) the learned Judges who decided the case felt bound, in view of a series of previous rulings of their own Court, to hold that proceedings between a decree holder who has purchased at a Court auction and the judgment-debtor are proceedings relating to the execution, discharge or satisfaction of the decree; otherwise they would have supported the view that such proceedings do not fall within the purview of section 47 of the Civil Procedure Code. In *Sultan Sahib Marakayar* v. *Chidambarum Chettiar* (18), in which the point actually decided by the Court was one of limitation relating to an application made by the decree-holder auction-purchaser for delivery of possession under section 318 of the Civil Procedure Code of 1882, the learned Judges observed:—

"It is clear that an application by a decree-holder for delivery of possession of property purchased in execution is not in strictness an application for execution of the decree, a direction for delivery of possession being no part of the decree, and though we may be bound by a number of decisions to hold that such an application raises a question relating to the execution of the decree, it does not follow, and we do not think, that it is an application for execution." It will thus be seen that the Madras High Court is disposed to favour the principle enunciated in the Full Bench decision of the Allahabad High Court, but that it has refrained, in accordance with the maxim of *stare decisis*, from disturbing a series of its own previous decisions in which the opposite view has been propounded.

In *Sadashiv Mahadu* v. *Narayan Vithal* (19) it was held by a Division Bench of the Bombay High Court that a decree-holder by becoming a purchaser at a Court sale of property belonging to the judgment-debtor did not cease to be a party to the suit within the meaning of section 47, Civil Procedure Code, and that proceedings for delivery of possession of such property were proceedings in execution of the decree and fell within the scope of the said section. The learned Judges followed *Madhusudan Das* v. *Gobinda Pria Chowdhurani* (8), *Ram Narain Sahoo* v. *Bandi Pershad* (10), *Kasinatha Ayyar* v. *Uthumansa Rowthan* (15) and dissented from the Full Bench decision of the Allahabad High Court in *Bhagwati* v. *Banwari Lal* (1). After referring to these decisions the learned Judges say at page 458 * of the report:—

"It is contended that the execution proceedings came to an end when the property was sold and the sale confirmed. This contention does not appear to us to be sound. We are of opinion that proceedings in execution (so far as the decree-holder is concerned) are not completed until the decree-holder obtains the benefit of the sale held in execution of his decree. In *Bapuchand Jethiram Gujar* v. *Mugutrao* 22) it was held by this Court that an application by a judgment-creditor for payment to him of money which has been paid into Court on his account in execution of his decree, is an application to take a step in aid of execution of the decree. In that case Farran, C. J., observes that when money is paid into Court in satisfaction of a decree, the execution of the decree with regard to such payment is not fully completed till the money has been actually paid by the Court to the judgment-creditor. That is also the view taken by the Madras and Allahabad High Courts..... If then an application made by a decree-holder to be paid the proceeds of a sale held in execution of his decree is a step-in-aid of execution, we do not see any difference in principle between such an application and an application made by a decree-holder, who is

(22) 22 B. 340; 11 Ind. Dec. (N. S.) 809.

* Page of 35 B.—*Ed.*

also the auction-purchaser, to be put in possession of that which represents the money which would have been paid into Court, if a third party had purchased the property. We think that the execution of the decree is not complete and final, until in the one case the decree-holder actually receives the sale-proceeds through the Court, and in the other case until he secures possession of the property through the Court."

With all possible respect to the learned Judges we find ourselves unable to accept the reasoning employed in the above passage. The weakness of the argument will be clear from a simple illustration. Suppose *A* obtains a decree for Rs. 500 against *B*; *A* takes out execution of the decree and in due course purchases at an auction sale, with the permission of the Court, a house belonging to *B* for Rs. 1,000. The sale is confirmed by the Court and a sale certificate is thereafter duly granted to *A*. Suppose further that *A* does not take advantage of the special concessions given him, as has been explained in the earlier part of this judgment, by Order XXI, rules 72 (2), 84 (2) and 85, Civil Procedure Code, and pays into Court the full amount of the purchase-money, Rs. 1,000, within the time fixed. A few days after, he makes an application to the Court to be paid the amount of the decree due to him, and the money is paid over to him and the balance is handed over to the judgment-debtor. Thereupon the Court enters up full satisfaction of the decree and consigns the execution case to the record room. Here up to a certain point the decree-holder has acted as if he were a third party; *i. e.*, he has paid the purchase money into Court like any other auction-purchaser; but thereafter he has applied for payment to him of part of the money paid into Court in full satisfaction of his decree; and on the money being paid to him by the Court, the execution is complete and final even according to the view of the learned Judges of the Bombay High Court. Now, suppose that *B* does not deliver possession of the house sold to *A*, and *A* applies under Order XXI, rule 95, Civil Procedure Code, to the executing Court for delivery of possession of the house. Is his application one "relating to the execution, discharge or satisfaction of the decree?" It clearly is not, for the simple reason that *A* having received the sale-proceeds through the Court in full satisfaction of his decree, the execution proceedings came to an end; and, therefore, in the case suppose *A* stands on precisely the same footing as would any other auction-purchaser who has had nothing whatever to do with the execution of the decree against *B*. Or suppose that *A* does not make an application to be put in possession of the house summarily under rule 95 aforesaid; but that after the lapse of a few years he brings a regular suit for possession of the house against *B*, can it be said that the dispute between *A* and *B* regarding the liability of *B* to deliver possession of the house to *A* relates to the execution, discharge or satisfaction of the decree which had originally been passed in favour of *A*? There can be but one answer to this question, for upon no reasonable grounds can it be argued that *A*, having received the sale-proceeds of the house through the executing Court and having thus had his decree fully satisfied, is still entitled to secure possession of the house through that Court although that Court became *functus officio*, so far as the execution of *A*'s decree was concerned, many years before the institution of the suit in question. It seems to us that the mistake in applying the provisions of section 47, Civil Procedure Code, to a case of this kind has arisen mainly from the fact that some of the Courts have lost sight of the special provisions enacted in the Civil Procedure Code for the benefit of the decree-holder who purchases property belonging to the judgment debtor with the permission of the executing Court. But for those special provisions the decree-holder who purchases the property of his judgment-debtor at a Court sale would in all respects be treated as any other auction-purchaser, and in that event the reasoning employed by the learned Judges of the Bombay High Court in *Sadashiv Mahadu* v. *Narayan Vithal* (19) would be entirely out of place.

Coming now to the decisions of our own Court, the one directly in point is *Bhaga Shah* v. *Bura Shah* (20). There it was held by a Division Bench that

the mere circumstance that a decree-holder who had purchased his judgment-debtor's property at an auction sale sued as an auction-purchaser did not get over the fact that he was a decree-holder who had brought the property in suit to sale; and that as the suit was brought against the judgment-debtor in the execution proceedings and the question involved related to the execution of the decree in which both the plaintiff and the defendant were parties, the suit was barred by the provisions of section 244, Civil Procedure Code of 1882. No authorities in support of this view are discussed in the judgment; but reference is made to *Sodhi Hukam Singh* v. *Sardar Arjan Singh* (23) and *Kashi Ram* v. *Harnam Das* (24), where all the authorities are stated to have been collected. On turning to *Sodhi Hukam Singh* v. *Sardar Arjan Singh* (23) and *Kashi Ram* v. *Harnam Das* (24), we find that those decisions do not directly relate to the question now under consideration, but that they only indirectly lend support to the view held in *Bhaga Shah* v, *Bura Shah* (20). In *Musammat Har Devi* v. *Ramjiwan* (2) and *Than Singh* v. *Kazim Ali* (3), there are certain *obiter dicta* to the effect that where a decree-holder has purchased property belonging to his judgment-debtor and has then brought a suit to recover possession of the property purchased, the provisions of section 244, Civil Procedure Code of 1882, operate to bar the suit because the opposing parties are the decree-holder and the judgment-debtor, who were parties to the suit in which the decree was passed (see pages 91 and 368 of the report*). But the question was not directly before the Court for decision; nor were the learned Judges called upon to consider whether a suit of the above description could be said to involve a question relating to the execution, discharge or satisfaction of the decree within the meaning of section 244, Civil Procedure Code of 1882. The two decisions of 1893 are, therefore, of very little value in the present case and with all possible deference to the learned Judges who were parties to *Bhaga Shah* v. *Bura Shah* (20), we are of opinion that the decision in that case is unsound and we dissent from it

Lastly, it was pointed out by the Pleader for the respondent, *Musammat* Karmon Bai, that when in 1901 she brought a regular suit to establish her right of residence in the house now in dispute, it was contended in the Divisional Judge's Court by the present appellant, Chotha Ram, that the suit was barred under section 244, Civil Procedure Code of 1882, and that that contention was accepted by the Divisional Judge and the respondent's suit was dismissed on that ground alone. Such being the case, it was argued, the present appellant is estopped from urging in this suit that section 47 of the new Code is not applicable to it, because execution proceedings came to an end when the certificate of sale relating to the house was granted to the appellant in February 1901. In support of this contention reliance was placed on the case of *Jagannadha Rao* v. *Katreddi Kurmayya* (25). But that decision is not at all applicable to the facts of the present litigation. There it was held that the defendants to the suit who pleaded, *inter alia*, that the plaintiff could not proceed in execution of a prior decree for delivery of possession of properties and had a prior application dismissed on the ground could not in defence to a suit instituted on the strength of the order plead section 244, Civil Procedure Code, as a bar. The doctrine of estoppel by pleadings enunciated in the Madras case clearly does not help the respondent in the present case, inasmuch as the present suit which is brought by the appellant against the respondent has nothing whatever to do with the pleadings in the suit of 1901 brought by the respondent against the appellant or with the final order passed by the Court in that suit.

For the foregoing reasons we hold that the suit brought by the appellant, Chotha Ram, is not barred by section 47, Civil Procedure Code. We accordingly accept this appeal, set aside the judgment and decree of the Divisional Judge and remand the case under Order XLI, rule 23, Civil Procedure Code, to the District Judge, Multan, for decision of the appeal with reference to the merits of the case.

Appeal accepted; Case remanded.

(23) 12 P. R. 1887.
(24) 47 P. R. 1887.
(25) 17 M. L. J. 314.

*Pages of P. R. 1893—*Ed.*

CHANDI CHARAN GIRI *v.* GADADHAR PRODHAN.

CALCUTTA HIGH COURT.

CRIMINAL REVISION PETITION No. 707 OF 1917.

August 10, 1917.

Present:—Mr. Justice Chitty and Mr. Justice Richardson.

CHANDI CHARAN GIRI AND OTHERS—PETITIONERS

versus

GADADHAR PRODHAN AND ANOTHER—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 195, cls. (6) and (7)—Sanction for prosecution—Bengal Tenancy Act (VIII of 1885), ss. 69, 70, Collector acting under, whether Court subordinate to District Court.

A Collector acting under sections 69 and 70 of the Bengal Tenancy Act is a Court within the meaning of section 195, Criminal Procedure Code. [p. 177, col. 2; p. 178, col. 2.]

Proceedings under sections 69 and 70 of the Bengal Tenancy Act are of a civil nature and the Collector's Court trying such proceedings must be deemed to be subordinate for the purpose of section 195, Criminal Procedure Code, to the principal Court of original civil jurisdiction in the District, *i.e.*, the Court of the District Judge. [p. 178, col. 1; p. 179, col. 1.]

Per *Chitty, J. (Richardson, J,* hesitating).—The principal Court of original jurisdiction within the meaning of section 195, clause 7, does not necessarily refer to a Court of any particular class. It is a Civil or Criminal or Revenue Court as the case may be. [p. 178, col. 1.]

Per *Richardson, J.*—The words "where no appeal lies" in clause 7, section 195, Criminal Procedure Code, are wide enough to include both a particular case or class of cases in which no appeal lies as well a Court from which no appeal lies in any case, *e.g.*, a Small Cause Court. [p. 178, col. 2.]

Per *Chitty, J.*—Although these words in clause 7, section 195, Criminal Procedure Code, are capable of such a wide meaning, yet the Legislature referred to Courts whose decisions are made final by law, *e.g.*, Small Cause Courts [p. 178, col. 1.]

Rule against the order of the Sub-Divisional Magistrate, Contai, dated the 3rd January 1917.

Babus *Jyotish Chandra Hazra* and *Santosh Kumar Pal*, for the Petitioners.

Babu *Jogenda Narayan Mazumdar* for Babu *Sarada Charan Maity*, for the Opposite Party.

JUDGMENT.

CHITTY, J.—In this case the petitioners Chandi Charan Giri and Gajendra Barik applied to the Sub-Divisional Officer of Contai, exercising the powers of a Collector, for appraisement of produce under section 69 of the Bengal Tenancy Act. In those proceedings the officer deputed to hold a local enquiry reported that the petitioners had made use of forged receipts. On this report the Sub-Divisional Officer refused their application, and at the instance of their opponents granted sanction for their prosecution under sections 471 and 209, Indian Penal Code. From that order the petitioners appealed to the Commissioner of the Burdwan Division. The Commissioner held that he had no jurisdiction and that the Court to which the Sub-Divisional Officer's Court was subordinate was that of the District Judge of Midnapore under section 195 (7) (*c*) of the Criminal Procedure Code. The petitioners then applied to the District Judge, but he threw out their application on the ground that he had no jurisdiction to entertain it. He was of opinion that the Commissioner's Court had jurisdiction, as the Court to which appeals from the decisions of a Collector or officer exercising the powers of a Collector under the Bengal Tenancy Act would ordinarily lie. Against the District Judge's order the petitioners applied to this Court to exercise its revisional powers, and this Rule was issued. It should be noted that in proceedings under section 69 of the Bengal Tenancy Act by section 70 (5) "the Collector may, if he thinks fit, refer any question in dispute between the parties for the decision of a Civil Court, but subject as aforesaid his order shall be final and shall on application to a Civil Court by the landlord or the tenant be enforceable as a decree." There is consequently no appeal from an order of the Collector under section 70.

The Collector acting under sections 69 and 70 is a "Court" within the meaning of section 195, Criminal Procedure Code [see *Raghoobuns Sahoy* v. *Kokil Singh* (1)]. The question is to what authority he is to be regarded as subordinate for the purposes of section 195 (6). Section 195 (7) purports to supply the answer, but it is so unfortunately worded as to leave the enquirer in much the same doubt and uncertainty as he was before. The difficulty of interpretation will be apparent if clauses (*a*) and (*b*) be omitted. Section 195 (7) will then read: "For the purposes of this section every Court shall be deemed to be subordinate only to the Court, to which appeals from the former Court ordinarily lie, that is to say, (*c*) where no appeal lies such Court shall be deemed to be

(1) 17 C. 872; 8 Ind. Dec. (N. S.) 1126.

subordinate to the principal Court of original jurisdiction within the local limits of whose jurisdiction such first mentioned Court is situate." The difficulty seems to have arisen from the attempt to provide in one clause for cases where an appeal lies as well as for those where no appeal lies.

No doubt the words "where no appeal lies" are wide enough to cover cases, where all decisions of a particular Court are made final by law, *e. g.*, a Small Cause Court, and also cases where a particular order is non-appealable, *e. g*, the case before us. I am inclined to think that the former class of cases only was referred to by the Legislature in this section 195 (7). If it were not so, the word "ordinarily" in the earlier part of the sub-section would be meaningless. Further, there does not seem to be any good reason for possibly transferring jurisdiction from a Court of one class to a Court of another, simply because an appeal from the particular order in question is forbidden. Nor am I prepared to say that the principal Court of original jurisdiction must necessarily refer to a Court of any particular class. It is a Civil or Criminal or Revenue Court, as the case may be.

In this particular case, however, I think that the difficulty may be surmounted. I cannot agree with the learned District Judge when he says that appeals from the decisions of the Collector under the Bengal Tenancy Act ordinarily lie to the Commissioner of the Division. A perusal of the Act will show that while in some cases an appeal is allowed to the Commissioner, *e. g.*, under section 40 (5), in other cases an appeal lies to the Special Judge *i. e.*, to a Civil Court. If that be so, then under section 195 (7) (*b*) the nature of the case has to be considered. Proceedings under sections 69 and 70 are clearly of a civil nature. The Collector may state a case for the decision of a Civil Court and his order may be enforced as a decree of a Civil Court. The Collector's Court may, therefore, be deemed to be subordinate to the Civil Court. *i. e.*, the Court of the District Judge, for the purposes of section 195. This is on the assumption that the words "where no appeal lies" refer only to the case where all decisions of a particular Court are not appealable.

If they also refer to a case like the present, where a particular order is not appealable, we arrive at the same result. In that view, it being a matter of a civil nature, the Collector's Court must be regarded as subordinate to the principal Court of original civil jurisdiction, that is, to the Court of the District Judge.

The matter is by no means free from doubt, but this is the conclusion to which I have come after giving the matter my best consideration. I would accordingly make the Rule absolute, set aside the order of the District Judge, and remand the application of the petitioners to his Court to be disposed of on the merits.

RICHARDSON, J.—The opening words of clause (7) of section 195 were apparently intended as a general definition or explanation of the term 'subordinate,' as applied in the previous clauses to a Court.

The sub-clauses of clause (7) were meant, I think, to indicate the result of applying the opening words of the clause to the particular cases dealt with in the sub clauses The words "that is to say" at the end of the opening paragraph refer to the preceding words as a whole, with the sense "which means" or "the result being." The language is not very happy but that seems to me to be its effect.

This Court has held in *Raghoobuns Sahoy* v. *Kokil Singh* (1) that a Collector acting in appraisement proceedings under sections 69 and 70 of the Bengal Tenancy Act is a 'Court' within the meaning of section 195 of the Criminal Procedure Code. Reference may also be made to *Abdullah Khan* v. *Emperor* (2).

Under clause (5) of section 70 of the Bengal Tenancy Act, the Collector's order is final, There is, therefore, no appeal and the case would seem to fall within clause (7), sub-clause (*c*) of section 195. The words "where no appeal lies" in that sub-clause are wide enough to include both a particular case or class of cases in which no appeal lies and a Court from which no appeal lies in any case, such as, Small Cause Court [*Nibaran Chandra* v. *Akshoy Kumar Banerjee* (3)].

(2) 5 Ind Cas 62; 37 C. 52; 14 C. W. N. 132; 11 Cr. L. J. 45.

(3) 41 Ind. Cas. 311; 21 C. W. N. 948; 26 C. L. J. 138; 18 Cr. L. J. 791.

EMPEROR *v.* JAWAI.

As to the expression "principal Court of original jurisdiction" in sub-clause (*c*) it has been held in *Ajodhia Parshad* v. *Ram Lal* (4) that it means the principal Court of civil, criminal or revenue jurisdiction according to the nature of the case in which the question of sanction arises. I am not aware of any express decision on the point in this Court and I am not sure that it has not been generally assumed in this Province that under the clause, as it stands, "the principal Court of original jurisdiction" is in a District the Court of the District Judge who is also in the great majority of cases the Sessions Judge. However that may be, it is unnecessary in the present case to carry the discussion further. I agree that proceedings before the Collector under sections 69 and 70 of the Bengal Tenancy Act are in their nature civil proceedings and I concur in the order proposed by my learned brother.

Rule made absolute.

(4) 13 Ind. Cas. 284; 34 A. 197; 9 A. L. J. 124; 13 Cr. L. J. 44.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL NO. 931 OF 1917.

February 1, 1918.

Present:—Mr. Justice Scott-Smith and Mr. Justice Shadi Lal.

EMPEROR—APPELLANT

versus

Musammat JAWAI AND ANOTHER—RESPONDENTS.

Criminal Procedure Code, Act V of 1898, s. 417—Appeal against acquittal—Appellate Court, interference by, when justified—Confession, retracted, use of, against person making it and against co-accused—Corroboration.

Where the findings of fact of a Trial Court are in favour of the accused's innocence, a Court of Appeal will not in an appeal against the order of acquittal interfere with the verdict unless the indications of mistake in the judgment of the lower Court are obvious or the evidence as to the accused's guilt is too strong to be rejected. It is immaterial that the Appellate Court might have arrived at a different conclusion had it been trying the accused as a Court of original jurisdiction. [p. 181, col. 1; p. 183, col. 1.]

A confessing prisoner should not be condemned upon a retracted confession unless it is corroborated in material particulars. [p. 182, col 1.]

Where it is a question of using a confession against a co-accused and the Court is not prepared to accept the confession *per se* as sufficient, the corroboration ought to be of the kind that not only confirms the general story of the crime but also unmistakably connects the co-accused with the crime. [p. 182, col. 1.]

Appeal from the order of the Additional Sessions Judge, Shahpur at Mianwali, dated the 9th July 1917, acquitting the respondents.

The Government Advocate, for the Appellant.

Mr. *Beechey*, for the Respondents.

JUDGMENT.—The Sessions Judge of the Shahpur Division has acquitted *Musammat* Jawai of the murder of her husband Gullu, and her co-accused Faujdar of the abetment of the murder. Against the order of acquittal the Local Government has preferred an appeal to this Court under section 417, Criminal Procedure Code, and we have heard the case argued at length by Mr. Petman for the appellant and Mr. Beechey for the accused, and given our anxious and careful consideration to the arguments advanced by the learned Counsel and to the findings arrived at by the learned Sessions Judge.

The deceased Gullu, who was a *Machhi* of Khushab in the Shahpur District, died on the 13th March 1917 after an illness lasting for about a fortnight, and as his death did not excite any suspicion, his body was buried on that very day. Two days later the Sub-Divisional Magistrate received an anonymous letter charging *Musammat* Jawai with having killed her husband by administering arsenic to him at the instance of her paramour Faujdar, and it was on the strength of this letter that the corpse was disinterred on the 22nd March and some parts of the viscera were sent to the Chemical Examiner, who detected arsenic, mercury and opium therein. It appears that certain allegations, for which there was no foundation, were made that the exhibits despatched to the Chemical Examiner had been tampered with, and it was consequently considered advisable to exhume the body again, which operation was performed on the 9th May in the presence of the Superintendent of Police with the result that the Chemical Examiner

again found arsenic in the remains sent to him for examination.

In the meanwhile the Inspector, who had been conducting the investigation, was superseded by a C. I. D Inspector from Lahore, and this officer in consequence of information received by him from *Musammat* Jawai's father Karm Ali arrested on the 20th May 1917 both the accused. It is alleged that after a week, namely, on the 27th May, *Musammat* Jawai threw up the sponge, made a clean breast of the whole affair, and took the Police to her house from which she produced a rag upon which the Chemical Examiner found traces of arsenic. The woman also gave information which led to the removal on the succeeding day of a waistcoat from the person of Faujdar, the right hand pocket of which was found by the Chemical Examiner to contain white arsenic.

On the 29th May she was produced before a Magistrate and made a confession which was retracted on the 7th June, the date on which enquiry into the case commenced before Mr. Blacker, who finally committed the case to the Sessions. On that day she also made an application in writing complaining of torture by the Police and demanding a medical examination. This request was granted, and the Civil Surgeon found three contusions on her right thigh, left thigh and left knee respectively and also a black mark of the size of a rupee on the outer surface of the right shoulder. To this retraction she adhered before the Sessions Judge and denied the commission of the crime.

These are, in brief, the salient features of the case, and it now remains only to set out the motive for the crime. There is ample evidence upon the record, and indeed, it is not seriously contested on behalf of the accused, that the woman had a liaison with Faujdar, that she eloped twice with him, and that the illicit intimacy led the husband and his brother to make reports at the Police station and even to institute criminal complaints which, however, proved abortive, as the woman declined to depose against her paramour. All this took place prior to 1916, and it was argued in the Sessions Court, and the matter has again been pressed in this Court, that the intrigue came to an end more than a year before the occurrence, and that there was consequently no motive for committing the murder. Now, it is true that neither *Musammat* Jawai in her confession nor the relatives of the deceased in their evidence before the Court referred to any recent incident which could be regarded as an indication of the continuance of the intrigue, and a perusal of their statements shows that they did not make any definite allegation that the liaison continued up to the death of Gullu in March 1917. The learned Sessions Judge is, however, wrong in thinking that *Musammat* Jawai's confession "is absolutely silent on this point." Though she does not mention any outward indication of the amour during the year preceding her husband's death, she states in clear terms that her intense feeling of love for her paramour was the cause of all "what happened to him (the husband)". The confession does not expressly state either that the intimacy continued up to that event, or that it came to an end; but it certainly conveys an impression that the lapse of time did not produce any appreciable difference and that the two were in love with each other up to the last moment.

While we are not prepared to endorse the remarks of the learned Sessions Judge on the question of the cessation of the intimacy between the two accused, we do not think that there are any clear indications of error on any other matter discussed in his judgment. The learned Government Advocate has cited the well-known judgment of this Court in *King-Emperor* v. *Chattar Singh* (1), which enunciates the principle governing appeals against orders of acquittal, and has asked us to apply the test laid down therein to the present case. Now, that very judgment points out that "the finding of fact of a Court, which has the evidence before itself, is ordinarily entitled to great weight and should be set aside by the Court of Appeal only when the indications of mistake are clear, and this is specially true in cases where the finding is in favour of the accused's innocence. If in such a case the evidence is all oral and its credibility is a mere matter of opinion without involving other considerations, the

(1) 7 P. R. 1904 Cr.; 97 P. L. R. 1904; 1 Cr. L. J. 781.

opinion of the Court which heard the witnesses must be treated as almost conclusive. Again, if the evidence is such that opinions may reasonably vary as to its worth, the Court of Appeal will hardly adopt the view adverse to the accused and believe the evidence as to his guilt, which the lower Court has disbelieved, and take upon itself to set aside the verdict of acquittal. The indications of mistake must be obvious, or the evidence too strong to be rejected, before the Court will interfere."

Now the assessors were unanimously of opinion that the guilt of the accused had not been established and the learned Sessions Judge upon an examination of the entire material before him has returned the verdict of acquittal. His remarks showing that the intrigue between the couple had come to an end are probably wrong, though it can hardly be said that the error is a clear one; but we are unable to discover any other clear error which would warrant the reversal of the verdict in favour of the accused. Indeed, we are by no means certain that arsenic was the cause, or at any rate, the sole cause of the death. Now, the first report of the Chemical Examiner shows that not only arsenic, but also mercury was discovered in the stomach, kidney, spleen, liver and intestines, and though the medical witness, who conducted the *post mortem* examination, says in his examination-in-chief that the Chemical Examiner's reports combined with symptoms such as discolouration of mouth, pharynx and gullet, perforation of stomach and detection of arsenic in the bone show that the cause of death was most probably arsenic, his cross-examination indicates that discolouration of the mouth, etc., and the perforation of the stomach could be produced by other causes, and that mercury as well as arsenic is both irritant and corrosive. So far as the symptoms observed by the medical witness are concerned, they are compatible with mercurial poisoning just as they are with arsenical poisoning, and there is no reliable evidence to show how mercury got into the body. The woman in her confession says: "Faujdar told me that he had instructed Sultan Ahmad that whenever I needed some medicine, he would fetch it for me. My husband's mind sickened on the third day. I went to Sultan Ahmad. He fetched me some draught and a pill. My husband took the pill and the draught on the 3rd day and died of it" Now, it is possible that the pill and the draught contained mercury as well as opium which was found in the stomach and intestines; but it would be unsafe to offer any definite opinion on the subject. The testimony of Gullu's relatives shows that he did not vomit at all, and though Karam Ali tried to improve upon the version related by him before the Committing Magistrate by stating in the Sessions Court that he had seen the deceased vomit once or twice, there can be no manner of doubt that this addition is a subsequent invention and does not represent the truth. It is thus clear that arsenic must have been administered in very small doses, and it cannot be said with any certainty that the death was due to arsenic or to mercury, or to both.

Karam Ali deposes that his daughter informed him that Faujdar had given her poison in a packet, and that she had given that poison to the deceased; and that she asked the witness to hush up the matter. The learned Counsel for the respondents impeaches the veracity of this witness and points out that he is anxious to get hold of the property of the deceased, which he cannot do unless he gets rid of the latter's widow and that this greed is, *inter alia*, a reason for his falsely implicating his own daughter. The learned Counsel has also referred to other reasons summarised in the judgment of the Sessions Judge at page 56, lines 30 36, which the learned Judge considers to be fairly good reasons for his giving evidence against his daughter. Karam Ali's conduct as father does, no doubt, appear to be unnatural, and it cannot be supposed that it is his regard for truth that has impelled him to give the most damning evidence against his own daughter. It is manifest that on one matter at least, namely, the deceased having vomited prior to his death, he has perjured himself.

In view of all the circumstances we think that Karam Ali is not a person whose word can be implicitly relied upon.

Musammat Jawai's confession recorded by the Magistrate on 29th May contains a long and circumstantial narrative of the long standing intrigue between her and

her paramour, and of the various events prior to and after the death of her husband, and we agree with the learned Sessions Judge that this confession was not the result of torture, and that the simple injuries discovered by the Civil Surgeon on her person were probably self-inflicted. At the same time it is obvious that for full one week, namely, from 20th May, when she was arrested, up to the 27th May, when she is alleged to have made an incriminating statement to the Police, she remained firm and we cannot, therefore, say that the learned Sessions Judge has committed a mistake in drawing the inference that "she was very closely pressed to make a confession" during the period. It would be idle to contend that she was overtaken by repentence and consequently made a clean breast of the whole affair.

One thing is, however, beyond question that at a very early opportunity, indeed on the first day when the Committing Magistrate commenced to record the evidence for the prosecution, she retracted her confession; and the principle of law is firmly established that a confessing prisoner should not be condemned upon such a confession, unless it is corroborated in material particulars. As laid down in *Jawan* v. *Emperor* (2), "experience and common sense show that in the absence of corroboration in material particulars it is not safe to convict on a confession unless from the peculiar circumstances in which it was made, and judging from the reasons, alleged or apparent, of the retraction, there remains a high degree of certainty that the confession, notwithstanding its having been resiled from, is genuine." Further, when it is a question of using a confession against a co-accused and the Court would not be prepared to accept the confession *per se* as sufficient, the corroboration ought to be of the kind that not only confirms the general story of the crime but also unmistakably connects the co-accused with the crime.

Now, the learned Sessions Judge holds that the production of the arsenic infected rag from her house by *Musammat* Jawai is not a sufficient corroboration to warrant her conviction for murder. It appears strange, as the learned Counsel argues, that while the murder was carefully planned and carried out, and all reasonable precautions to divert suspicion were adopted, the rag which originally contained the packet of arsenic was allowed to remain in the house for ten weeks. *Per contra* it can be argued that *Musammat* Jawai had no sort of idea that there was any arsenic sticking to the rag, and did not, therefore, consider it necessary to destroy it. Be that as it may, the matter has been duly considered by the lower Court and we do not think we would be justified in upsetting its conclusion on the ground of the *quantum* of evidence required to corroborate the confession.

As against Faujdar, the only corroborating evidence, apart from the motive, is the discovery of arsenic in his waistcoat pocket in pursuance of the information supplied by the woman. Now, it is common ground that this accused was in possession of arsenic, having purchased from Kishen Chand (P. W. No. 9) two *tolas* in March 1916 and two and a half *tolas* on 8th March 1917. Both these purchases are admitted by Faujdar, who, however, explains that he bought arsenic for medical purposes, namely, for preparing tonic and *kushta*. Now, the Sub-Inspector Jawahar Singh deposes that Faujdar delivered to him on 20th March 1917 two and a half *tolas* of arsenic, which, he said, he had purchased from Kishen Chand, and the learned Sessions Judge thinks that the arsenic handed over to the witness was that purchased on the 8th March 1917. Mr. Petman, however, retorts that Faujdar was in possession of other arsenic which could be used for poisoning the deceased, but assuming that this contention is correct, it is obvious that the accused did not stand in need of making a purchase in March 1917 in order to administer poison to Gullu. Considering that Faujdar was *ex hypothesi* in possession of arsenic on 20th March 1917, the discovery in May of the traces of the poison on the waistcoat pocket cannot *per se* be regarded as an incriminating circumstance. It was contended on behalf of the accused in the lower Court that the packet of arsenic purchased in March 1917 might

(2) 25 Ind. Cas. 634; 30 P. R. 1914 Cr.; 264 P. L. R. 1914; 50 P. W. R. 1914 Cr.; 15 Cr. L. J. 626.

have been placed by Faujdar in the pocket of his waistcoat and might have left traces of the poison therein, and this contention was considered by the Sessions Judge as "perfectly possible". It is to be observed that the Sub-Inspector does not depose to anything which would negative the contention. The matter so far is capable of explanation. Mr. Petman, however, points out that it was *Musammat* Jawai who supplied the information which led to the discovery, and this circumstance lends support to the case for the prosecution. But it is to be remembered that *ex concesso* the couple were on very intimate terms, and that *Musammat* Jawai's knowledge of her lover having arsenic in his pocket may, therefore, be ascribed to more causes than one, and it cannot be laid down positively that the poison alleged to have been used in the commission of the crime came from the pocket of Faujdar.

The above discussion contains practically all that can be urged on both sides, and after viewing the case as a whole in the light of the conclusions reached by the learned Sessions Judge and giving due consideration to the question of the motive, we are not prepared to hold that the test prescribed by *King-Emperor* v. *Chattar Singh* (1) has been satisfied. We consider that there is a good deal to be said in favour of the case for the prosecution; but as pointed out in a Division Bench judgment of this Court in Criminal Appeal No. 1013 of 1913 [*Emperor* v. *Bishen Singh* (3)], it is immaterial that we might ourselves have arrived at a different conclusion, had we been trying the accused persons as a Court of original jurisdiction.

Accordingly we dismiss the appeal, and direct that the respondents, who were arrested in pursuance of an order of this Court passed under section 427, be released forthwith.

Appeal dismissed.

(3) 22 Ind Cas. 987: 27 P. W. R. 1914 Cr.; 125 P. L. R. 1914; 15 Cr. L. J. 203.

BOMBAY HIGH COURT.

CRIMINAL APPEAL No. 436 OF 1917.

November 22, 1917.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

MARI PARSU—ACCUSED—APPELLANT

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 369—Trial for theft—Conviction and sentence—Subsequent sentence on account of previous conviction, validity of—Penal Code (Act XLV of 1860), ss. 75, 379.

Accused was tried, convicted and sentenced under section 379 of the Penal Code. There was also a charge against the accused under section 75 of the Code read with section 379, which was not proceeded with until after the sentence in respect of the offence under section 379 had been passed:

Held, that the trial came to an end when sentence was pronounced in respect of the offence under section 379 and that having regard to the provisions of section 369 of the Criminal Procedure Code the Judge had no power to proceed with the trial of the charge under section 75 of the Penal Code and sentence the accused to enhanced punishment. [p. 184, col. 1.]

Criminal appeal from conviction and sentence passed by the Assistant Sessions Judge, Thana.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

SHAH, J.—In this case the accused was charged under section 379 of the Indian Penal Code and tried by the Assistant Sessions Judge of Thana and a Jury. The Jury found the accused guilty. The Judge accepted the verdict and proceeded to pass a sentence in respect of that charge, and sentenced the accused to three years' rigorous imprisonment on the 23rd August. There was, however, a charge against the accused under section 75 read with section 379 of the Indian Penal Code, which, for reasons not material for our present purposes, was not proceeded with before passing the sentence on the charge under section 379, Indian Penal Code. The trial practically ended when the sentence was passed in respect of the offence under section 379. The learned Judge, however, proceeded thereafter to try the accused, and to record evidence, with respect to the charge of previous convictions. The Jury found the accused guilty on that charge on the 31st of August and the learned Judge sentenced the accused to

seven years' rigorous imprisonment. It is against this order of conviction and sentence that the present appeal is preferred.

The point that arises in appeal is whether the subsequent proceedings with reference to the charge under section 75 are valid. In my opinion they are not valid, because under section 369 of the Criminal Procedure Code after the judgment including the sentence was pronounced in the trial on the 23rd of August, there was no power to alter or review the same. It seems to me that after the verdict of the Jury was accepted and the sentence passed on the 23rd of August on the charge under section 379, the trial came to an end. Whatever may have been the reasons for sentencing the accused under section 379, Indian Penal Code, in the first instance, and thereafter proceeding with the charge under section 75, the subsequent proceedings cannot be treated as valid.

I would, therefore, set aside the order made by the Assistant Sessions Judge on the 31st of August and restore that made on the 23rd of August. The result will be that the accused will have to suffer rigorous imprisonment for three years.

HEATON, J.—I concur.

Order set side.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 300 OF 1917.

June 29, 1917.

Present:—Mr. Justice Scott-Smith.

GHULLA AND ANOTHER—CONVICTS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 342—Accused, duty of Court to question, after examination of prosecution witnesses.

The term "shall" in section 342 of the Code of Criminal Procedure makes the duty imposed on the Court to question the accused generally on the case, after the witnesses for the prosecution have been examined and before he is called for the defence, mandatory and not discretionary and having regard to the object of the examination specified in the section, namely, that it is intended to enable the accused to explain any circumstances in the evidence against him, the omission by a Court to perform this duty must be presumed to seriously prejudice the accused. [p. 184, col 2; p. 185, col. 1.]

Appeal from the order of the District Magistrate, Montgomery, dated the 21st March 1917.

Mr. *Sadiq Jilani*, for the Appellants.

Mr. *Sewa Ram Singh*, for the Respondent.

JUDGMENT.—This is an appeal from the order of the District Magistrate of Montgomery convicting Ghulla and Shera, appellants, of theft under section 380, Indian Penal Code, and sentencing each of them to five years' rigorous imprisonment.

The first objection raised by Counsel for the appellants is that the Magistrate has disregarded the provisions of section 342, Criminal Procedure Code, as to the examination of the accused person at the conclusion of the case for the prosecution. The section in question lays down that "for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any inquiry or trial, put such questions to him as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence." In the present case, after the evidence of only one witness for the prosecution, *viz.*, Gulsher, had been recorded the Magistrate examined Ghulla accused, but he did not examine either of the accused after the witnesses for the prosecution had been examined. In fact, Shera was never examined at any stage of the case at all. It is contended that the appellants have been prejudiced by the omission of the Court to examine him in accordance with law. It was held by a Division Bench of the Bombay High Court in *Emperor* v. *Savalya Atma Pastya* (1) that the term "shall" in section 342, Criminal Procedure Code, makes the duty imposed on the Court to question the accused generally on the case, after the witnesses for the prosecution have been examined and before he is called for the defence, mandatory not discretionary, and having regard to the object of the examination specified in the section, namely, that

(1) 9 Bom. L. R. 356; 5 Cr. L. J. 332.

it is intended to enable the accused to explain any circumstances in the evidence against him, it is clear that the omission by the Court to perform such a duty in a Criminal trial must be presumed to have seriously prejudiced the accused.

The same view was taken by the same High Court in a subsequent case reported as *Bas pa Ningapa* v. *Emperor* (2). In both these reported cases the High Court ordered a re-trial. I see no reason to differ from the view expressed in these rulings, and I hold that the District Magistrate's disobedience to the direct provision of the law contained in section 342, Criminal Procedure Code, is prejudicial to the accused and has vitiated the trial. I, therefore, accept the appeal and setting aside the convictions and sentences, direct that the appellants be re-tried from the point where the evidence for the prosecution was closed. Pending the decision of the case the accused persons should be transferred to the judicial lock-up.

Appeal accepted; Retrial ordered.

(2) 31 Ind. Cas. 365; 16 Cr. L. J. 765; 17 Bom. L. R. 892.

PATNA HIGH COURT.
FULL BENCH.

ORIGINAL MISCELLANEOUS CASE No. 1 OF 1918.

February 4, 1918.

Present:—Sir Dawson Miller, KT., Chief Justice, Mr. Justice Chapman, Mr. Justice Mullick, Mr. Justice Roe and Mr. Justice Atkinson.

PARMESHWAR AHIR—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Councils Act, 1861 (*24 and 25 Vict. C. 67*), *s 22—High Courts Act*, 1861 (*24 and 25 Vict. C. 104*), *s. 9—Defence of India (Criminal Law Amendment) Act (IV of 1915), s. 4—Governor-General, power of, to create Courts—Jurisdiction—High Court, power of, to declare an Act* ultra vires.

Section 22 of the Indian Councils Act, 1861, read with section 9 of the Indian High Courts Act, 1861, is in terms amply wide to give the Governor-General of India in Council power to create new tribunals such as those contemplated in section 4 of the Defence of India (Criminal Law Amendment) Act, 1915. [p. 201, col. 1.]

Empress v. *Burah*, 4 C. 172 at p. 180; 5 I. A. 178; 3 C. L. R. 197; 3 Sar. P. C. J. 834; 3 Suth. P. C. J. 556; 2 Ind. Jur. 618; 2 Shome L. R. 63; 2 Ind. Dec. (N. S.) 110 (P. C.), followed.

If an enactment of the Indian Legislature is outside the scope of the powers conferred upon the Governor-General in Council by Act of Parliament, the High Court has power in a proper proceeding to declare such an enactment *ultra vires* and of no force and effect, with all the consequences that may result therefrom. [p. 195, col. 2.]

Per *Chapman, J.*,—A Court cannot be constituted otherwise than in the name of the Sovereign, and before it can be held that the Indian Legislature can create a Court it must be clear beyond doubt that the power to create a Court has been properly delegated. [p. 201, col. 2.]

The power conferred on the Governor-General in Council by section 22 of the Councils Act of 1861 included the power to make laws and regulations for all persons and all Courts of justice whatever and for all places and things whatever This delegation of plenary power was designed for the benefit of public interests of the greatest magnitude and whatever may fairly be regarded as incidental to or consequential to the main purpose ought not, unless judicially prohibited, to be held by judicial construction to be *ultra vires*. [p. 202, col. 2.]

FACTS.—This was an application made on behalf of Parmeshwar Ahir, convicted of dacoity at Peru in the Shahbad District by the Special Tribunal at Arrah, for a writ of *habeas corpus* on the ground that the Government of India had no power to constitute the Court which convicted him.

Mr. *P. R. Das*, (with him Messrs. *A. Sen* and *S. M. Mullick*), for the Petitioner, said the petition was very short and raised no question of fact. It raised only one question, namely, whether the tribunal as constituted by the Defence of India Act was legal.

[MILLER, C. J.—You are asking for the issue of a writ of *habeas corpus*. How can we issue it without any evidence?]

Because there is no denial of facts. The only question before Your Lordships is whether the tribunal is a legal tribunal or not

[MILLER, C. J.—There is no affidavit verifying the facts stated in the petition.]

[The Advocate General, Bengal, for the Crown.—Strictly speaking, they must make an affidavit, but I am not here to take any technical objection. The facts in the petition are admitted.]

Mr. *Das* said he desired to make it perfectly clear that this application was not under the Code of Criminal Procedure.

PARMESHWAR AHIR *v.* EMPEROR.

His submission was that their Lordships had power to issue a prerogative writ of *habeas corpus*, and that they could issue it in spite of the Code of Criminal Procedure. The application, therefore, raised only two questions—*first*, whether the detention of the petitioner was illegal, and, *second*, if so, whether their Lordships had power to issue a prerogative writ of *habeas corpus*. With regard to the first point he submitted that it was beyond the power of the Governor-General in Council to create a tribunal and invest that tribunal with jurisdiction such as was conferred on it by the Defence Act. Their Lordships would find from relevant sections of the Act that the Governor General in Council purported to create a supreme Court to try certain offences, with power to sentence persons to death, and not requiring confirmation by their Lordships. Their Lordships would find that their power, appellate as well as revisional, was completely taken away, and even the Judicial Committee of the Privy Council was powerless to interfere. The first proposition he, therefore, wished to advance was that the power of Parliament was supreme. The Indian Legislature was in no sense a sovereign Legislature and had none of the attributes of a sovereign body. His next point was that the creation of tribunals was a thing which stood distinct and apart from the power to make laws and regulations. It was an attribute of sovereignty and was claimed at one time as the prerogative of the Crown, and it was now vested in Parliament. His submission was that it was an attribute of sovereignty and could only be exercised by a body exercising sovereign authority. Their Lordships would find that the power of the Indian Legislature was expressly limited by an Act which brought into existence that body, and they would not find in that Act any power given to the Governor-General to establish a tribunal. There was a distinction between the power to make laws and the power to establish a tribunal which would enforce that law. Counsel then cited passages from Halsbury's Laws of England to show that power to establish Courts of law belonged to Parliament, and said that historically it could be shown that at one time the King claimed the sole prerogative to establish Courts of law, and that gradually that power was taken away by Parliament. Still something remained to the Crown, and the King could establish Courts to administer the common law but he could not establish Courts to administer any other law. Counsel also relied on a passage in Blackstone's Commentaries to show that a Court of law must derive its authority mediately or immediately from the Crown.

[MILLER, C. J.—Could the King create Courts in India?]

The King in Council could create a Court to administer the common law but not to administer statutory law.

[MILLER, C. J.—Is not statutory law part of the law of the land?]

Yes. But there is a distinction between common law and statutory law.

[MILLER, C. J.—What distinction do you draw between common law and the law of the land?]

The difference is that common law is law that has existed from time immemorial. It was not enacted by Statute.

[CHAPMAN, J.—The last Court created by the Crown was the Privy Council.]

Yes.

[CHAPMAN, J.—And that Court administers all laws.]

The Privy Council has existed for a very long time and this Court was created long before Parliament took away this power.

[MILLER, C. J.—If the King in Council has powers to create Courts to administer the law of the land, do you say the Governor General in Council would be infringing on the Royal prerogative?]

He would be: But there is a section in the Act which says such laws would not be void. My point, however, is that the King could not constitute Courts to administer any but common law.

[MULLICK, J.—You say the King in Council cannot create Courts except to administer common law. What about Prize Courts? They are created by the King in Council.]

What jurisdiction does a Prize Court exercise? That is a question you have to consider. I say their jurisdiction is to administer common law. Prize Courts had

always been established by the King in Council. That is a power the King already possessed.

Continuing, Counsel said he strongly relied upon the provision in the Government of India Act which empowered the King to issue Letters Patent. It showed that the King had got no power beyond such as was conferred at the time. If the King had power to constitute a High Court, where was the necessity of a special provision in the Act giving him power to do so? If there had been no section 113 in the Act, His Majesty could not have established the Patna High Court. Their Lordships would find that whenever High Courts were established they had been established in virtue of an Act of Parliament.

[MILLER, C. J.—What do you mean when you say the King could constitute Courts in India to administer the law of the land?]

Common law of the land, which was Muhammadan Law. Before India was transferred to the Crown, the only law the Company's Courts could administer was Muhammadan Law and that is the law of the land.

[MILLER, C. J.—Now-a-days there is very little distinction between common law and statutory law.]

The Privy Council ruling makes that distinction.

[MILLER, C. J.—The distinction there was between ecclesiastical law and common law.]

So far as I remember statutory law is expressly stated there.

[MILLER, C. J.—Punishment of crime is the law of the land.]

There are various offences made offences by Statutes. They may not be offences under the common law

Continuing, Counsel said his submission was that all authorities established clearly that power to constitute Courts of Judicature vested in Parliament unless that power has been given to the Indian Legislature.

[MULLICK, J.—The result of your argument will be that a Court like the Chief Court of the Punjab will be *ultra vires*.]

No, all these were conquered and ceded provinces, and, therefore, were non-regulation provinces. The King had absolute power to do anything, and the Governor-General in Council has the same powers.

[MULLICK, J.—The Act of 1874 says the Governor-General in Council may remove trials from the jurisdiction of the High Court and create separate Courts.]

There is no power to create separate Courts. I shall come to that later.

Continuing, Counsel said that regarding the powers of the Indian Legislature he would draw their Lordships' attention to a leading case known as Burah's case, reported as *Empress* v. *Burah* (1). That case defined precisely the powers of the Indian Legislature. The Privy Council there held that the Legislature must act within the powers expressly conferred by Acts of Parliament.

[MILLER, C. J.—That case did decide that the Governor-General had power to take away the jurisdiction of a High Court from tracts and establish other Courts in those tracts.]

It did not decide that the Governor-General could take away the jurisdiction of a High Court and for that purpose could delegate their authority to a Local Government, but I shall fully deal with this case later.

Counsel then referred to section 22 of the Indian Councils Act of 1861, under which the Defence Act was enacted, and said the last clause of that section was extremely important. It laid down that the Legislature could not pass any Act which might affect the authority of Parliament or any part of the unwritten laws of the United Kingdom whereon might depend the allegiance of any subject of the Crown.

[ATKINSON, J.—Had the East India Company power to constitute Courts?]

Yes. But they created those Courts as a sovereign power in pursuance of a document obtained by Clive in 1765. Your Lordships will find that although from 1600 the Company had power to make laws and regulations, they never attempted to constitute Courts before they got the document of 1765. Your Lordships will have to consider why it was that they never attempted to constitute a single Court.

(1) 4 C. 172 at p. 180, 5 I. A. 178; 3 C. L. R. 197; 3 Sar. P. C. J. 834; 3 Suth. P. C. J. 556; 2 Ind. Jur. 618; 2 Shome L. R. 63; 2 Ind. Dec. (N. s.) 110 (P. C.).

Continuing, Counsel said the words under which the Governor-General in Council purported to act in constituting this Court were to make laws and regulations and he would satisfy their Lordships that there was a wide distinction between creating a law and creating a jurisdiction. The whole point was that the Legislature was one thing and the Judicature another. If the Legislature had such power, why was no High Court created by the Governor-General in Council?

[ATKINSON, J.—As regards High Courts powers were expressly reserved by Parliament by the Act of 1861.]

Mr. *Das* said, section 9 of the Indian High Courts Act was most important, and was a complete answer to *Burah's case* (1). It implied that there was no power in the Indian Legislature or in His Majesty to establish a High Court.

[MILLER, C. J.—A section saves the powers of the Governor-General in Council whatever they may be.]

My point is that reading the section in its ordinary sense the power of the Governor-Generel is limited to inherited jurisdiction and not to conferred jurisdiction.

[MILLER, C. J.—If you turn to section 131 of the Government of India Act and then to the 5th Schedule, how can you say the Governor-General has no power to interfere with jurisdiction?]

It emphasises my point. Parliament gives them special power to interfere with the jurisdiction of four High Courts, but interfering with the jurisdiction of four High Courts is not the same thing as creating a new tribunal.

Counsel submitted that the section made it perfectly clear that, apart from the sanction of Parliament, the Legislature had no right under the terms of section 22 of the Councils Act of 1861. Section 113 under which the Patna High Court was constituted was not in the Schedule referred to in section 131.

[MULLICK, J.—Does this High Court stand on a different footing from other High Courts?]

No power is given to the Governor-General to interfere with this High Court which is constituted under section 113. There is no power in the Governor-General in Council to repeal, alter or amend section 113.

[MULLICK, J.—Section 113 is controlled by section 106, which refers to all existing High Courts and those to be constituted hereafter.]

No. The same jurisdiction may not have been conferred on this High Court.

[The Advocate-General.—If your Lordships will turn to section 101, in the first few lines you will find that section 106 controls section 113.]

To further questions put from the Bench, Mr. *Das* said his only point was that the Court that tried the petitioner was an illegal Court, the ground being that it could not be established by the Government of India.

[CHAPMAN, J.— A Court was created in *Burah's case* (1).]

I will come to that. The latter point was never raised nor argued before their Lordships. Counsel said that their Lordships would find a remarkable statement in *Burah's case* (1). Their Lordships said that the Indian Legislature could not have brought into existence another Legislature unless that power was expressly given by Act of Parliament. If the Governor-General could not create a new Legislature, how could he create a new Judicature? Counsel then dealt with the history of the East India Company to show that although they had powers to make laws and regulations from 1600, they never attempted to create a Court until after 1765. He further inquired, where was the necessity of the Validating Act of 1781 if the Company had power to constitute Courts?

In course of his argument Counsel admitted to Mr. Justice Chapman that there was no recognition by any Act of Parliament of Criminal Courts in India other than High Courts.

Continuing his arguments the following morning, Mr. *Das* said he had pointed out that the East India Company never established Courts of law, though they had power to make laws and regulations, until they got their patent from the Nawab and thus became virtual sovereigns. Therefore, if any question were propounded to him that all these Courts were illegal because they were not established by Parliament

but by the Company, his answer would be, No, because they were established by a sovereign power. The question, therefore, the Court had to consider was what was the effect after 1858.

[MILLER, C. J.—The question is whether this power was transferred to Parliament or to the Governor-General in Council.]

My reading is that the power of the Company came to an end in 1858 and was transferred.

[CHAPMAN, J.—Transferred to whom?]

The Act said: "India shall be governed in the name of the Crown through Act of Parliament"—21 and 22 Victoria, Chapter 56. Your Lordships will find that Parliament took control of Indian affairs, and that the sovereignty of the Company came to an end and became vested in the Crown, in Parliament. Counsel then cited authorities in support of his proposition, and observed that the Government of India did not realise that their power had gone out in 1858 and had become vested in Parliament.

[The Advocate-General.—If my learned friend's argument is correct, then the following Courts are also illegal: the Chief Court of Burma, the Chief Court of the Punjab, the Courts in Sind, Oudh, Madras, and the Central Provinces, and Courts created under the Presidency Small Cause Courts Act and Provincial Small Causes Courts Act.]

Mr. *Das* said that with regard to Chief Courts the Government had power. These were conquered and ceded provinces and the Goverment's power was supreme, but he was concerned only with provinces included in the Dewani.

[After some further arguments Miller, C.J., asked: "If the Privy Council said the Governor-General in Council had power to take away the jurisdiction of the High Court and transfer it to another Court, was that not important?"]

Mr. *Das* said his Lordship was thinking of *Burah's case* (1) and he would presently come to it.

[ROE, J., pointed out that under section 39 of the Councils Act of 1833 all power vested in the Board of Directors of the Company was given to the Governor-General in Council.]

Mr. *Das* said this section did not give power to the Governor-General in Council for the first time or at all to establish Courts. It gave powers of superintendence, direction and control of civil and military administration. What he asked respectfully was, was in section 39 authority given to the Governor General in Council to establish Courts of law? All authorities went to show that the Company did not establish Courts of law because of authority derived from Parliament but because of their sovereign power.

[MILLER, C. J., drew the attention of Counsel to section 43 of the same Act which empowered the Governor-General in Council to make laws and regulations for all Courts of Justice, whether established by Charter or otherwise.]

Mr. *Das* said all that the section meant was that all laws and regulations should be enforced, not only by Courts established by the Company but also by Courts established by Charter. Counsel then dealt with *Burah's case* (1).

He discussed the judgment in the case at some length and said he relied on it very strongly. First of all the case restricted the powers of the Governor-General in Council, and, secondly, it laid down that the Governor-General in Council could not create a new legislative power. Counsel contended if they could not create a new Legislature they could not create a new Judicature because both stood on the same footing.

[ROE, J., pointed out that section 5 of the Act of 1869 created a new jurisdiction, because power could be given to any person whomsoever the Lieutenant-Governor may appoint.]

Mr. *Das* said that as that power was not exercised nobody could complain.

[ROE, J.—But nobody complained before the Judicial Committee that section 5 was in excess of the power of the Governor-General in Council.]

Mr. *Das* said his submission was that there was no decision of the Privy Council on the point. Continuing he said it was conquered and ceded territory, and, therefore, it was important to see what powers the Governor-General in Council possessed in respect of conquered and ceded territories.

Summing up his arguments on this branch of the case Mr. *Das* said authorities clearly established that the right to establish Courts of law for Indian subjects belonged exclusively to the East India Company after they acquired virtual sovereignty of Bengal, Bihar and Orissa, and they exercised that authority as a sovereign power and not as agents of the Crown. *Secondly*, after 1858, the territories belonging to the Company became vested in the Crown, and Parliament became the supreme authority so far as India was concerned. *Thirdly*, the powers of the Governor-General were defined in the Councils Act and the High Courts Act, and these Acts did not give any power to the Indian Legislature to establish Courts of law. *Fourthly*, they had, therefore, no power to create this tribunal, and if this tribunal was not legally constituted the detention of the petitioner was illegal.

Counsel then addressed the Court on their powers to issue a prerogative writ of *habeas corpus*. A lengthy argument took place on this question, Mr. *Das* submitting in conclusion that the Court had power to issue a writ of *habeas corpus*.

Mr. *T. C. Gubbins*, Advocate-General, Bengal (with him the Government Advocate, Bihar and Orissa) for the Crown, said that in a case of this importance the second point raised by his learned friend was of little value, and he asked their Lordships to decide the main issue if they could see their way to do so. With regard to the main question, then, he said that since the Act of 1861 had been passed, in his experience this was the first time that anybody had dared to put forward that argument. It had taken nearly sixty years to find Mr. Das to argue this point.

Counsel said he did not propose to go into the earlier history as his learned friend had done, and he would deal with only two Acts of Parliament, namely, the Indian Councils Act of 1861 and section 9 of the Indian High Courts Act, from which the Governor-General in Council derived his power. His submission with regard to section 22 of the Indian Councils Act was that one could conceive of no wider words. It laid down that the Governor-General in Council might legislate on any subject for anybody. It laid down, within the limitations of what it had said, that the Governor General in Council might do anything he liked. When one went to look to decided cases he would find how these powers were exercised and how those powers were upheld, and how everything done by the Governor-General in Council had remained absolutely unchallenged. If the Governor-General in Council was exercising a power he had no right to do, how was it that the Parliament in England had never raised any objection? They were presumed to know what the Governor-General in Council was doing. The Advocate-General referred to section 9 of the High Courts Act, and, continuing the main argument, said it was not suggested here as in other cases that the Governor-General in Council had done anything which had affected any of the Acts of Parliament which he could not affect. He also relied on the fact that since 1861 no Act of the Government of India had been declared *ultra vires*. There was one thing clear from decided cases, that the Government of India had been allowed to add to the jurisdiction of the High Court, they had been allowed to withdraw certain clauses of suits from the High Court, and they had been allowed to withdraw certain classes of persons from the High Court.

The Advocate-General then gave a list of what the Government of India had actually done since the passing of the Act of 1861. He first took the case of Burma. He said the Government of India first conferred jurisdiction on the High Court in Calcutta. Burma was not even mentioned in the Letters Patent of the Calcutta High Court. The Government went outside Bengal altogether and conferred on the High Court power over Burma. The Government gave powers to Criminal Courts in Calcutta for review of the decisions of Recorders' Courts in Rangoon. That existed from 1863 to 1890 and was never challenged. Then there was the case of Darjeeling. By Act XIX of 1367 the Governor-General in Council

conferred power on the High Court as regards Darjeeling which it did not possess before. Then there was the Indian Divorce Act. Oudh was a non-regulation province. It had no Chief Court. For the purposes of divorce the Government brought it into the jurisdiction of the Allahabad High Court, which then had only extraordinary Criminal jurisdiction over European British subjects in Oudh. Then by the Criminal Law Amendment Act of 1908 power was given to the Governor-General to transfer proceedings from a Magistrate to a Special Tribunal and a Special Tribunal consisting of three Judges of the High Court. There was to be no trial by Jury, and, as he understood, ordinarily there could be no trial in the High Court without a Jury. That was setting up a new tribunal.

[At this stage the Court rose for the day.]

On the hearing being resumed on the following day, the Advocate-General said that last night (January 22) he was endeavouring to show that the words of a Statute gave the Government the powers they purported to exercise in reference to the Defence of India Act, and he had also shown that, having got these powers by the Act of 1861, they had purported to exercise and had exercised those powers. From 1861 to 1915 the attention of Parliament must have been drawn to the Indian Legislature and to what they were doing. In addition to that he would show in greater detail that the Government had purported under the Act of 1861 to create not one Chief Court but a number of Chief Courts, and not one class but several classes of Courts. It would be extraordinary that, having power to make laws and say what was right and what was wrong, they would have no power to enforce the doing of right and the preventing of wrong. He submitted that the probable thing would be that the authority that had power to make laws and regulations had authority to create tribunals to enforce those laws and regulations. It was auxiliary to the right to make laws. The Government had the power to make laws and regulations and the words "to make laws and regulations" were in his submission wide enough, having regard to the words coming after, to cover the creation of Courts. "Regulations" was a word well understood in 1861 and Courts had been constituted under "regulations."

With regard to the High Court's power to issue a writ of *habeas corpus*, the Advocate-General's submission was that though the Calcutta High Court might have power to issue that writ within the precincts of Calcutta, he did not admit, in fact he contended to the contrary, that the Calcutta High Court had no power to issue a writ in the Mofussil. But even assuming that the Calcutta High Court had power to issue a writ in the Mofussil, that was not a power transferred in the only way in which it could be transferred by the Patna Charter to the Patna High Court.

The Advocate General then drew their Lordships' attention to what happened after Mr. Justice Norman's judgment in the celebrated *Wahabi case* [*In the matter of Ameer Khan* (2)] in which the learned Judge held that a writ issued in Calcutta ran into the Mofussil. He said that Act X of 1872, which was an Act of Parliament and which was something in the nature of a Criminal Procedure Act for the Mofussil, contained this provision: "Neither the High Court nor any Judge of such High Court shall issue any writ of *habeas corpus* nor any writ of a like nature beyond presidency towns." This Act, the Advocate-General said, continued to exist for ten years, after having been modified in 1875. From 1882 in the Criminal Procedure Act *habeas corpus* seems to be dropped and there was provision for what they called a writ in the nature of *habeas corpus*. From this it was quite clear that the Legislature had from time to time interfered with this right and that interference by the Governor-General in Council continued for a considerable time. The Advocate-General also drew the attention of their Lordships to a section in the Acts of 1861 and 1915 which provided that no Act of the Governor-General in Council shall be invalidated by reason of its in-

(2) 6 B. L. R. 392.

fringing on the prerogative of the Crown. He further observed that one must remember that in this respect there had been numerous cases in which the Government had detained people, and this action had been held to be within their powers.

Continuing the Advocate-General said that the first point he wanted to make, more as a matter of protest than as an assertion of right, was this. The proceedings by which the Government had been brought there were not usual and not proper proceedings. *Habeas corpus* was a proceeding which lay against the person who actually detained, and the proceedings in this case should have been taken against the jailor. After some discussion on the subject with their Lordships the Advocate-General proceeded to argue the main question, and in support of his argument that the Government had added to the jurisdiction of the High Court, cited two cases, including a case decided in Bombay in which power was given to the High Court to hear appeals from a tribunal set up under the Bombay Improvement Trust Act. Authorities were then cited to show the power of the Government to withdraw certain classes of suits from the High Courts. He further cited a case reported as *Premshankar Raghunathji* v. *Government of Bombay* (3), to show that a local Legislature could constitute a Court in the Mofussil without any jurisdiction to the High Court to interfere.

[ATKINSON, J., pointed out a case decided by a Full Bench of the Allahabad High Court, reported as *Abdulla* v. *Mohan Gir* (4), to show that new Courts were created in Jhansi.]

A discussion then took place with regard to the Defence Act between Atkinson, J., and the Advocate-General on the latter mentioning a remark made by a learned Judge that if this Act had not been passed, there would have been enormous delay in the trial of cases which would amount to a denial of justice to many accused persons.

[ATKINSON, J., wanted to know of a single case where a man was transported for life with forfeiture of his property without an appeal.]

The Advocate-General said the Act had been passed for a particular class of crime, at a particular time, under particular circumstances, and it was an Act which experience had shown was absolutely necessary for the administration of justice. One of the objects of Criminal justice was that it should not be delayed, as delay meant denial of justice. The trial before the tribunal was conducted properly and with due decorum, and though this Court had no jurisdiction these were tribunals such as might well be created. The same thing, he said, was done in Act XI of 1857. By that Act the jurisdiction of the High Court could be taken away altogether. All that the Executive Government had to say was that a particular locality was in a state of rebellion and a commission could go forthwith. The Advocate General then gave the dates of the establishment of various Courts which he said were all done soon after 1861. He said that since the passing by Parliament of the Act of 1861 there had been the India Councils Acts of 1890, 1891, 1892 and 1909, when the very matter of the creation of these Courts must have been brought specifically to the notice of Parliament. Parliament had the very matter under their consideration.

[ATKINSON, J., said that the case of *Damodar Gordhan* v. *Deoram Kanji* (5) showed that Mr. Das's argument about the sovereign powers of the East India Company was more imaginary than real.]

The Advocate-General then referred to sections 6 and 9 of the Criminal Procedure Code and relied on the words "besides the High Court and Courts constituted under any law other than this Code" in the former section, and the words "the Local Government shall establish a Court of Session for every Sessions division" in the latter section. Concluding this point he said it would seem going a long way to say that if the Govern-

(3) 8 B. H. C. R. A. C. J. 195.
(4) 11 A. 490; A. W. N. (1889) 194; 6 Ind. Dec. (N. S.) 741 (F. B.).

(5) 1 B. 367 at p. 460; 3 I. A. 120; 1 A. C. 332; 3 Suth. P. C. J. 277; 3 Sar. P. C. J. 543; 25 W. R. 261; 1 Ind. Dec. (N. S.) 245 (P. C.).

ment had power to abolish a High Court they had no power to create something to take its place. The only point he wished to draw their Lordships' attention to was that if there were any doubts about the Government's power to create Courts, that would have appeared in section 25 of the Act of 1861, which dealt with doubts, remembering that Courts were constituted under regulations before 1861.

The Advocate-General then dealt with *Burah's case* (1) on which he strongly relied, and on the authority of this case he said that what the Government had done had received judicial sanction of the greatest possible kind.

With regard to the argument that the business of Court making was an attribute of sovereignty and that sovereignty lay with the East India Company and had now passed to the Crown, he said that the facts as stated were not correct. Parliament had asserted itself as a sovereign power in 1813, and by the language they employed in the Act of 1813 they gave retrospective effect to that sovereignty.

To sum up, the Advocate-General said he had shown that the Governor General in Council had power to create Courts. He had that power before 1861 and continued to exercise it since that. There had been no objection taken to it, and there had been no legislation of Parliament putting him right if he had gone wrong. Counsel had given at least one instance, if not more, of the power which had been exercised, which was still in force, and which might be exercised to day or to-morrow. The Advocate General reminded their Lordships that this Act was in the nature of emergency legislation for obtaining speedy trial under particular circumstances.

The Advocate General then dealt with the point relating to *habeas corpus*, but in doing so said it was quite a side issue and he most respectfully asked their Lordships to give a decision on the main point, whatever their decision on the subsidiary point might be.

Mr. *Sultan Ahmed*, Government Advocate, Bihar and Orissa, put in the notification creating the tribunals and extending certain provisions of the Defence Act to the District of Shahabad. He then briefly referred to a few points raised by Mr. Das in his argument. He said there were certain Courts created before and after 1858 by the Governor-General in Council in territories which were not conquered or ceded territories. The first Act was Act XXXVII of 1855, which created Courts in the Sonthal Parganas. This Act took away the jurisdiction of Courts which had jurisdiction over those territories and vested jurisdiction in new Courts established under that regulation. The same thing was done in Chota Nagpur in 1834. So far as the Chittagong Hill Tracts went, there Courts were created between 1834 and 1860. All these Courts were created, not because the East India Company had sovereign authority, but because the Governor General in Council by powers under the Act of 1733 could constitute Courts everywhere.

Mr. *Das*, in reply. Dealing with the question of *habeas corpus* first, he said the Act of 1872 could not take away the power of the High Court to issue writs of *habeas corpus*, and his authority for saying so was section 22 of the Indian Councils Act of 1861, which by its last clause imposed restrictions on the Indian Legislature not to affect any part of the unwritten laws or constitution of the United Kingdom whereon might depend the allegiance of a subject of the Crown. With regard to the powers of the Government of India to create Courts, he said the learned Advocate-General's argument came to this: that if an illegal act or illegal conduct was persisted in for a sufficient number of years it gave them a prescriptive title to commit illegalities. If, Counsel said, the power to make laws and regulations included the power to create Courts there was an end of the matter. With regard to the creation of Courts his proposition was that in fact there was no creation of new Courts after 1861, but merely a consolidation of all existing Courts; and, secondly, that if in fact there was creation of new Courts, those Courts being in non-regulation provinces, it was an invasion of the royal prerogative and as such protected by the Indian Councils Act. He contested the proposition that the East India Company created Courts as trustees on behalf of the Crown, and observed that the authorities

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all showed that they established Courts on the strength of the Diwani obtained from the Nawabs. The point was in what capacity the Company purported to act, and the authorities established that they purported to act as Diwan of the Muhammadan Rulers.

JUDGMENT.

MILLER, C. J.—This matter comes before us on the application of one Parmeshwar Ahir, an Indian subject of His Majesty, praying that a writ of *hub-as corpus* may issue to the jailor of Buxar Jail, where he is now imprisoned, to produce him before this Court with a view to enquire into the legality of his detention.

The application came originally before a single Judge of this Court and as the case involved questions of constitutional importance affecting the legislative powers of the Governor-General of India in Council, he ordered that notice should issue in the first instance to shew cause why a writ of *habeas corpus* should not issue on the jailor of Buxar Jail to produce the body of Parmeshwar Ahir with a view to consider whether or not his conviction was valid, and it was directed that the notice should be served on the Crown. By this procedure the Government of India was given an opportunity of appearing by Counsel and the matter was referred to a Full Bench.

The facts of the case which were not in dispute appear from the petition and from documentary evidence put in on behalf of the Government of India, who instructed the Advocate-General to appear at the hearing to shew cause against the Rule. The petitioner was arrested in connection with what are known as the Bakr-Id riots, which occurred in different parts of this province in the months of September and October last resulting in considerable loss of life, personal injury and destruction of property. He was tried and convicted of dacoity, rioting and offences under section 295, Indian Penal Code, and sentenced to 5 years' rigorous imprisonment. The legality of the whole proceedings, which terminated in the conviction and imprisonment of the petitioner, is called in question on the ground that the tribunal which tried the case had no jurisdiction to act. The tribunal in question consisted of three Commissioners specially appointed by the Local Government of Bihar and Orissa under powers granted by the Defence of India (Criminal Law Amendment) Act, 1915 (Act IV of 1915), for the trial of persons under the said Act in the District of Shahabad. It is not disputed that the tribunal was properly constituted in accordance with the provisions of the Defence of India Act and it is not necessary to refer to the rules and notifications contained in the copies of the Gazette which have been handed in and which shew that the proper formalities were complied with, but it is contended that the Act itself in so far as it granted the powers mentioned is *ultra vires* the Imperial Council, on the ground that it was beyond the power of the Governor-General in Council to constitute a Court of justice or to authorise any other person to constitute such a Court.

The Defence of India Act as the preamble shews is in the nature of emergency legislation passed owing to the existing state of war and is entitled: "An Act to provide for special measures to secure the public safety and the defence of British India and for the more speedy trial of certain offences". It is a temporary measure only and by section 1 (4) its operation is to cease six months after the termination of the war. It received the assent of the Governor-General on the 19th March 1915 and sections 1 and 2 came into immediate operation. The rest of the Act was to come into operation in any province or part thereof by notification in the Gazette of India by the Governor-General in Council. By section 2 (1): "The Governor-General in Council may make rules for the purpose of securing the public safety and the defence of British India and as to the powers and duties of public servants and other persons in furtherance of that purpose." Then follow certain particular purposes for which rules may be made without prejudice to the generality of the foregoing power. These relate to precautions necessitated directly by reason of the war and are not material in the present case. The rest of section 2 limits the punishment to be imposed by the rules for contravention of any order issued under the authority of the same, and provides for publication of the rules in the Gazette of India whereupon they shall have effect

as if enacted in the Act. By section 3 (1)—"The Local Government may by order in writing direct that any person accused of anything which is an offence in virtue of any rule made under section 2, or accused of any offence punishable with death, transportation or imprisonment for a term which may extend to seven years, or of Criminal conspiracy to commit, or of abetting, or of attempting to commit or abet any such offence, shall be tried by Commissioners appointed under this Act." By section 3 (2) orders under sub-section (1) may be made in respect of all persons or any class of persons accused of any offence or any class of offences referred to in that sub section. By section 4 all trials under the Act shall be held by three Commissioners of whom two at least must have certain legal qualifications and such Commissioners are to be appointed by the Local Government for the whole or any part of the province or for the trial of particular persons or classes of persons.

Sections 5, 7 and 9 provide that the existing procedure in Criminal cases and the rules of evidence shall in certain respects be modified for the purposes of trials under the Act, and section 6 provides that any sentence authorised by law may be imposed and the judgment of the Commissioners shall be final and conclusive and no order of confirmation shall be necessary. Section 10 gives the Local Government power by notification in the local official Gazette to make rules regulating the procedure to be adopted at the trials by the Commissioners and the execution of sentences passed by them.

Sections 8 and 11 are important. They are as follows:—

"8. (1) Notwithstanding the provisions of the Code of Criminal Procedure, 1898, or of any other law for the time being in force, or of anything having the force of law by whatsoever authority made or done, there shall be no appeal from any order or sentence of Commissioners appointed under this Act and no Court shall have authority to revise any such order or sentence or to transfer any case from such Commissioners, or to make any order under section 491 of the Code of Criminal Procedure, 1898, or have any jurisdiction of any kind in respect of any proceedings under this Act.

"(2) Nothing in sub-section (1) shall be deemed to affect the power of the Governor-General in Council or the Local Government to make orders under section 401 or 402 of the Code of Criminal Procedure, 1898, in respect of persons sentenced by Commissioners under this Act."

"11. No order under this Act shall be called in question in any Court and no suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done under this Act."

It should be observed that the Act is designed not only to carry into effect the precautions enumerated in the second paragraph of section 2 (1), which may be regarded as precautions directly necessitated by reason of a state of war, but also to provide special measures for dealing speedily with offences affecting the public safety, which though not directly arising through a state of war are particularly undesirable in times of great stress and emergency. We are not concerned, however, with the wisdom of the policy underlying the enactment in question. If the Act itself is outside the scope of the powers conferred upon the Governor-General in Council by Act of Parliament, I conceive that this Court has power in a proper proceeding to declare such an enactment *ultra vires* and of no force and effect with all the consequences that may result therefrom.

When the Defence of India Act was passed the Government of India Act, 1915 (5 and 6 Geo V, C. 61), which consolidated and re-enacted existing Statutes relating to the Government of India and the functions of the High Courts, had not come into operation. It is, therefore, necessary to consider the Defence of India Act in the light of the powers conferred upon the Governor-General in Council by earlier Statutes and in particular the Indian Councils Act, 1861 (24 and 25 Vict. C. 67) and the Indian High Courts Act passed in the same year (24 and 25 Vict., C. 104). Before doing so it would be convenient to deal shortly with the learned and elaborate argument of Mr. Das on behalf of the petitioner in which he surveyed the whole history of the powers conferred upon or exercised by the East India Company from its earliest infancy when a Charter was granted by Queen Elizabeth in the year 1600 to

certain merchants trading in the East Indies. It is sufficient for our purpose to say that the Company, under whatever name it was from time to time called, in the course of its development gradually acquired by successive charters certain legislative and administrative powers and certain rights and prerogatives appertaining to the sovereign which they at first exercised in delegation of the powers so granted. Having established themselves in territories extending from Madras northwards into Bengal, Bihar and Orissa, and other parts of India, the Company undoubtedly in exercise of powers conferred or assumed not only made their own laws but also constituted Courts for the administration of the laws which they sought to enforce. Whether this was done by virtue of the prerogative of the British sovereign or whether after the Dewani was obtained by Lord Clive from Shah Alum in 1765, it was done by virtue of the sovereign rights of the Moghul Emperor or whether it was done by reason of an assumed power devoid of legal sanction, does not appear to me to be of vital consequence in the view I take of this case. Mr. Das's argument on behalf of the petitioner, however, was largely directed to the point that the powers of the Company to establish Courts were derived either from the sovereign powers of the Moghul Emperor or in virtue of the prerogative of the Crown up to the period between 1858 and 1861 when by the enactments passed in those years, he contends, those powers ceased to exist in the Government of India and were transferred to the Crown in Parliament. The question we must consider is whether the power which was undoubtedly exercised before 1858 was continued in the Governor-General in Council after 1861 by the enactments of that year, and for this purpose a short survey of the earlier legislation becomes necessary in order to see how far Parliament has recognized that power either expressly or by implication and whether if it was so recognised, there is anything to indicate that a different policy was intended to be followed by the two enactments of 1861. It was not until the so-called Regulation Act of 1773 (13 Geo. III, C. 63) and the Charter of George III establishing the Supreme Court in the following year came into force, that the executive and legislative powers of the Company then exercised by the Governer-General in Council, came to be questioned. The acute conflict which then arose between the Governor-General in Council on the one hand and the Supreme Court on the other led to the passing of the East India Company Act of 1781 (21 Geo. III, C. 70). That enactment provided that the Governor-General in Council should not be subject jointly or severally to the jurisdiction of the Supreme Court when acting in their public capacity and that persons impleaded in the Supreme Court for acts done by written order of the Governor-General in Council might plead the general issue and proof of such order should amount to a complete justification of such acts except in cases affecting the rights of British subjects over which the jurisdiction of the Supreme Court was recognised. All matters concerning the revenue were also declared beyond the jurisdiction of the Supreme Court. The conflict although not so acute continued thereafter to some extent until 1858, when the territories and government of India were transferred to and exercised in the name of the Crown. In the meantime, however, new Courts were established by the Company in the conquered or ceded territories. In 1793 (33 Geo. III, C. 52) "the whole Civil and Military Government of the Presidency of Fort William in Bengal and also the ordering, management and government of all the territorial acquisitions and revenues of the Kingdoms and Provinces of Bengal, Bihar and Orissa were vested in the Governor-General in Council subject to the restrictions of unrepealed enactments and the control of the Board of Directors in matters relating to the declaration of war and treaties guaranteeing possessions."

In 1833 the Government of India Act of that year (3 & 4 William IV, C. 85) was passed. It provided that the government of the British territories in India should remain in the Company until 1854 (subsequently continued by an Act of 1853 "until Parliament shall otherwise provide") and that all the real and personal property of the Company should be held in trust for the Crown for the service of India. Section 39 vested the Government in the Governor-General in Council and section 45 provided that all laws and regulations made by the Governor-General in Council should be of

the same force and effect throughout the Indian territories as any Act of Parliament and "shall be taken notice of by all Courts of justice whatsoever within the same territories in the same manner as any public Act of Parliament would and ought to be taken notice of." Section 46 provided that it should not be lawful for the Governor General in Council without the sanction of the Court of Directors to make any law or regulation which should empower any Courts of justice other than those established by Royal Charter to sentence to death any of His Majesty's natural born subjects born in Europe or their children or which should abolish any of the Courts established by Royal Charter. Section 51 expressly reserved the right of Parliament to legislate for India and provided that the laws and regulations made by the Governor-General in Council should be transmitted to England and laid before both Houses of Parliament "the better to enable Parliament to exercise at all times such right and power."

No other Act of importance was passed until 1858, but it should be observed that although the enactments of the Indian Council were from 1833 brought directly under the notice and control of Parliament, no question seems to have been raised therein as to the powers of the former body to constitute, as they did, new Courts or to interfere with the jurisdiction of existing Courts. Indeed it is conceded by Mr. Das that the power of the Indian Legislature to interfere with the jurisdiction of any existing Court cannot be contested and in view of the ruling of the Judicial Committee in the case of *Empress* v. *Burah* (1), it is difficult to see how such a contention could be urged with any hope of success even by Counsel of Mr. Das's undoubted courage and ability. He does contend, however, that there is no power in the Governor-General in Council to constitute a new Court. The power of destruction except as expressly limited by the Act of 1861 is conceded, the power of construction is denied. It is not necessary to refer in detail to the Government of India Act, 1858 (21 & 22 Vic., C. 106). It marked the end of the activities of the old East India Company, although the Company was not formally dissolved until 1874, and it directed that henceforward India should be governed by and in the name of Her Majesty. The Secretary of Sate for India was clothed with the powers formerly exercised by the Company or the Court of Directors or Court of Proprietors. A new Council was to be established which together with and under the direction of the Secretary of State was to form the Secretary of State in Council and conduct the business transacted in the United Kingdom in relation to the Government of India in place of the old Court of Directors and Court of Proprietors. The Council in India was to remain under the style of the Council of the Governor-General in India and all existing establishments and all laws and provisions then in force were to continue subject to the provisions of the Act pending further changes. The next few years were pregnant with legislation relating to India and in 1861 the Indian Councils Act and the Indian High Courts Act were passed. By section 22 of the former Act the Governor-General in Council was given power, subject to the provisions of the Act, to make laws and regulations "for repealing, amending or altering any laws or regulations whatever now in force or hereafter to be in force in the Indian territories now [or hereafter (see 55 & 56 Vic., C. 14, section 3)] under the dominion of Her Majesty and to make laws and regulations for all persons whether British or native foreigners or others and for all Courts of justice whatever and for all places and things whatever within the said territories." Certain restrictions on the wide powers given above are set out in the section. Those material to the present case are that the said laws and regulations shall not repeal or in any way affect any of the provisions of this Act or the unrepealed sections of the Acts of 1833, 1853 and 1854, or any of the provisions of the Acts of 1858 and 1859 "or any provisions of any Act passed in this present session of Parliament or hereafter to be passed in anywise affecting Her Majesty's Indian territories or the inhabitants thereof: or which may affect the authority of Parliament or the constitution and rights of the East India Company or any part of the unwritten laws of the constitution of the United Kingdom of Great Britain and Ireland whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom or the sovereignty or

dominion of the Crown over any part of the said territories."

By the Indian High Courts Act, 1861, the Supreme Court and the Sudder Courts were established and by section 9 the jurisdiction of the High Courts to be established thereunder is defined. Such jurisdiction was twofold, (*i*) that which should be expressly granted by Letters Patent, and (*ii*) save as otherwise directed by the Letters Patent "and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council" such jurisdiction as was exercised in the same presidency by any of the Courts abolished under the Act.

The Letters Patent dated the 9th February 1916, under which the High Court at Patna was constituted, provide by clause 41 as follows: "And we do further ordain and declare that all the provisions of these our Letters Patent are subject to the legislative powers of the Governor-General in Legislative Council and also of the Governor-General in Council under section 71 of the Government of India Act, 1915, and also of the Governor-General in cases of emergency under section 72 of that Act and may be in all respects amended and altered thereby." It is clear, therefore, that whatever jurisdiction this Court has, whether derived from the Letters Patent or whether as the successor to the jurisdiction which the High Court at Calcutta formerly exercised in this Province, in either case such jurisdiction is subject to the legislative powers of the Governor-General in Council and the only question for determination is, assuming this Court has power to issue a writ of *habeas corpus*, is this a case in which the Governor-General in Council has acted outside the scope of his powers. It is contended that the words "laws and regulations" are synonymous and that the power granted to make laws should be confined to declaring the law as defined by Blackstone at page 44, Volume 1, section 2, of his Commentaries where he says: "Municipal Law is properly defined to be a rule of civil conduct prescribed by the supreme power in a state commanding what is right and prohibiting what is wrong," and that the power to make laws does not carry with it the power of creating the machinery by which the laws shall be enforced. The power of creating Courts, it is said, is an attribute of sovereignty exercised either by virtue of the royal prerogative or possibly now-a-days by a Sovereign Legislature and in either case is outside the scope of the powers of the Governor General in Council since 1858. Whatever may have been the extent of the royal prerogative in respect of creating Courts in former times, it is probably accurate to say that at the present day that power would not ordinarily be exercised without the consent of Parliament. If then this power must now be regarded as a function of the Legislature in England it is difficult to see why the same power, which had previously been exercised by the Governor General in Council, should be regarded as excluded by the Act of 1861 or the Act of 1858 from the functions of the Legislative Council in India which is empowered to make laws and regulations for all Courts and all persons. In *Damodar Gordhan* v. *Deorom Kanji* (5) Lord Selborne in delivering the judgment of their Lordships described the combined effect of the Acts of 1833 and 1861 in these words: "By the Imperial Statute 3rd and 4th William, cap 85, section 43 a general power of legislation with certain exceptions not material for this purpose was given to the Governor-General in Council as to (among other things) 'all Courts of Justice whether established by Her Majesty's Charters or otherwise and the jurisdiction thereof.' This power is in substance continued by 24 & 25 Vic., cap. 67, section 22, though the particular clause of the former Statute is thereby repealed." And the same noble Lord in *Burah's case* (1), to which I shall refer again presently, is reported as saying [*Empress* v. *Burah* (1)]: "The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But when acting within these limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself." But if on the other hand the power is to be regard-

ed as part of the prerogative of the Crown section 24 of the Indian Councils Act, 1861, provides that no law or regulation shall be deemed invalid by reason only that it affects the prerogative of the Crown. Moreover, at the time when the Act of 1861 was passed the words "laws and regulations" had received a recognised significance and included, in my view, the power of making laws and enforcing their observance by the creation of Courts of justice. Many new Courts have been created by Acts of the Indian Council since 1861 and our attention was drawn to a list of such Courts by the learned Advocate-General in the course of the argument. Some of them may be mentioned as typical. The Recorders' Courts at Rangoon and Moulmein were created by Act XXI of 1863; the Chief Court of Lower Burma by Act VI of 1900; the Punjab Chief Court by Act XIX of 1865; the Central Provinces Courts by Act XIV of 1865. Other Courts were created by the Criminal Law Procedure Code, 1898. It is also worthy of notice that in 1857, acting under the powers conferred by the Act of 1833 already referred to, Act XI of 1857 was passed by the Governor-General in Council entitled: "An Act for the prevention, trial and punishment of offences against the State." It was *in pari materia* with the Defence of India Act, 1915. It gave the executive Government of any presidency or place power to establish a Special Court to try certain offences, including murder, arson and robbery, within proclaimed areas and the decisions of such Court were declared to be final and not subject to the Sudder Courts. There can be no doubt that many persons were tried and convicted by such Courts. It has never so far as I am aware, been suggested that the Act in question was illegal. So also in 1860 by Act XXII of that year the Chittagong Hill Tracts were entirely excluded from the jurisdiction of the Civil and Criminal Courts and from the revenue laws and officers, and power was given to the Local Government to appoint what Courts and officers it thought fit and to issue what instructions it pleased for the guidance of such officers and Courts. None of these Acts has been challenged or impeached. The decrees of the Courts so constituted have issued far and wide and have affected many persons. The Acts constituting them were within the knowledge of Parliament but in no case has the power to create such Courts been called in question. And with full knowledge of the manner in which the powers conferred by previous Statutes had been exercised by the Governor-General in Council, the Imperial Legislature on successive occasions extending over a number of years has re-enacted those powers in almost identical phraseology. In the case, above referred to, of *Empress* v. *Burah* (1) the Court had to consider the powers conferred on the Indian Council by the Acts of 1833 and 1851. By an Act of the Governor-General in Council passed in 1869 certain districts were removed from the jurisdiction of the existing Courts and placed under the jurisdiction of officers to be appointed by the Lieutenant-Governor of Bengal, who was also empowered to extend the provisions of the Act to the Cassyah and Jynteeah Hills. This the Lieutenant-Governor did in 1871 by notification in the Gazette and constituted a Court to exercise the powers of revision and appeal formerly exercised by the High Court of Calcutta. It was objected that the Act was *ultra vires* on the grounds, (*i*) that the Governor General in Council had no power to interfere with the jurisdiction of the High Court, and (*ii*) that he had no power to delegate his legislative functions to the Lieutenant-Governor, as, it was contended, had been done by the Act. A Full Bench of the High Court of Calcutta were unanimous in holding that the Governor General in Council had power to remove the district in question from the jurisdiction of the High Court and this view was affirmed on appeal to His Majesty in Council. The Court differed as to the power to delegate authority to the Local Government and their Lordships overruling the majority of the Court decided that such power was also *intra vires*. In dealing with the proper inference to be drawn from the fact that the disputed powers had been regularly exercised by the Governor General in Council under the provisions of the earlier Act, which had been re-enacted in similar language in the Act of 1861, Sir Richard Garth, C. J.,

in the Court below [*Empress* v. *Burah* (6)] is reported as saying: "Has then the Legislature of this country been proceeding all these years upon a principle unwarranted by law? Has it been abdicating its proper functions and transferring powers which it had no right to transfer. The answer to this question will be found in the Councils Act of 1861. That Act has put a construction upon the meaning of the Indian Charter of 1833 which it seems to me almost impossible to misunderstand." This view was approved on appeal. Lord Selbourne in delivering the judgment of the Board said: "If their Lordships were to adopt the view of the majority of the High Court they would be casting doubt upon the validity of a long course of legislation appropriate as far as they can judge to the peculiar circumstances of India; great part of which belongs to the period antecedent to the year 1861 and must, therefore, (as Sir Richard Garth well observed) be presumed to have been known to and in view of the Imperial Parliament when the Councils Act of that year was passed." The Indian Councils Act, 1915, afforded another opportunity for Parliament to correct, if it required correction, the manner in which the Indian Council had for so long been exercising the powers which they conceived to have been conferred by the existing Acts, but the Government of India Act, 1915, which was passed after the Defence of India Act came into operation, re-enacted the former Statutes in practically identical language and must in my view have been intended to recognise the correctness of the interpretation placed upon the former enactments by the Indian Council. The same canon of construction, which was enunciated by Sir Richard Garth and approved by their Lordships of the Privy Council in *Burah's case* (1), was followed by Sir John Edge, C. J., and four other Judges of the High Court at Allahabad in *Abdulla* v. *Mohan Gir* (4) in 1899 and Lord Macnagten in the case of *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (7) expressed similar views in a case dealing with the construction of words occurring in the Income Tax Acts.

(6) 3 C. 63; 1 C. L. R. 161; 1 Ind. Dec. (N. S.) 632.

(7) (1891) A. C. 531; 61 L. J. Q. B. 265; 65 L. T. 21; 55 J. P. 805.

It was contended that *Burah's case* (1) was no authority for the proposition that the Indian Legislature could constitute new Courts, as this point was not urged in argument before the Court which tried that case and was not specifically dealt with by the judgments. On page 181 of the report in the Indian Law Reports, 4 Calcutta series, Lord Selborne in dealing with the question of the Indian Legislative Council's powers of delegation says: "What was done is this. The Governor-General in Council has determined in due and ordinary course of legislation to remove a particular district from the jurisdiction of the ordinary Courts and offices *and to place it under new Courts and offices to be appointed by and responsible to the Lieutenant-Governor of Bengal.*" There can be no question, therefore, that the fact that new Courts had been created was a matter which was brought before the notice of their Lordships and admitting that it is accurate to say that the question was not specifically dealt with, it is highly improbable that the point could have been lost sight of.

It seems reasonable to suppose that once it was determined that power to interfere with the jurisdiction of the High Court existed, the power to substitute a new Court to act in place of that whose jurisdiction had been determined was regarded as a matter which could not well be challenged. That case is at the least a light for our guidance in the present case, but I do not consider the matter as at all concluded by reason of that decision where the point was not specifically dealt with. I prefer to rest my decision upon the construction of the Act of 1861 viewed in the light of previous enactments and the powers consistently exercised thereunder. It was contended on behalf of the petitioner that in so far as new Courts were constituted by the East India Company before 1858 this was done in the ceded or conquered provinces in exercise of the royal prerogative or in the regulation provinces in exercise of the sovereign powers of the Moghul Emperor, both of which powers it is said were taken away from the Governor General in Council in 1858 and vested in the Crown or in the Secretary of State in Council and in so far as they were constituted after 1861, it was merely a rearrangement of existing Courts created under earlier powers. As to the first part of this

contention, even if it is conceded that the assumption of the powers exercised in the earlier period was justified on the constitutional grounds stated, it can hardly be disputed that Parliament recognised and acquiesced in what was done and I find nothing in the enactments of 1858 or 1861 to lead to the supposition that a different policy towards the Indian Legislature was at that time contemplated. It appears to me that section 22 of the Indian Councils Act of 1861, read with section 9 of the High Courts Act, is in terms amply wide enough to cover the powers now in question and had it been intended to deprive the Governor-General in Council of the powers so long exercised by his predecessors, such intention would have been expressed in clear and unambiguous language. Having regard to the opinion just expressed, it is not necessary to deal with the second part of the argument just mentioned. It would appear, however, to be based upon a false assumption. Some of the Courts mentioned in an earlier part of this judgment were entirely new Courts and some were in newly acquired territory. No question has so far been raised as to the validity of their constitution. Indeed apart from the High Courts it would be difficult at the present day to find any Court in British India which does not owe its existence to an Act of the Indian Legislature. Were we to decide that such Acts are *ultra vires* practically the whole administration of justice in British India would cease to exist. I think the petitioner's application should be rejected and the rule will be discharged.

The decision arrived at makes it unnecessary to consider the question which was raised as ancillary to the main question, namely, whether this Court has jurisdiction to issue a writ of *habeas corpus* and that point I leave undecided.

CHAPMAN, J.—The petitioner is confined under sentence from a tribunal constituted under the Defence of India Act, 1915. He has moved this Court for a writ of *habeas corpus* on one ground only, namely, that so far as the Defence of India Act authorised the creation of the tribunal, the Act is void inasmuch as it is beyond the power of the Governor-General of India in Council to constitute a Court or to authorise any other person or persons to constitute a Court.

It is contended that the Indian Legislature is not sovereign inasmuch as it derives its powers from Act of Parliament, that the power to create a Court of justice rests in some special manner in the sovereign and that this power cannot be delegated otherwise than by an express enactment or proceeding to which the sovereign is a party.

It is not necessary for the purposes of this decision to deal elaborately with the latter part of this contention. The argument was mainly concerned with the authorities which deal with the prerogative to create Courts in England. But the sovereign power in respect of Courts outside Great Britain has histories and rests upon foundations of its own [*Campbell* v. *Hall* (8) and *In the matter of the States of Jersey* (9)]. It is sufficient to say that a Court cannot be properly constituted otherwise than in the name of the sovereign and that, therefore, before I can hold that the Indian Legislature can create a Court it must be clear beyond doubt that the power to create a Court has been properly delegated.

The powers of the Governor-General of India in Council, so far as the Defence of India Act is concerned, are derived from the Government of India Act of 1858 and India Councils Act of 1861 (21 & 22 Vic., C. 106, and 24 & 25 Vic., C. 67). The former Act recited that the government of the territories then in the possession of or under the Government of the East India Company and all powers in relation to Government vested in or exercised by the said Company, and all rights vested in or which if the Act had not been passed might have been exercised by the said Company in relation to any territories, shall become vested in Her Majesty and be exercised in her name. It was enacted that India shall be governed by and in the name of Her Majesty and all the rights referred to may be exercised by and in the name of Her Majesty as rights incidental to the Government of India; that the existing Council in India should be styled;

(8) 20 St. Tr. 239.
(9) 8 St Tr (N. S.) 286.

"The Council of the Governor-General in India." The Indian Councils Act of 1861 provided for the addition to this existing Council of further members for the better exercise of powers to make laws and regulations and that at meetings of the enlarged Council so constituted the Governor General of India in Council should have power to make laws and regulations for repealing, amending or altering any law and any regulation whatever now in force or hereafter to be in force in the Indian territories now under the dominion of Her Majesty and make laws and regulations for all Courts of Justice whatever and for all places or things whatever within the said territories. This power was subject to certain provisos and control, with which it is not necessary now to deal. These Statutes in terms recognised and were expressly founded upon the facts then existing. Section 7 of the Government of India Act of 1858 refers to the Council in India then bearing that name. It is necessary, therefore, to refer shortly to the constitution of the Council in India existing at the time of the enactment of the Government of India Act of 1858. The East India Company was originally a corporation with a trade monopoly created by charter from the Crown. It soon became necessary for the Company's officers to exercise powers of Government over the members of the Company who were engaged in trade in India. Such powers were accordingly conferred upon the Governor in Council in each of the Company's factories and were extended over all persons residing within factory limits. In 1765 the Company obtained the Dawani or right to conduct the revenue and civil administration on behalf of the Moghul Emperor in the Provinces of Bengal, Bihar and Orissa. In view of this expansion of power and responsibility the East India Company Act of 1772 was enacted and it was directed that for the Government of the Presidency of Fort William in Bengal the Company should appoint a Governor-General and Councillors and that the whole Civil and Military Government of the Presidency, the ordering, management and government of all the territorial acquisitions and revenues in the Provinces of Bengal, Bihar and Orissa should be vested in the said Governor-General in Council. Thereupon the creation of Courts for the proper administration of civil justice was immediately undertaken and proceedings called regulations were issued creating these Courts. As instances of these regulations the Regulations of 1780 and 1793 may be referred to. This form of government in India was continued from time to time by successive Acts of Parliament and the recognition was not thought inconsistent with the sovereignty of the Crown. In the recital to the Act of 1813 (53 Geo. III., C. 155) reference was made to the undoubted sovereignty of the Crown of the United Kingdom of Great Britain and Ireland in and for territorial acquisitions in India. In 1833 the powers of the Governor-General of India in Council were again revised and it was enacted that the superintendence, direction and control of the whole of the civil Government should be thereby vested in the Governor-General of of India in Council. At the time the Government of India Act of 1858 was passed this Council had created an elaborate system of administration of Civil and Criminal justice. What then can be the meaning of section 22 of the Indian Councils Act of 1861, which enables this Council which had been entrusted with the government of India at meetings to which additional persons had been summoned to make laws and regulations repealing, amending or altering any law or regulation whatever now in force in the Indian territories? Several of the regulations then in force were regulations creating Courts. The power included the powers to make laws and regulations for all persons and all Courts of justice whatever and for all places or things whatever. This delegation of plenary power was designed for the benefit of public interests of the greatest magnitude and whatever may fairly be regarded as incidental to or consequential to the main purpose ought not (unless expressly prohibited) to be held by judicial construction to be *ultra vires* [*Attorney-General* v. *Great Eastern Railway Company* (10)].

(10) (1880) 5 A. C. 473; 49 L. J. Ch. 545; 42 L. T. 810; 28 W. R. 769.

This principle has been applied by the Privy Council to the interpretation of the Acts of the Imperial Parliament creating the Indian Legislature in the case, *Empress* v. *Burah* (1). Their Lordships say that when the question is raised whether the limits of the powers of the Indian Legislature have been exceeded *if the act done lies within the general scope of the affirmative words conferring the power and if there is no express condition or restriction by which that power is limited, it is not for any Court of Justice to enquire further or to enlarge constructively those conditions or restrictions.* Now it is clear that the creation of a Court is within the general scope of the affirmative words which confer powers upon the Governor General of India in Council, for it cannot be denied that the creation of Courts is an essential function of Government. It is also clear that there is no express condition or restriction in the Statute which would apply. Their Lordships' judgment also sanctions the principle that where there has been a long course of legislation appropriate to the peculiar circumstances of India prior to the year 1861 it must be presumed to have been known to the Imperial Parliament when the Indian Councils Act of 1861 was passed and that the inference may be drawn that the Imperial Parliament intended to sanction the continuance of the exercise of legislative powers of the same kind. By the application of these principles the Imperial Parliament must be held to have, in 1861, sanctioned the continuance of legislation for the creation of Courts. So far as it may be said to be necessary that the King in person should take a part in the delegation of power such as this, it is sufficient to say that these Statutes received the assent of the Crown—an assent which was not merely formal but which was affirmed so far as the Government of India Act of 1858 is concerned, in a historic proclamation.

The petitioner's Counsel has endeavoured to combat this manifest conclusion by contending that whenever the East India Company, prior to 1861, desired to create a Court, they never ventured to do so without either obtaining a Charter from the sovereign or a special Act of Parliament or authority from the Emperor of Delhi. I am not satisfied that the proposition is true even for the period prior to 1772, for the first Charter creating Mayors' Courts for Madras, Calcutta and Bombay in 1726 refers to the reputation already made for strict and equal distribution of justice. The Act of 1772 creating the Supreme Court in Calcutta as first enacted appears to have enabled cases to be brought before that Court by way of appeal from the Provincial Courts and thus recognised the existence of Courts which were or might be created irrespective of the Act (see concluding portion of section 16, East India Company Act of 1772). The creation of the Provincial Court of Final Civil Appeal; (The Saddar Dewani Adaulat) was, it is true, subsequently validated by Act of Parliament in 1781 but this was done merely in order to obviate conflict with the Supreme Court. The Court of Final Criminal Appeal and the entire system of Criminal Courts created in 1793 received no such validation and can be ascribed to no special express authority either from the sovereign or Parliament in England or from the Emperor at Delhi or to the sovereign prerogative in ceded and conquered territory. It can be referred only to the Act of 1772. Since the enactment of the Government of India Act of 1858 there have been repeated instances of the creation of new Courts by the Governor General of India in Council without any authority other than that derived from the Government of India Act of 1858 and the Indian Councils Act of 1861. The Acts creating these Courts were subject to disallowance by the Crown by order conveyed through the Secretary of State for India, who is representative of the Crown so far as India is concerned. None of these Acts were ever disallowed. The Indian Councils Act came before Parliament for amendment in 1890, 1891, 1892, and 1909 and the Statute of the law on the subject of the Government of India was consolidated by an Act of 1915. Yet the continuous course of legislation for the creation of Courts was never at any time questioned.

The creation of the Court under whose warrant the petitioner is held in custody has not been attacked upon any special ground. It was not, for instance, contended that the Defence of India Act is invalid on the ground that it involves the abrogation of a function essential to the operative existence of this Court I is clear that the Governor-General in the Legislative Council

has power to create Courts. I agree that the ground upon which the petitioner asks for our interference fails on the merits.

It is not, therefore, necessary for me to consider whether this Court has power to issue a writ of *habeas corpus* and I leave the question undetermined.

MULLICK, J.—I entirely concur in the judgment of the learned Chief Justice. In the view I take it is unnecessary to discuss the limits of the authority of the Crown to erect Courts of Justice in India by executive order. In my opinion the authority conferred by section 22 of the Indian Councils Act of 1861 was sufficient to justify the Governor-General in Council in constituting by means of Act IV of 1915 the tribunal by which the petitioner before us has been convicted

ROE, J.—I concur in the order proposed. The passages quoted in the judgment of the learned Chief Justice from the judgment of the Judicial Committee in the case of *Empress* v. *Burah* (1) furnish in my view a complete answer to the petitioner's case.

ATKINSON, J.—Having had the opportunity of reading and considering the judgment of the learned Chief Justice I desire to express my entire concurrence therewith.

Application rejected.

PUNJAB CHIEF COURT.

CRIMINAL REVISION No 665 OF 1917.

July 6, 1917.

Present:—Mr. Justice Scott-Smith.

RODA SINGH—CONVICT—PETITIONER

v rsus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 199—Penal Code (Act XLV of 1860), s. 498—Accused charged with theft, whether can be convicted under s. 498.

The provision in section 199 of the Code of Criminal Procedure, that no Court shall take cognizance of an offence under section 498 of the Indian Penal Code except upon a complaint made by the husband of the woman, refers to a complaint by the husband of an offence under section 498, not to any complaint made by the husband. [p 205, col. 1.]

Where the complainant charged the accused with theft and neither in the complaint nor in his statement did he allege facts that constituted an offence under section 498 of the Penal Code, nor did he ever ask that the accused should be dealt with under that section:

Held, that having regard to the provisions of section 199 of the Code of Criminal Procedure the accused could not be convicted of an offence under section 498 of the Penal Code, there being no complaint against him by the husband that he had committed such an offence. [p. 205, col. 1.]

Criminal revision from the order of the District Magistrate, Ludhiana, dated the 22nd March 1917.

Mr. *Jai Gopal Sethi*, for the Petitioner.

JUDGMENT.—The case out of which the present application for revision arises was started upon a complaint made by Rattan Singh against his wife *Musammat* Chhoto, *Musammat* Atri and Rodu, present petitioner, charging them with an offence under section 381, Indian Penal Code. The Magistrate remarks, "upon a perusal of the Police papers it appears that the case is under section 498 of the Indian Penal Code," and started to try under that section *Musammat* Atri and Rodu, and eventually convicted them of offences under that section. The District Magistrate dismissed the appeal to his Court and Rodu Singh has now come up on the revision side.

The contention on his behalf is that there was no complaint by the husband of an offence under section 498, Indian Penal Code, and that the conviction is illegal having regard to section 199 of the Criminal Procedure Code. The District Magistrate has referred to *Tara Prosad Laha* v *Emperor* (1), in which it was held that the word complaint in section 199, Criminal Procedure Code, means a complaint as defined by section 4 of the Code, and that the complaint filed by Rattan Singh and his statement of 16th October 1906 constituted a complaint under section 498, Indian Penal Code.

Neither in his original complaint nor in his statement did Rattan Singh allege facts that constituted an offence under section 498, Indian Penal Code, nor did he ever ask that the petitioner should be dealt with under that section. He charged the accused persons with theft and with theft only. In *Jatra Shekh* v. *Reazat Shekh* (2) when the complainant charged the accused with

(1) 30 C. 910; 8 C. W. N. 17.
(2) 20 C. 483; 10 Ind. Dec. (N. S.) 327.

an offence under section 366 of the Indian Penal Code in respect of his wife, it was held that the Magistrate was authorised to convict him of an offence under section 498 of the Penal Code. The facts are hardly on all fours with the present case, because the offences described in sections 366 and 498 of the Indian Penal Code are cognate ones, that under section 498 being a minor offence included in one under section 366. In *Bangaru Asari* v. *Emperor* (3) it was held that the provision in section 199 of the Code of Criminal Procedure, that no Court shall take cognizance of an offence under section 493 of the Indian Penal Code except upon a complaint made by the husband of the woman, refers to a complaint by the husband of an offence under section 498, not to any complaint made by the husband. In that case *Empress of India* v. *Kallu* (4) was followed and approved.

The case referred to by the District Magistrate reported as *Tara Prosad Laha* v. *Emperor* (1) only dealt with the meaning of the word "complaint" referred to in section 199 of the Code of Criminal Procedure. The question for decision in the present case was not before the Court in that case. In *Chemon Garo* v. *Emperor* (5) it was held that, before a criminal charge of adultery can be preferred, a formal complaint of that offence must be instituted in the manner provided by section 199 of the Criminal Procedure Code. Therefore, when an accused person was committed to the Sessions to stand his trial on a charge preferred by a husband under section 376 of the Penal Code, and the Sessions Judge at the trial added a charge of adultery under section 497 and acquitted the accused under section 376, but convicted him under section 497, it was held that the Sessions Judge had acted without jurisdiction.

Following these decisions and the one reported as *Bangaru Asari* v. *Emperor* (3), I am clearly of opinion that petitioner cannot be convicted in the present case of an offence under section 498, Indian Penal Code, as there was no complaint preferred by the husband that he had committed such an offence. I, therefore, allow the revision, and setting aside the conviction of Rodu Singh acquit him and order him to be discharged from his bail.

Revision allowed.

(3) 27 M. 61; 2 Weir 236.

(4) 5 A. 233; A. W. N. (1883) 1; 3 Ind. Dec. (N. S.) 205.

(5) 29 C. 415; 6 C. W. N. 677.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 558 OF 1917.
(CRIMINAL REVISION PETITION NO. 436 OF 1917.)

January 8, 1918.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Phillips.

APPAJI IYER AND OTHERS—ACCUSED—PETITIONERS

versus

EMPEROR—RESPONDENT.

Madras Town Nuisances Act (Mad. Act III of 1889), s. 3—Criminal Procedure Code (Act V of 1898), s. 517—Gambling, conviction for—Money tied in gambler's cloth, whether used for 'commission of offence'—Confiscation, legality of—'Used for gaming', meaning of—Discretion of Court—Jurisdiction—'Make such order as it thinks fit' in s. 517 of Act V of 1898, meaning of.

Money or coins can be said to be used for the purpose of gaming under section 3 of the Madras Town Nuisances Act III of 1889 only if they are actually staked. To justify their confiscation the money or coins should have been actually used or displayed in the act of gambling. [p. 206, col. 2.]

Section 517, clause 1, Criminal Procedure Code, authorises the confiscation only of property which has been used for the commission of an offence. [p. 206, col. 1.]

The words 'may make such order as it thinks fit' in the section do not confer on a Court absolute power of disposition over property which is produced before it but regarding which no offence has been committed and which has not been used for the commission of an offence [p 207, col. 1; p. 208 col. 1.]

In re Ponnuswamy Pillay, 1 Ind Cas. 79; 19 M. L. J. 254; 5 M. L. T. 256; 9 Cr. L. J. 149, not approved.

Where some sovereigns were found tied up in the waist cloth of one accused and some others concealed in the mouth of another accused who were convicted under the Madras Town Nuisances Act and the Magistrate ordered confiscation of the sovereigns:

Held, that the order so far as it related to the sovereigns found in the mouth of one of the accused was legal, as it could be reasonably inferred that they were intentionally secreted to avoid exposure but that the confiscation of the coins tied in the waist cloth was illegal. [p 207, col. 1; p. 208, col. 1.]

Per *Phillips, J*—The powers under section 517, Criminal Procedure Code, are very large and the Magistrate's discretion under it is wide, but such discretion must be exercised judicially and, if so exercised, the High Court should not interfere with it in revision. [p. 207, col. 2.]

If there are circumstances from which an inference can be drawn that money has been used for gaming, a Magistrate can order its forfeiture and it is not necessary that he should hold an enquiry for that purpose. [p. 208, col. 1.]

APPAJI IYER *v.* EMPEROR.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate, Gopichettipalayam, in Appeal No. 26 of 19 7, preferred against that of the Court of the 3rd Class Magistrate, Satyamangalam, in Calendar Case No. 84 of 1917.

Mr. *J. C. Adam*, for the Petitioners.

Mr. *C. Narasimha Chariar*, for the Public Prosecutor, for the Crown.

JUDGMENT.

AYLING, J.—I can see no reason for interfering with the conviction in this case or with the order directing the destruction of the cards. The real difficulty is in determining whether the Magistrate had jurisdiction to pass the order confiscating the money (12 sovereigns) found on the person of accused Nos. 2 and 3.

The order admittedly cannot be brought under the last paragraph of section 3 of Act III of 1889, inasmuch as the conviction was not under clause 10 of the same section: and it can only be upheld if it is covered by section 517, Criminal Procedure Code, clause 1 of which runs as follows:—

"When an enquiry or a trial in any Criminal Court is concluded, the Court may make such order as it thinks fit for the disposal of the property or document produced before it or in its custody or regarding which any offence appears to have been committed, or which has been used for the commission of any offence."

Mr. C. Narasimha Chariar who appeared for the Public Prosecutor has endeavoured to support it on two grounds:—

(1) That the money was property "which has been used for the commission of an offence", *i. e.*, gaming in a common gaming house (section 7 of Act III of 1889);

(2) that, even if it were not, the Court had jurisdiction to dispose of it by confiscation under the earlier part of the clause as property produced before it.

I have no doubt that the section authorises the confiscation of property "which has been used for the commission of an offence" [*vide Ramasami Aiyar* v. *Venkateswara Aiyar* (1)] but are the sovereigns such property? The Sub-Magistrate who passed the order merely speaks of them as property 'concerned in the case'. The Sub Divisional Magistrate in upholding it calls them "sovereigns used for gaming"; but he does not refer to, much less discuss, the evidence to show that they were used for gaming, or consider the difference between the sovereigns found in 3rd accused's mouth and the sovereigns found in 2nd accused's pocket. I take it the coins can only be said to have been used for gaming if they had been actually staked.

Now, as regards the 8 sovereigns found in 3rd accused's mouth I think this can be legitimately inferred from the evidence. The place of concealment tends to indicate a guilty knowledge and P. W. No. 1 deposes that, when the Police party entered, 7 or 8 sovereigns were lying on the mat with the cards. This disappeared somehow and it may be fairly inferred that 3rd accused, who was one of the gamblers, snatched them up and put them in his mouth. I think the order of confiscation of the 8 sovereigns found in 3rd accused's mouth can be upheld on this ground.

The other four were found, three tied in 3rd accused's waist cloth and one in 2nd accused's pocket. There is nothing to indicate that these coins had been staked; and it cannot be inferred from the fact they were found in the pocket or cloth of a person engaged in gambling. *Emperor* v. *Walli Mussaji* (2) and *Emperor* v. *Tota* (3) are cases in which orders for confiscation of money in similar circumstances were set aside, because they were not covered by the terms of the Gambling Acts in force; there was apparently no suggestion in either case that any portion of section 517, Criminal Procedure Code, could be invoked in aid of the order.

Mr. Narasimha Chariar, however, seeks to fall back on the first portion of the section and argues that the coins were produced before the Court, and that the Court is authorised to dispose of them 'as it thinks fit', which words would, he says, include even confiscation. The section was altered in 1898 and its present wording is, no doubt, startlingly wide; but I cannot believe that it was

(1) 18 Ind. Cas. 171; 24 M. L. J. 1; 14 Cr. L. J. 27; (1913) M. W. N. 851; 14 M. L. T. 431.

(2 26 B. 641; 4 Bom. L. R. 427.

(3) 26 A. 270; A. W. N. (1904) 11; 1 Cr. L. J. 35.

order under section 517 o… al Procedure Code for the co… money employed or displayed f… rpose of gaming would be a … er, for it would be an order p… he lines of a statutory provision … r cases, and could not be deemed … bitrary exercise of discretion. In t… owever, there is no definite proof th… particular sovereigns were employed … layed for the purpose of gaming, b… ew of the act that sovereigns ha… used for gaming and had been … on the mat used by the gamblers, it is … an unreasonable presumption that the … igns found on accused Nos. 2 and 3 … some of those sovereigns. The … vereigns in the 3rd accused's mo… rdly be said to have been ca… m in this way in the ordinary … iness; and a very natural inferen… that he had snatched up the … the mat and concealed them in … and, the inference is all th… from this that he had three … reigns tied up in a cloth at … The inference as to these latte… the one sovereign found with the 2… oused that they were being employed … gaming is much weaker, but there is t… rcumstance that accused Nos. 2 and 3 h… not explained their possession on any other hypothesis The evidence of D. W. No. 1 … redible and, if believed, would merely … w that 1st accused was going to … the 12 sovereigns the following day … t into jewelry. In a case unde… s City Police Act III of 1888, … *ess.* v. *Bhasyam Chetti* (7), it was … t the Magistrate was not requi… ld an enquiry as to whether the … dered to be forfeited had been … ming, that it was suffi… honey etc., had been seize… ioner of Police under circu… nable suspicion entertained … money, were found in a gar… nd there were no circumstance… that it had been employed fo… it would certainly be unreason… rder its confiscation, but, in t… here are circumstances from whi… nference can be drawn that the sovereigns had been employed for gaming. As regards eight of them the inference is very strong; but the inference as regards the other four is much weaker, and while I am doubtful whether it can be said that the Magistrates have exercised their discretion in an arbitrary manner as regards these four sovereigns and that, I take, would be the only ground for interference by this Court in a case of revision, I am not prepared to differ from my learned brother's opinion and agree in the order proposed.

Order partly set aside.

M. C. P.

(7) 19 M. 209; 1 Weir 850; 6 Ind. Dec. (N. S.) 850.

PATNA HIGH COURT.

CRIMINAL REVISION No. 33 OF 1918.

February 7, 1918.

Present:—Justice Sir Ali Imam, KT.

RAM KANT PANDIT—PETITIONER

versus

EMPEROR THROUGH RAMANAND PANDIT—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 421—Appeal, summary dismissal of, without giving reason, legality of—Procedure.

In dismissing appeals under section 421 of the Code of Criminal Procedure some reason should be given and without such reason the summary dismissal would involve either a remand of the appeal to be admitted and heard or an examination of the evidence by the High Court.

Criminal revision from an order of the District Magistrate, Shahabad.

Mr. *Rajendra Prasad*, for the Petitioner.

JUDGMENT.—The order of the learned District Magistrate of Shahabad dismissing the appeal of Ram Kant Pandit is composed of one line. "This appeal is summarily dismissed." This order of the learned Magistrate is *ultra vires* of the Code of Criminal Procedure and the point is concluded by authority. It was held in *Gurubari Behera* v. *Emperor* (1) that in dismissing appeals under section 421 of the Code some reason should be given and that without such reason the summary dismissal would involve either a remand of the appeal to be admitted and heard or an examination of the evidence by this Court. The learned Magistrate of Shahabad has not acted in accordance with the principle laid down in this ruling. His order of summary dismissal of the appeal is set aside, and the case is sent back with directions to the District Magistrate to admit the appeal and try it.

Order set aside.

(1) 43 Ind. Cas. 439; 2 P. L. J 695; 19 Cr. L. J. 151.

intended thereby to confer on a Court the absolute power of disposition of property regarding which no offence has been committed and which has not been used for the commission of an offence. A reference to the draft bill which ended in the Code of 1898 shows that the original intention was to empower a Court to pass such order as it thought fit for the disposal of any property produced before it "the title to which is doubtful or in dispute"; which seems to indicate a provisional disposal of that property, leaving any party claiming an interest therein to seek his remedy through the usual channels against the holder. In the Select Committee the words 'the title to which is doubtful or in dispute' disappeared, an omission which is not explained in the Committee's report. If the intention had been to confer such wide punitive powers as are now claimed (for confiscation implies nothing less), it is difficult to believe that no explanation would have been offered. We have not been referred to any case in which the section has been construed in such a wide sense. The judgment in *Kussul Bibee* v. *Ahmed Moosajee* (4) implies no more than the limited and provisional power above indicated. The two cases already quoted, *Emperor* v. *Walli Mussaji* (2) and *Emperor* v. *Tota* (3), are both indirectly against such a view; for in each case the order set aside could apparently have been supported in view of the law contended for on behalf of the Court. With these may be read the order in *Ponnusawmy Pillay, In re* (5), which is indeed an authority to the contrary though no doubt of an *obiter* nature and unsupported by reasons. I may also refer to the view taken by the learned Judges in *Abinash Chandra Battacharjee* v. *Emperor* (6) regarding the proper interpretation of the earlier portion of the section, although I am unable to follow them as regards the limitation of forfeiture of property connected with an offence.

I would set aside the order of confiscation of these four sovereigns as not warranted by section 517, Criminal Procedure Code, and direct their return to the persons from whom they were seized.

(4) 34 C 347: 5 C. L. J. 44; 5 Cr L. J. 48.

(5) 1 Ind Cas 73; 19 M. L. J. 254; 5 M. L. T. 256; 9 Cr. L. J. 149.

(6 34 C. 936; 11 C. W. N. 1046; 6 C. L. J. 754; 6 Cr L. J. 293.

PHILLIPS, J.—The first point taken is that the finding that the house is a gaming house is based on the uncorrobrated testimony of an accomplice. In the first place P. W. No. 2 is hardly an accomplice in the offence charged, although he may have frequented the house for gambling on previous occasion and, secondly, the evidence of P. W. No. 1 is corroborative in that it shows that some nine persons of different castes were gambling together. Our interference in the concurrent finding of the two Courts is not called for on this ground.

The second point is that the order to confiscate the cards and sovereigns is not legal. The Sub-Magistrate does not state under what provision of law he passed the order, but inasmuch as the convictions were under sections 6 and 7 of Act III of 1889 the order cannot have been passed under section 3 of that Act and the presumption being that the Sub-Magistrate acted according to law, the order must have been passed under section 517, Criminal Procedure Code, the section relied on by the Sub-Divisional Magistrate. The question then is whether the order is a legal order; and the cases quoted for petitioners, *i. e.*, *Emperor* v. *Walli Mussaji* (2) and *Emperor* v. *Tota* (3), are not very much to the point as they relate to the provisions of special Acts, and not to section 517, Criminal Procedure Code. The powers under the section are very large and the Magistrate's discretion under it is wide, for he can make such order as he thinks fit' for the disposal of any property produced before him [*vide Kussul Bibee* v. *Ahmed Moosajee* (4)]. Such discretion must, I take it, be exercised judicially, and if it has been so exercised, I do not think that we should interfere in revision, especially when the order has been confirmed by an Appellate Court. In the present case, P. W. No. 1 says that he saw sovereigns being used for gambling, and when accused Nos. 1 to 3 were arrested 8 sovereigns were found in 3rd accused's mouth, three in a towel or handkerchief tucked into his waist and one in 2nd accused's pocket. Under section 3 of Act III of 1889 money employed or displayed for the purpose of gaming is liable to forfeiture, and consequently an

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 165 OF 1915.

January 23, 1918.

Present:—Mr. Justice Shadi Lal and Mr. Justice Scott Smith.

Masammat JASODHAN—PLAINTIFF—APPELLANT

versus

BISHAN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Will, construction of—Life-estate to daughter-in-law, with reversion to her male issue—Son, whether can alienate property during lifetime of devisee.

The single rule of construction in a Hindu as in an English Will is to try to find out the meaning of the testator taking the whole of the document together and to give effect to this meaning. [p. 210, col. 1.]

Plaintiff sued for a declaration that the alienation of certain property effected by her son was null and void, on the ground that under the Will of her late father-in-law she was the sole owner of the property during her lifetime and that the defendant had no interest in it The Will gave a life-estate to the plaintiff and provided that her husband "should receive one-half of the income accruing from the property during his lifetime", that after his death "the right to income accruing from immoveable property shall devolve upon his male issue, if any," and that after the plaintiff's death the property shall devolve upon the male issue, if any, of the plaintiff and her husband:

Held, (1) that the testator intended that his estate should vest in his daughter-in-law for her lifetime and that his son (plaintiff's husband) and, after his death, his male issue should receive a moiety of the income accruing therefrom; [p. 210, col. 1.]

(2) that during the lifetime of the plaintiff her son had no right whatsoever in the estate and was not consequently entitled to dispose of it either temporarily or permanently. [p. 210, col. 1.]

First appeal from the order of the Sub-Judge, 1st Class, Lahore, dated the 27th October 1914.

The Hon'ble Mr. *Fazl-i-Husain* and Pandit *Ram Bhaj Dutta Chaudhri*, for the Appellant.

Lala *Moti Sagar*, R. S., for the Respondents.

JUDGMENT.—On the 13th November 1881 one Punjab Singh, the father in-law of the present plaintiff, made a Will disposing of certain moveable and immoveable property in the manner described therein, and the dispute between the parties to this litigation depends upon the interpretation to be placed upon the provisions relating to the disposition made by the testator. It may be stated at once that there is no longer any contest as to the *factum* of the Will; and Mr. Moti Sagar for the respondents also admits the validity thereof in so far as the testator's power of disposal over the property is concerned. The following brief pedigree-table explains the relation[illegible] different persons affected by the [illegible]ons of the Will :—

PUNJAB SINGH
|
Devi Dial=*Musammat* Jasodhan (plaintiff)
|
Bishan Singh.

Punjab Singh died in 1882, and his son Devi Dial died 18 years afterwards in 1900. Bishen Singh, who was born in 1890, mortgaged on the 19th December 1912 one-half share in certain house property to the defendants Bulaki Ram and Ram Lal, and the action out of which the present appeal arises was brought by *Musammat* Jasodhan on the allegation that under the Will she was the sole owner of the property during her lifetime and that Bishan Singh had no interest in the property during that period ; and she accordingly prayed for a declaration that the alienation effected by him was null and void. The Subordinate Judge, while holding that a life-estate was created in favour of *Masammat* Jasodhan, has dismissed the suit on the ground that " Bishan Singh was not born at the time of its execution, its provisions so far as they postpone the vesting of the property in him are thus not binding on him. " He then by a curious process of reasoning, which we are unable to follow, has reached the conclusion that the Will is "ineffectual to restrain the rights of the grandson who was not born at the time and who would be entitled to succeed in the ordinary course of succession under the Hindu law. " The result is that the Sub-Judge has dismissed the suit, presumably on the ground that the life estate in favour of the plaintiff is rendered invalid by reason of the restriction on the rights of the grandson.

It is clear that this judgment is wholly wrong and cannot be sustained. If the estate in favour of the plaintiff was validly created and came into operation on the death of the testator, we fail to understand how the alleged invalid restriction imposed upon the estate in favour of the grandson, which estate could in no case take effect prior to his birth, would have the effect of putting an end to the prior estate. It is, however, unnecessary to consider this matter at length, because Mr. Moti Sagar for the respondents frankly admits that he is unable to support the judgment of the lower Court. He, however,

contends that *Musammat* Jasodhan is, under the Will, entitled only to one-half of the income of the estate ; that she has no other interest in the property ; and that consequently she has no *locus standi* to contest the alienation.

Now, it has been repeatedly laid down that the single rule of construction in a Hindu as in an English Will is to try to find out the meaning of the testator, taking the whole of the document together, and to give effect to this meaning. We have given our careful consideration to the language of the document as a whole, and arrived at the conclusion that the testator intended that his estate should vest in *Musammat* Jasodhan for her lifetime; and that Devi Dial and after his death, his male issue should receive only a moiety of the income accruing therefrom. As regards Devi Dial the testator says in the clearest possible language that he "should receive one-half of the income accruing from the property during his lifetime." The Will further provides that "after the death of Devi Dial the right to income accruing from immoveable property shall devolve upon his male issue, if any", and it is only after the death of *Masammat* Jasodhan that the property shall devolve upon the male issue, if any, of *Musammat* Jasodhan and Devi Dial.

There can, therefore, be no manner of doubt that during the lifetime of *Musammat* Jasodhan, Bishan Singh has no right whatsoever in the estate, and is not consequently entitled to dispose of it either temporarily or permanently. But Mr. Moti Sagar contends that even if the alienation is unauthorized, the plaintiff upon whom the onus rests, has failed to show that she is entitled to contest it. The learned Pleader argues that the only right, she possesses, is to receive one half of the income, and that that right is not prejudicially affected by the alienation in question, which deals only with a moiety of the property. This contention would place *Musammat* Jasodhan upon the same footing as her husband Devi Dial, but on a perusal of the different clauses of the testament we are of opinion that the testator drew a distinction between her and the male devisee, and that he conferred the estate upon her for her lifetime. In paragraph 6 after providing for the payment of his debts and for certain legacies the testator says that the remaining property shall devolve upon *Musammat* Jasodhan. It is clear that there is no such provision in favour of her husband or her son. Then paragraph 7 prescribes that "after the death of *Musammat* Jasodhan the property shall devolve" upon her male issue by Devi Dial, and the only thing, which Mr. Moti Sagar urges in this connection, is that the word "property" means one-half of the property. There is, however, no foundation for this contention. Apart from the clear language used by the testator it is to be observed that if the word "property" was intended to refer to half the estate, there would have been some provision dealing with the remaining half ; but no such provision is to be found anywhere.

It is true that *Musammat* Jasodhan was not allowed to alienate any part of the property but this must be construed in a reasonable manner and what the testator probably intended was that she must have the usual life-estate recognized by the Hindu Law. It appears that ordinarily she was to enjoy half the income of the property, the other half going to her husband and upon his death to his male issue, if any. But even this second half she was entitled to receive in the event of there being no issue of Devi Dial.

For the foregoing reasons we hold that Bishan Singh has no right to the property during the lifetime of the plaintiff, and that the latter is entitled to impeach the alienation which affects her prejudicially. Upon the question of estoppel, which has not been determined by the lower Court, there is no evidence worth the name which would show that the plaintiff led the alienees to believe that Bishan Singh was the owner of the property alienated by him, or that they acted upon such belief. Accordingly we accept the appeal, and setting aside the decree of the lower Court, pass a decree in plaintiff's favour declaring that she is the owner of the property during her lifetime, that Bishan Singh has no right to that property during that period, and that the mortgage effected by him in favour of defendants Nos. 2 and 3 is null and void. The alienees must pay the costs incurred by the plaintiff in both the Courts.

Appeal accepted.

HARIPDA SADHUKHAN *v.* ANATH NATH DEY.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 352 OF 1915.

January 16, 1918.

Present:—Mr. Justice Fletcher and Justice Sir Shamsul Huda.

HARIPADA SADHUKHAN—DEFENDANT No. 2—APPELLANT

versus

ANATH NATH DEY AND OTHERS—PLAINTIFFS AND REMAINING DEFENDANTS—RESPONDENTS.

Mortgage, equitable—Hypothecation of immoveable property, whether passes fixtures—Contract Act (IX of 1872), s. 172—Chattels, whether can be hypothecated without transfer of possession—Registration Act (XVI of 1908), s. 17—Letter from mortgagor to equitable mortgagee showing object of mortgage, whether requires registration.

Where immoveable property is hypothecated the fixtures pass to the mortgagee. The rule in this respect as between landlord and tenant does not apply as between mortgagor and mortgagee. [p. 211, col. 2.]

The method provided by section 172 of the Contract Act for the hypothecation of loose chattels is not the only method for creating security thereon. They may be hypothecated without transferring their possession. In such cases the only question that arises is whether there was an intention to create a security and if there was an intention to create a security, equity gives effect to it. [p. 211, col. 2.]

A letter addressed by the mortgagor of an equitable mortgage to the mortgagee, showing for what purpose he has deposited the title-deeds, is not a document requiring registration under the provisions of the Registration Act as a mortgage. [p. 212, col. 1.]

Appeal against the decree of the Subordinate Judge, Howrah, dated the 6th of May 1915.

Babus *Dwarka Nath Chackerbutty* and *Kali Kinkar Chackerbutty*, for the Appellant.

Babus *Mohendra Nath Roy* and *Ramani Mohan Chatterjee*, for the Respondents.

JUDGMENT.

FLETCHER, J.—This is an appeal by the defendant No. 2 against the decision of the learned Subordinate Judge of Howrah dated the 6th May 1915. The action was brought by the plaintiff for the purpose of enforcing an equitable mortgage on certain moveable and immoveable properties comprised in an indenture of conveyance executed in favour of the Defendant No. 1. The Defendant No. 2 is an attaching creditor of the defendant No. 1, and he says that the property in suit is not subject to any equitable mortgage as stated by the plaintiff. The learned Judge in the Court below decreed the suit in favour of the plaintiff and hence the present appeal.

The learned Judge in the Court below has found that the deposit as mentioned by the plaintiff was, in fact, made. It was evidenced by a letter, dated the 20th November 1913, signed by the first defendant and it is not denied that the deposit did, in fact, take place within the limit of the Presidency town. Therefore, as regards the immoveable property, the security could be created in that manner as provided by section 59 of the Transfer of Property Act. This appeal has been argued solely with regard to the moveable property that is mentioned in the conveyance to the defendant No. 1. The moveable property consists of plant and machinery, both fixed and unfixed. As regards the fixed machinery, the law is well established that between the mortgagor and the mortgagee that passes by the mortgage. The rule as between landlord and tenant does not apply between the mortgagor and mortgagee and the fixtures pass to the mortgagee. That rule has been established for many years. As regards the loose chattels, the case stands differently. It has been argued in the present appeal that the law in British India does not permit of a hypothecation of loose chattels except in the method provided by section 172 of the Indian Contract Act; that is, the only security that is permitted on loose chattels is the contract of pawn where the possession of the goods is transferred to the pawnee. That is clearly not so. The Indian Contract Act does not state that the whole of the law of contract in British India is comprised in the Act. In fact, the preamble of the Act shows clearly that the Act only contains a portion of the law of contract applicable in British India and there is nothing to prevent a person from hypothecating his goods to another person for security. The ordinary principles of equity apply in such cases, namely, the question becomes whether there was an intention to create a security and if there was an intention to create a security, equity gives effect to it. It is quite clear that in a case like this, it is impossible to hold, where a large body of the community is engaged in commercial pursuits—say, where

KESHAO *v.* MANSHA.

a thousand tons of coal or a large parcel of goods is concerned; that the banker is bound to take actual possession of the property. That contention obviously has no force. That is the first point that has been raised. It is quite clear that there is nothing to prevent a security of this nature.

The second point is that the letter, dated the 20th November 1913, is a document of title requiring registration under the provisions of the Indian Registration Act. Quite clearly, it is not a document of title. It does not profess to be a document of title, it professes to be a letter addressed by the defendant No. 1 to the plaintiff showing for what purpose he had deposited the document with the plaintiff. That is merely evidentiary to the purposes for which the deposit was made. That clearly is not a document requiring registration under the provisions of the Indian Registration Act as being a mortgage.

The next point is, as I have already stated, that no security is recognised on chattels except as provided by section 172 of the Indian Contract Act. That is not so, as already remarked.

The last point is as to the form of the decree. It is agreed between the parties that the decree made herein does not cast any personal liability on the defendant No. 2 to pay the money found due on the mortgage.

The appeal is dismissed with costs.

SHAMSUL HUDA, J.—I agree.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 102-B OF 1917.

February 4, 1918.

Present:—Mr. Kotwal, Offg. A. J. C.

KESHAO—PLAINTIFF—APPELLANT

versus

MANSHA—DEFENDANT—RESPONDENT.

Berar Land Revenue Code, s. 79 (2)—*Annual tenancy, whether includes tenancy for a year—Notice to quit, whether necessary—Transfer of Property Act (IV of* 1882), *s.* 111 *d.*

The expression "annual tenancy" as used in section 79 of the Berar Land Revenue Code is meant to cover a tenancy from year to year only and not a tenancy lasting for a year only. No notice by either party to a contract of tenancy for one year is therefore, necessary to determine the tenancy. [p. 213, col. 1.]

Appeal from the decree of the Court of the Additional District Judge, East Berar, dated the 5th of January 1917, in Appeal No. 304 of 1916.

Mr. *V. D. Sathaye*, for the Appellant.

Mr. *A. C. Roy*, for the Respondent.

JUDGMENT.—The plaintiff, an *ijardar* of a village in Berar, filed this suit on the 25th April 1916 to eject the defendant from two fields, on the ground that they had been leased to him in writing for one year from the 1st April 1915 to the 31st March 19 6, and the defendant has refused to vacate the fields on the expiry of the term. The defendant admitted that he had held on lease the above fields in 1915-1916 but he pleaded that the lease was an oral one. He further alleged that he was holding the same fields then on another lease for one year, *viz.*, 1916-17, and the plaintiff had, therefore, no right to eject him.

Both the lower Courts have found that the defendant held the fields in 1915-16 on an oral lease and that the alleged lease for 1916-17 is not proved. The first Court decreed the plaintiff's claim, but the lower Appellate Court has dismissed it on the plea raised by the defendant in appeal that the plaintiff was bound to give notice to quit under section 79 (2) of the Berar Land Revenue Code before he could be ejected. It has overruled the plaintiff's contention that the lease in suit is not an annual tenancy such as is contemplated by section 79 of the Berar Land Revenue Code. The point, therefore, for determination is whether the expression "annual tenancy" used in that section applies to a lease for a single year.

The term "annual tenancy" may have two meanings, *viz.*, "tenancy from year to year," and if you give the word "annual" one of its dictionary meanings, *viz.*, lasting for a year (as an annual plant or annual ticket), "a tenancy for a single year."

I think there are strong reasons against holding that the expression "annual tenancy" in section 79 (2) was meant to cover a ten-

ancy for one year only. Apart from the fact that it is a somewhat unusual use of legal language to speak of tenancy for one year only as an annual tenancy, the general rule of law with regard to notice to quit in connection with tenancies is that no such notice is necessary to determine a tenancy for a fixed period as a demise for a year (see Woodfall's Law of Landlord and Tenant, 19th Edition, page 403, and cases cited therein, and the Transfer of Property Act, IV of 1882, section 111 A). If, therefore, the expression "annual tenancy" is held to include a tenancy for a year, it would be attributing to the Legislature an intention of derogating from the general law and of interfering with the freedom of contract, for a notice to quit cannot be taken to have been contemplated by the parties to a tenancy for a year as the contract itself virtually provides for its determination. In such a case it would be unreasonable and unjust to one of the parties to allow the other to insist upon a notice before the tenancy can be determined. Any construction which leads to such unreasonableness or injustice should be avoided (see Maxwell on the Interpretation of Statutes, 5th edition, page 372).

I hold that section 79 (2) of the Berar Land Revenue Code does not apply to a tenancy for a year and no notice by either party to the contract is necessary to be given to the other before the tenancy can be determined in such a case. The appeal is allowed with costs.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1482 OF 1914.

May 19, 1917.

Present:—Mr. Justice Scott-Smith and Mr. Justice Leslie Jones.

RAM CHAND —DEFENDANT— APPELLANT

versus

MEWA RAM—PLAINTIFF AND *Musammat* RAHIMAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 20—Mortgage without possession—Sub-mortgagee, rights of—Payment made by mortgagor to sub-mortgagee, whether saves limitation against sub-mortgagor.

A sub-mortgage comprises amongst other things the personal covenant of the sub-mortgagor and under that covenant his position in relation to the sub-mortgagee is closely analogous to that of a surety and he is thus entitled to recover the debt from the original debtor, though he is bound to pay it over to the sub-mortgagee in discharge of the sub-mortgage. [p 215, col. 2.]

There is no essential distinction between his position and that of an acknowledged surety. [p. 216, col. 1.]

If the mortgagor, therefore, makes a payment to the sub mortgagee, it operates to save limitation also as against the sub-mortgagor. [p. 216, col. 1.]

(Case-law discussed.)

Second appeal from the decree of the Additional Divisional Judge, Multan, at Muzaffargarh, dated the 1st April 1914.

Dr. *Gokal Chand Narang*, for the Appellant.

Messrs. *Shah Nawaz* and *Hargopal*, for the Respondents.

JUDGMENT.—In 1896 Sultan mortgaged his own land and that of his younger brother Ahmad to Ram Chand for Rs. 1,500. The mortgage was without possession but the mortgagor agreed to pay one-fourth of the produce as interest.

In 1898 Ram Chand sub-mortgaged half of his rights to certain relatives who are now represented by Mewa Ram alone.

On the 28th April 1904 Sultan having died Ram Chand sued *Musammat* Rahiman, the widow of Sultan and Ahmad, for one-fourth of the produce of the whole area mortgaged. He obtained a decree on 23rd July 1904 for the produce of one-half of the land only, it being held that the mortgage by Sultan of Ahmad's land was invalid.

On 19th August 1904 the property of *Musammat* Rahiman was bought by Khuda Bakhsh and Imam Bakhsh, defendants Nos. 2 and 3 in this case. They admittedly paid off the half of the debt due to Ram Chand and they contend that they paid off the whole debt. According, however, both to Mewa Ram and Ram Chand, only Ram Chand's share of the debt was redeemed.

The present suit was instituted on 7th March 1912 by Mewa Ram, the real defendants being Khuda Bakhsh and Imam Bakhsh, defendants Nos 2 and 3, and Ram Chand, defendant No. 4. The plaintiff asked for a decree for the principal and the value of the produce for three years estimated at Rs. 350, total Rs. 1,100, against the defendants

personally and against the property mortgaged.

The District Judge, who was of the opinion that Ram Chand had committed some fraud, found himself unable to hold that defendants Nos. 2 and 3 were still liable for the debt and as against them he dismissed the suit; but he found that Ram Chand was personally liable to the plaintiff and that the plaintiff had been getting his share of the produce through Ram Chand up to within six years of the institution of the suit which was, therefore, within time. He accordingly granted the plaintiff a decree for Rs. 1,100 against Ram Chand alone.

With this decree the plaintiff was satisfied, but Ram Chand appealed to the Additional Divisional Judge who referred to the finding that the plaintiff had been receiving produce through Ram Chand. He may have intended to endorse it, though he did not do so expressly remarking merely that the plaintiff had certainly been receiving the produce up to 1906. That, however, does not appear to have been his reason for holding that the suit was within time as against Ram Chand. His view was that as Ram Chand had not informed Mewa Ram of the suit for produce brought in 1904, he had committed a fraud upon Mewa Ram. The line of argument adopted by him was that as Ram Chand had sued for the whole produce including the share of Mewa Ram (though that fact was not disclosed in the suit), Mewa Ram was debarred under Order II, rule 2, from recovering his money from defendants Nos. 2 and 3 and that time began to run against Mewa Ram for the recovery of his money from Ram Chand only when this fraud on the part of Ram Chand came to the knowledge of the plaintiff. The Additional Divisional Judge agreed with the first Court that Ram Chand was personally liable and he, therefore, dismissed the appeal.

Ram Chand has now preferred a second appeal to this Court.

It is not now seriously contended that section 18 of the Limitation Act is of any application in the present case. A suit of Mewa Ram against defendants Nos. 2 and 3 would not be barred by Order II, rule 2, because a sub-mortgagee is not in any way bound by the result of any suit brought by the original mortgagee (see Gour's Law of Transfer, 4th Edition, Volume II, page 1482), and it cannot be said that the right of the plaintiff to institute the present suit has been kept from his knowledge by any fraud on the part of Ram Chand.

The appeal is, however, defended on another ground, that the suit as against Ram Chand is within time by virtue of the provisions of section 20 of the Limitation Act.

Counsel for the respondent relies first on the finding of the first Court that Mewa Ram continued to receive his share of the produce through Ram Chand. As already explained, it is uncertain whether the Additional Divisional Judge intended to concur in that finding, but even if he did so it is one which cannot stand. The only evidence on the point which has been believed is contained in the books of the plaintiff Mewa Ram, and from this it would appear that he was getting his share of the produce first from Sultan and afterwards from Khuda Bakhsh up to November 1906, that being the date of the last entry. Moreover, the plaintiff himself never alleged that he had got his share of the produce through Ram Chand. The finding in question, therefore, must be regarded as a finding that Mewa Ram continued to get his produce up to November 1906 from defendants Nos. 2 and 3. That is a finding which cannot be attacked on second appeal and it is not attacked. Indeed when Ram Chand was examined by the first Court he admitted that Mewa Ram had continued to get his share of the produce from defendants Nos. 2 and 3 as alleged by him.

Accordingly as between Mewa Ram and Ram Chand whose personal liability is not denied, the only question now remaining in issue is whether limitation is saved as against Ram Chand by the payment of produce by Khuda Bakhsh and Imam Bakhsh to Mewa Ram up to November 1906.

This being a mortgage without possession, the law applicable is that contained in section 20 (1) of the Limitation Act. The contention of Counsel for the appellant is that limitation is saved only as against Khuda Bakhsh and Imam Bakhsh and in support of this contention he has cited *Narayana Ayyar* v. *Venkataramana Ayyar* (1) and *Gopal Daji Sathe* v. *Gopal* (2). *Narayana Ayyar* v. *Venkata-*

(1) 25 M. 220 (F. B.).
(2) 28 B. 248; 5 Bom. L. R. 1020.

ramana Ayyar (1) was a case in which a mortgage had been acknowledged by only one of several co-mortgagors and the High Court of Madras held that the suit was saved from being barred by limitation as against him only. The view taken was that one of several joint contractors cannot be chargeable by a written acknowledgment under section 19 of Act XV of 1877 by reason only that such acknowledgment is made by another joint contractor. As a matter of fact co-mortgagors are not expressly mentioned in section 21 (2) of Act IX of 1908 but granting that they are included in the term "joint contractors" the ruling in question does not appear to us to assist the appellant. Khuda Bakhsh and Imam Bakhsh were admittedly both liable to pay the produce to Mewa Ram and they were the only persons liable in the first instance, the personal liability of Ram Chand only arising on their default.

In *Gopal Daji Sathe* v. *Gopal* (2) it was held that part payment of a debt by a principal debtor would not prevent limitation running against the surety. Both the principal and the surety seemed to have agreed to pay by the same contract and it may be that they were regarded as joint contractors. Jenkins, C. J., however, had observed that the principal's debt was distinct from that of the surety and that the principal was not the person liable to pay the debt of the surety, and this *dictum* was criticised in *Velayudam Pillai* v. *Vaithyalingam Pillai* (3), a decision of a Division Bench of the Madras High Court where it was remarked that the view taken was hardly in accordance with *Allison* v. *Frisby* (4). We have not been able to find any reported case in which the exact point now under our consideration has arisen. The debt under discussion in *Velayudam Pillai* v. *Vaithyalingam Pillai* (3) was one due on a promissory note, but it was held that section 20 of the Limitation Act requires that "the payer should be one liable to pay debts and provides that the result of the payment would be to give the creditor a fresh period of limitation from the date of payment; it does not restrict the benefit accruing to the creditor with respect to his debt to his remedy against the payer alone. According to the language of the section, the debt being kept alive the result must be to make it enforceable against any one liable for it."

Again in *Pears* v. *Laing* (5) it was held that the payment of interest by one person liable on a mortgage was binding upon all persons interested in the mortgaged property. In this ruling reference was made to the case of *Roddam* v. *Morley* (6), in which it has been held that the payment of interest by a tenant for life of a devised estate keeps a specialty alive against the persons entitled in remainder. Lold Cranworth in discussing the words of the Statute of Limitation said: "It does not in terms confine his right to a right of action against the persons who made the payment, and we have no right to introduce words for the purpose of so confirming it." *Allison* v. *Frisby* (4) was a case in which the mortgagor and his surety jointly and severally covenanted for the payment of the mortgage-debt. The mortgagor paid the interest up to a certain date, but the surety never made any payment or gave any acknowledgment. It was held that the payment of interest by the mortgagor prevented the Statute from running in favour of the surety. Lord Justice Fry remarked as follows:—"If we were to confine 'payment' to a payment by the person against whom or his representatives the action is brought, I think we should be doing great injustice. It is usual for the mortgagor, not the surety, to pay the interest, and it would be contrary to good sense and the common understanding of mankind that while he is doing so, the Statute should run in favour of the surety unless he makes a payment or gives an acknowledgment."

A sub-mortgage comprises amongst other things the personal covenant of the sub-mortgagor and under that covenant his position in relation to the sub-mortgagee is closely analogous to that of a surety and he is thus entitled to recover the debt from the original debtor, though he is bound to pay it over to the sub-mortgagee in discharge of the sub-mortgage (see Gour's Law of Transfer, 4th edition, Volume

(3) 17 Ind. Cas. 619; 12 M. L. T. 610; 24 M. L. J. 66.

(4) (1880) 43 Ch. D. 106; 59 L. J. Ch. 94; 61 L. T. 632; 38 W. R. 65.

(5) (1871) 12 Eq. 41; 40 L. J. Ch. 225; 24 L. T. 19; 19 W. R. 652.

(6) (1857) 1 De G. & J. 1; 26 L. J. Ch. 438; 3 Jur. (N. S.) 449; 5 W. R. 510; 44 E. R. 622; 118 R. R. 1.

II, page 823) and we can see no essential distinction between his position and that of an acknowledged surety. If again the mortgagor makes a payment to the sub-mortgagee the action is kept alive for the sub-mortgagor and if he is entitled to take the benefit he must surely accept the burden. A sub-mortgagee, while he is still receiving payment from the mortgagor, is led to believe that he will not lose his rights against the sub-mortgagor and if this is not so, he would in the case of a mortgage without possession always lose his rights against the sub-mortgagor at the expiry of six years from the date of the mortgage unless he obtained some separate acknowledgment from the sub-mortgagor also. Section 20 of the Limitation Act does not say that limitation is saved only against the person who makes the payment and we do not think that it should be so interpreted, especially when in our opinion such an interpretation would be repugnant to a sense of common justice.

We hold then that the suit as against Ram Chand is within time and as his liability is not disputed on any other ground, we dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 103 OF 1917.

December 18, 1917.

Present:—Mr. Justice Fletcher and Justice Sir Shamsul Huda

AHAMUDDIN TAMIJUDDIN AND OTHERS —DEFENDANTS—APPELLANTS

versus

AMIRUDDIN AND OTHERS—PLAINTIFFS —RESPONDENTS.

Co-owners, rights of—Adverse possession by co-owner, requisites of—Partition, suit for, by co-owner out of possession, form of—Court-fee payable—Suit financed by third person, effect of.

The possession of one co-owner is *prima facie* the possession of the other co-owners and in order to make the possession of one co-owner adverse to the other co-owners there must be an actual ouster of the latter. Where one co-owner has been in uninterrupted possession for a large number of years, the Court may presume that there has been an ouster of the other co-owners without any express evidence of the fact of such ouster [p. 217, cols. 1 & 2.]

In a partition suit ordinarily it is not very material as to whether the plaintiff is or is not actually in possession of his share. But in this country in the Mofussil Courts it is important, because a person who sues for partition and is out of possession must ask, first of all, to be restored to possession of his share and pay additional *ad valorem* fee upon his plaint, whereas in a case where the plaintiff is in possession he simply sues for partition and separation of his share on a plaint bearing a stamp of Rs. 10 only. [p. 217, col. 2; p. 218, col 1.]

If the case of a plaintiff is a genuine one it does not matter much who found the money to finance the suit. [p. 219, col. 1.]

Appeal against the decree of the Subordinate Judge, 2nd Court, Tipperah, dated the 24th March 1917.

Babu *Ram Dayal De*, for the Appellants.

Babu *Sasadhar Roy*, Senior, for the Respondents.

JUDGMENT.

FLETCHER, J.—This is an appeal by the defendants Nos. 1, 2 and 3 from the decision of the learned second Subordinate Judge of Comilla, dated the 24th March 1917. The appeal is preferred against a preliminary decree passed in a suit for partition. The parties are Mahomedans. They had a common ancestor, that is, the grandfather of the first three defendants one Fazil Mahomed. Fazil Mahomed had two sons, Jamiruddi and Maniruddi. Jamiruddi married Tilakjan, the defendant No. 4, and of that marriage there were two daughters only, namely, Atardan and Nabojan. Jamiruddi then died and Maniruddi married his widow Tilakjan. The children that Maniruddi had were, first of all, the defendants Nos. 1, 2 and 3, three sons. He had also a daughter named Safarjan. Safarjan married the first plaintiff and had one son and no more, namely, the plaintiff No. 2. The share sought to be recovered in this suit was the share that Safarjan took under the Muhammadan Law as one of the heirs of her deceased father Maniruddi. The question in this case, therefore, is whether the plaintiffs have the right to recover that share. The learned Judge of the Court below has found that the plaintiffs have got the right that Safarjan had and, as regards the property sued for, the learned Judge has decreed in favour of the plaintiffs a 1/8th share in one of the plots mentioned in the plaint, namely, plot No. 13, and 17/192 share of the other

plots. This appeal has been preferred against that finding and the points that have been urged in this appeal have been urged, if I may say so without disrespect, at great length and with considerable particularity and they are these:—

The first point is that the case of the defendants was that after the death of Maniruddi, Safarjan had relinquished in consideration of a payment of Rs. 50 all interest which she had taken in the property as one of the heirs of Maniruddi. That case of payment depended solely on consideration of the oral testimony and the learned Subordinate Judge disbelieved it. It is said that the learned Judge was wrong in disbelieving that, because he accepted the story put forward by these defendants that the two daughters of the defendant Tilakjan by her first marriage with Jamiruddi had, in fact, relinquished their shares in favour either of the defendants or of Maniruddi. I do not think that that is so. Those payments do not stand or fall together because the daughters of Tilakjan by her first marriage came forward and gave evidence and stated that they made no claim to the property; and after such statement, it was immaterial for the Judge to enquire whether the statment as to the time and mode of the payment of Rs. 50 was or was not correct. I do not see that that in any way can affect the truth of the story as to the payment of Rs. 50 to Safarjan. So far as I have seen the evidence, I am of opinion that the story of this alleged payment was a wholly improbable and untrue story.

The next question that is raised is a question which the learned Vakil for the appellants has placed considerable stress on, and that is the issue of limitation. It is stated that the plaintiffs never having been in possession of the property, their suit is barred by the law of limitation; and the learned Vakil cited a great number of cases in support of that argument. The principles applicable to cases of this nature are perfectly simple. They have been laid down in numerous authorities and they are these. That the possession of one co-owner is *prima facie* the possession of the other co-owners and that in order to make the possession adverse there must have been ouster of the plaintiff, although there are cases that where the possession of the defendant has been long and uninterrupted for a large number of years, the Court has come to the conclusion that the evidence in the circumstances of the case does warrant the finding that there has been an ouster of the plaintiff, without any express evidence of the fact of such ouster. These are the short principles that can be deduced from those cases. Judgments have been cited where a particular set of facts brought the case within those rules. But the rules are stated shortly and clearly in the judgment of the Privy Council in the appeal from the Colony of Ceylon reported as *Corea* v. *Appuhamy* (1). Now, what is the evidence in this case on which either it is proved that there was an actual ouster or it may be said that the Court ought to infer that there was an ouster of the plaintiffs? The actual ouster is really not set up by anybody. The case was not a case of actual ouster as presented in the written statement but it was a case of the acquisition of the interest of Safarjan by the payment of Rs. 50 and this case of ouster was not set up at all. The learned Judge was much impressed by the evidence of the fact of the occasional visits paid by Safarjan to her mother Tilakjan and also of the fact that the infant plaintiff was on his mother's death nursed and brought up at Tilakjan's house. Personally, I feel no doubt, even apart from that evidence of the infant plaintiff having lived in the premises of Tilakjan, that there was no ouster of the plaintiffs. The case set up in the written statement does not, in any way, support an actual ouster which is necessary to prove that the possession of the defendants had become adverse as against the plaintiffs.

The next point urged is a point that is closely allied to the question of limitation and that is whether at the institution of the suit the plaintiffs were or were not in possession of the property. In a partition suit ordinarily it is not very material as to whether the plaintiff is or is not actually in possession of his share. But in this country in the Mofussil Courts it is important, because on the rulings of the High Courts of India including this High Court a

(1) (1912) A. C. 230; 81 L. J. P. C. 151; 105 L. T. 836.

person who sues for partition and is out of possession must ask, first of all, to be restored to possession of his share and pay additional *ad valorem* fee upon his plaint, whereas in the case where the plaintiff is in possession he simply sues for partition and separation of his share. In this case, accepting that rule that this suit, if the plaintiffs were out of possession, would require an additional Court-fee as being a suit to restore the plaintiffs to possession, I think the evidence on the issue of limitation shows clearly that the plaintiffs had never been ousted from their shares as the possession of the defendants was the possession of the plaintiffs. Therefore, agreeing with the learned Judge on this issue, I am of opinion that the plaintiffs were in possession of their shares and were entitled to maintain the suit on a plaint bearing a stamp of Rs. 10 only.

Then, the next point that was urged was as regards defect of parties and the defect of parties, I gather, was this: It is said that the Court having disbelieved the defendants' story as to the relinquishment by Safarjan, the wife and mother of the two plaintiffs respectively, ought to have disbelieved the story of relinquishment by Atarjan and Nabojan, the two daughters of Jamiruddi, and that, therefore, the Court ought to have held that there was a defect of parties as the said two daughters of Jamiruddi were not made parties. That seems to me to be a manifest fallacy. The case of these two other persons Atarjan and Nabojan was supported by a statement of theirs that they had ceased to have any interest in the property and if they had ceased to have any interest in the property, clearly they were not necessary parties to a partition suit.

The next point, which is the only point that has any substance in it, is that the learned Judge of the Court below has awarded to the plaintiffs a larger share in the plots other than plot No. 13, which the facts found by him warrant. It is said that the share awarded ought to have been 29/384 instead of 17/192. Although the method of the calculation is not accurate, it seems on the statements made in paragraph 13 of the written statement, that the plaintiffs have not been awarded a larger share because the defendants' case was that Atarjan and Nabojan relinquished within one month after the death of Maniruddi and they stated that at the date of that relinquishment, the claim of Atarjan and Nabojan had long been barred by limitation. If it was long barred by limitation so shortly after the death of Maniruddi then, of course, the relinquishment by Atarjan and Nabojan must have enured for the benefit of Maniruddi and Tilakjan, his wife, she taking her rights as the widow of her first husband Jamiruddi. On that footing, the plaintiffs have not been given a larger share and there is no reason to disturb the finding of the learned Subordinate Judge in that respect.

The other point raised was with regard to plot No. 13, which the learned Judge has found to have belonged solely to Maniruddi and of which the plaintiffs were, therefore, entitled to $\frac{1}{8}$th share. That this property was acquired by Maniruddi originally there seems to have been no controversy in the Court below. The *kobala*, which has not been printed but the date of which and the boundaries are given in the paper-book, seems to show that it is the same property as is mentioned in the sale-certificate (Exhibit A) and also in the *khatian* (Exhibit E). What the sale-certificate was, whether it was a decree obtained by a co-sharer-landlord or not, we do not know, and, although the property may be the same the boundaries given in it do not agree with the boundaries given in the *kobala* in favour of Maniruddi, but some of the boundaries in the *khatian* (Exhibit E) do seem to agree with the boundaries in the *kobala* in favour of Maniruddi. Exactly what happened as to this property we do not know; but there is nothing to show that the interest that Maniruddi undoubtedly got under this *kobala* has been put an end to and I do not think that this certificate of sale the proceedings of which we know nothing about or the statement in the remarks column of the *khatian* only is sufficient to displace the title that Maniruddi acquired under the *kobala* Exhibit A. I do not think there is anything in this case. It is quite clear on the findings of fact and the statements made in the judgment of the learned Subordinate Judge that the present plaintiffs have perfectly good title to the share in the properties allotted to them. It may be that they had been

urged on to bring this suit or that they have been financed by Neazuddi, the brother of the plaintiff No. 1. But if the case is a genuine one, it does not matter much who found the money to finance the suit. There cannot be, in my opinion, any doubt that these two plaintiffs have got an interest in the property and that they have been rightly given their share. The points raised in the present appeal seem to me to have no force in them and I agree in the conclusion arrived at by the learned Judge of the Primary Court. The present appeal, therefore, fails and must be dismissed with costs. We assess the hearing fee at five gold *mohurs*.

SHAMSUL HUDA, J.—I agree.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 631 OF 1917.

November 15, 1917.

Present:—Mr. Justice LeRossignol.

SARDARA—DEFENDANT—APPELLANT

versus

KAURA RAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Muhammadan Law—Minor—Alienation by de facto *guardian, validity of—Punjab Redemption of Mortgages Act (II of* 1913*), s.* 12*—Mortgages by father and mother of minor—Redemption of only one mortgage—Suit by mortgagee—Principles applicable—He who seeks equity must do equity.*

Where a *de facto* but not a *de jure* guardian of a Muhammadan minor alienates the minor's property the alienee cannot enforce the alienation against the minor; but the minor, if he comes into Court to challenge the alienation, must before re-entry restore to the alienee all the benefits that he personally has derived from the alienation—this on the equitable ground that he who seeks equity must do equity. [p. 219, col. 2.]

The proceedings under the Punjab Redemption of Mortgages Act are summary and in a disputed case neither party should be prejudiced by the Collector's action when the matter is later on submitted to the decision of the Civil Courts. [p. 220, col. 1.]

Defendant's father mortgaged some land with possession to the plaintiff for Rs. 193 odd. After the father's death the defendant's mother, as his *de facto guardian*, created an additional mortgage of Rs. 100 on the land Defendant made an application under the Punjab Redemption of Mortgages Act, and the Collector ordered redemption to take place on payment of Rs. 193 odd only. The plaintiff then instituted a suit under section 12 of the Act:

Held, that the defendant could not redeem the land without redeeming both the mortgages, inasmuch as had the Collector not intervened and the minor had applied to the Civil Courts for entry, he would have obtained a decree conditional on payment of both mortgages and his position could not be allowed to be improved by what turned out to be an erroneous executive order. [p. 220, col. 1.]

Appeal from the decree of the District Judge, Shahpur, at Sargodha, dated the 2nd November 1916, reversing that of the Munsif, 1st Class, Shahpur, dated the 22nd January 1916, dismissing the suit.

Mr. *Nanak Chand*, for the Appellant.

Mr. *Mukund Lal Puri*, for the Respondents.

JUDGMENT.—The facts of this case, which appears to be one of just first impression, are that the father of defendant Sardara mortgaged land with possession to plaintiffs in Rs. 193-8-0. After the father's death, the minor's mother, as *de facto* guardian of her son, created an additional mortgage of Rs. 160 on the land.

As the result of an application by Sardara under Act II of 1913, which provides a summary procedure for the redemption of mortgages in the Punjab, the Collector ordered redemption to take place on payment of Rs. 193-8-0 only, and Sardara on depositing that sum was duly placed in possession.

This suit was then instituted by the mortgagee under section 12 of Act II of 1913. The law applicable to cases wherein a *de facto* but not a *de jure* guardian has dealt with a Muhammadan minor's property has now been settled by a large number of rulings of this Court which are resumed in *Ram Jawaya* v. *Natha* (1), and the principle followed is that the alienee of such property cannot enforce the alienation against the minor, but the minor, if he comes into Court to challange the alienation, must before re-entry restore to the alienee all the benefits that he personally has derived from the alienation—this on the equitable ground that he who seeks equity must do equity. The plaintiff in this case is not the minor, but the learned District Subordinate Judge holds that the minor must redeem both mortgages before he can obtain possession, because it is found that the mother's mortgage was

(1) 14 Ind. Cas. 787; 33 P. R. 1912; 295 P. W. R. 1912.

for the benefit of the minor and that but for the Collector's action under Act II of 1913, the minor instead of being the defendant would be the plaintiff.

I think the learned Judge has taken the correct view. The proceedings under Act II of 1913 are summary and in a disputed case, neither party should be prejudiced by the Collector's act, when the matter is later on submitted to the decision of the Civil Courts.

The civil suit arises directly out of the Collector's action and is not strictly a suit to enforce the mortgage, but rather one to establish the rights of the mortgagee; it is a continuation of proceedings in which the mortgagor first appeared in the guise of a plaintiff.

Indeed from the language employed in the Act, it would seem that the suit should be of a declaratory character and in any case it is a suit for righting any order incorrectly issued by the Collector.

Now had the Collector not intervened, and the minor had applied to the Civil Courts for entry, he would have obtained a decree conditional on payment of both mortgages and his position cannot be allowed to be improved by what turns out to be an erroneous executive order. In short the position at the time of the issue of the Collector's order must be borne in mind and it should be considered what the order should have been.

My conclusion then is that the plaintiff is entitled to remain in possession till both mortgages have been redeemed and I dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 79 OF 1917.

January 22, 1918.

Present:—Mr. Justice Richardson and Mr. Justice Beachcroft.

ISHAN CHANDRA SAMUI—PETITIONER—APPELLANT

versus

DULAL CHANDRA DE—OPPOSITE PARTY—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 182—Civil Procedure Code (Act V of 1908), O. XXI, rr. 11, 17 (2)—Execution application rejected for not specifying particulars, whether step-in-aid of execution—Res judicata in execution proceedings—Objection taken against one application, whether can be taken against subsequent application.

An application for execution rejected under Order XXI, rule 17 (2), of the Civil Procedure Code on the ground that it did not specify correctly all the particulars required to be specified therein by rule 11 of that Order, is not an application in accordance with law or a step-in-aid of execution taken in accordance with law within the meaning of Article 182, Schedule I of the Limitation Act. [p. 221, col. 2.]

Joyanuddin Khan v. *Jamiruddin Sarkar*, 37 Ind. Cas. 916; 21 C. W. N 835, followed.

A decree-holder applied for execution on the 25th March 1916. His previous application made on 12th May 1914 was withdrawn, the order then made by the Court being "the execution case is dismissed for non-prosecution and the objection case of the judgment-debtor is also dismissed for the present." In that objection case the judgment-debtor had pleaded that the application of the 12th May 1914 was out of time, having been made more than three years after the application for execution which preceded it:

Held, that regard being had to the way in which the execution case of 12th May 1914 terminated, it could not be said that the objection of the judgment-debtor on the ground of limitation was adjudicated upon, so that no question of *res judicata*, constructive or otherwise, could arise and it was open to the judgment-debtor to take the same objection in the present case. [p 221, col. 2.]

Appeal from the order of the Sub-Judge, Hooghly, dated the 4th December 1916, affirming that of the Officiating Munsif, Arambagh, dated the 23rd August 1916.

FACTS appear from the judgment.

Babu *Hari Narain Roy Chowhury*, for the Appellants.—The Courts below were wrong in allowing the execution of the decree, as the present application for execution of the decree is clearly barred by limitation under Article 182 of the First Schedule of the Limitation Act. The proceedings under the first application ended on the 13th January 1911. Then on the 3rd January 1914 an application for execution of the decree was made, but that application was rejected as it did not specify the particulars required by Order XXI, rule 11 of the Civil Procedure Code. Then on the 12th of May 1914 another application was made which was withdrawn on the 22nd August 1914. Thereafter, the present application was made on the 25th March 1916. The application dated 3rd January 1914 was not an application in accordance with law or a step-in-aid of execution taken in accordance with law within the meaning of Article 182. Refers to Order XXI, rule 17, clause (2), and *Joyanud-*

din Khan v. *Jamiruddin Sarkar* (1). Therefore the period of limitation is to run not from the application of 3rd January 1914 but from the application dated 13th January 1911; therefore the previous application of the 12th May 1914 was out of time, and, therefore, the present application is also out of time.

Babu *Gagan Chandra Boral*, for the Respondent.—The application dated 3rd March 1914 was one in accordance with law. Even conceding for the sake of argument that it was not in accordance with law, it was certainly a step-in-aid of execution within the meaning of Article 182, and, therefore, the question of limitation does not arise.

Refers to *Mathura Prosad* v. *Anurago Koer* (2), *Musaraf Ali* v. *Amir Jan Bibee* (3).

Babu *Hari Narain Roy Chowdhury* in reply.

JUDGMENT.

RICHARDSON, J.—The question in this appeal is whether an application for execution is barred by limitation under the provisions of Article 182 of the First Schedule of the Indian Limitation Act. The application was made on the 25th March 1916. The previous application made on the 12th May 1914 was withdrawn by the decree-holders on the 22nd August 1914, the order then made by the Court being, "the execution case is dismissed for non-prosecution and that the objection case of the judgment-debtor is also dismissed for the present." Now with reference to the application of the 25th March 1916 the judgment debtor pleaded that the previous application of the 12th May 1914 was out of time. It is conceded for the decree-holder that amongst the objections taken to that application there was an objection on the ground of limitation. Regard being had to the way in which the case terminated, it cannot be said that that objection was adjudicated upon. That being so, no question of *res judicata*, constructive or otherwise, arises and it is open to the judgment-debtor to take the point in the present case. If the point is open, there can be little doubt that the application of the 12th May 1914 was out of time. The application previous to that resulted in proceedings which terminated on the 13th January 1911 and from that date it is more than three years to the 12th May 1914.

For the decree-holder it has been strenuously urged by the learned Pleader who appears for him that the application of the 12th May 1914 was within three years of another application which I have not yet mentioned, which was made on the 3rd January 1914 within three years of termination of the previous case. In my opinion, however, the application made on the 3rd January 1914 is of no avail to the decree-holder, because it was not an application in accordance with law or a step-in aid of execution taken in accordance with law. The application was rejected on the ground that it did not specify correctly all the particulars which rule 11 of Order XXI requires that an applicant for execution should specify. It appears that the amount which had been recovered in the course of some previous proceedings was not correctly stated. No doubt, it was open to the Court dealing with that application either to reject it or to return it for amendment. Apparently the Court was not moved for leave to amend and the course which the Court actually took was to reject the application, which it could only do if the application was not in accordance with law. The terms of clause (2) of rule 17 of Order XXI show that when an application is rejected, it is not an application in accordance with law. The point has been decided in the case of *Joyanuddin Khan* v. *Jamiruddin Sarkar* (1). The result is that the objection taken to the present application on the ground of limitation succeeds. The previous application was out of time and this application is also out of time.

The appeal must, therefore, be allowed and the application for execution must be dismissed. In the circumstances we make no order as to costs.

BEACHCROFT, J.—I agree.

Appeal allowed.

(1) 37 Ind. Cas. 916; 21 C. W. N. 835.
(2) 5 Ind. Cas. 579; 14 C. W. N. 481.
(3) 8 Ind. Cas. 833; 15 C. W. N. 71.

SECRETARY OF STATE *v.* KAMAL KRISHNA PAL.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2680 OF 1914.

January 17, 1918.

Present:—Mr. Justice Richardson and Mr. Justice Beachcroft.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—APPELLANT

versus

KAMAL KRISHNA PAL—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII B. C. of 1885), s. 52—Landlord and tenant—Holder of temporary tenure whether can contract himself out of his right to apply for reduction of rent.

A holder of a temporary tenure under a *kabuliyat*, which provides that diluvion or no diluvion the tenant would remain liable for the full rent payable, is not entitled to claim reduction of rent on the ground of diluvion. [p. 223, cols. 1 & 2.]

Apart from any question of contract section 52 of the Bengal Tenancy Act is applicable both to tenure-holders and to *raiyats*. But a tenure-holder is at liberty to contract himself out of his right to apply for a reduction of rent under section 52. [p. 223, col. 1.]

In the case of a holder of a temporary tenure, section 52 of the Bengal Tenancy Act must be read subject to the terms of the contract between him and his landlord. [p. 223, col. 2.]

Appeal against the decree of the Subordinate Judge, Chittagong, dated the 23rd May 1914, confirming that of the Munsif, Chittagong, dated the 8th April 1913.

FACTS of the case appear from the judgment.

Babu *Ram Charan Mittra* (with him Babu *Sris Chandra Chaudhuri*), for the Appellant.—The appeal arises out of a suit for abatement of rent under section 52 of the Bengal Tenancy Act. The tenure was created by a *kabuliyat* in the year 1896, and the plaintiff is the purchaser of the tenure at a sale for arrears of revenue. The contract with the original tenant was that he would remain liable for the full rent payable even in case of diluvion of a portion of the tenure. In the face of this contract, the Courts below were wrong in allowing reduction of rent. Section 52 of the Bengal Tenancy Act applies to every tenant. But that section has no application when, as in the present case, there is a contract between the parties. There is nothing in the Bengal Tenancy Act which stands in the way of a tenure-holder's contracting himself out of the Act. The plaintiff, as purchaser of the tenure, is bound by the terms of the *kabuliyat* creating the tenure. Reading sections 52 and 178 together it is clear that in the case of a holder of a temporary tenure, section 52 must be read subject to the terms of the contract between the landlord and the tenant. Therefore the plaintiff, being bound by the terms of the *kabuliyat* of 1896 which provides that diluvion or no diluvion the liability of the tenant to the full rent payable should remain, is not entitled to any abatement of rent.

Babu *Khitis Chandra Sen*, for the Respondent.—The plaintiff is the purchaser of the tenure at a sale for arrears of revenue, and, therefore, he is entitled to the ordinary rights and is subject to the liabilities of a holder of a temporary tenure, and so he is not bound by the terms of the *kabuliyat*

Section 52 of the Bengal Tenancy Act applies to the case of every tenure-holder holding under a lease which is not a permanent lease within the meaning of section 179. Section 52, which commences with the words "every tenant", is applicable even in a case where the tenant has made a contract contrary to the provisions of the section, otherwise the Legislature would have introduced the words "in the absence of a contract to the contrary" into the provisions of the section.

JUDGMENT.—This appeal is preferred by the Secretary of State from the judgment and decree of the Subordinate Judge of Chittagong, dated the 23rd May 1914, confirming the decree of the Munsif of Chittagong, dated the 8th April 1913. The Secretary of State is the defendant in the suit. The plaintiff is the holder of a temporary tenure within a Noabad estate belonging to the Government. The plaintiff purchased the tenure at a sale for arrears of revenue. The tenure was created in the year 1896 and it was held under a *kabuliyat* of that year. One of the terms of the contract is that diluvion or no diluvion the liability of the tenant to the full rent payable should remain. The suit was brought by the plaintiff on the ground that more than one-half of the land of the tenure had been diluviated and that he was entitled to abatement under section

52, Bengal Tenancy Act. The Courts below have decided in his favour and made a decree allowing him a proportionate deduction of the rent. For the Secretary of State it is argued that the question whether the rent is liable to abatement on the ground of diluvion does not depend on section 52 alone but depends also on the terms of the contract between the parties. Section 52 begins no doubt with the words "every tenant" and, apart from any question of contract, is applicable both to tenure-holders and to *raiyats*. On the other hand, the general principle is that an individual may renounce an advantage conferred upon him by a legislative enactment, in the phrase sometimes used, he may contract himself out of the Act. Under the provisions of sub-section (3), clause (*f*) of section 178, a *raiyat* is expressly prohibited from contracting himself out of his right to apply for reduction of rent under section 52. There is no corresponding provision, however, in the case of a tenure holder. It would seem, therefore, that the tenure-holder is at liberty to contract himself out of his right to apply for a reduction of his rent on the ground of diluvion. For the plaintiff-respondent it is argued that inasmuch as section 52 expressly applies to every tenant, it must be taken that sections 52 and 179 of the Act cover the whole field, so that section 52 would apply to the case of every tenant under a lease which is not a permanent lease within the meaning of section 179. This argument appears to me unsound. No doubt there is section 179, which expressly provides that nothing in the Act shall be deemed to prevent a proprietor or a holder of a permanent tenure in a permanently settled area from granting a permanent *mokarari* lease on any terms agreed on between him and his tenant. But obviously that section has no application to the case of the holder of a temporary tenure or the lessee under a lease for a term of years, such as the lease in the present case. Such a lease is not within the section and in order to find out how the Act deals with such a lease we must look elsewhere than in section 179. In my opinion reading sections 52 and 178 together the plaintiff in this case must be taken to be bound by the terms of his contract. The opening words of clause (3) of section 178 are: "Nothing in any contract made between a landlord and a tenant after the passing of this Act shall." Then follow a number of clauses (*a*) to (*h*), in which different classes of tenants are referred to. Clause (*a*) refers to *raiyats* generally, clause (*b*) is limited to the case of occupancy *raiyats* and so on. Clause (*g*) refers to landlords and tenants and clause (*h*) is also applicable to landlords and tenants. It seems to follow that if the Legislature had intended to prevent the holder of a temporary tenure from parting with his right to apply for reduction of rent under section 52, express provision would have been made to that effect. That has not been done. In my opinion, in the case of the holder of a temporary tenure section 52 must be read subject to the terms of the contract between him and his landlord. His freedom of contract is bound by some but not by all the restrictions imposed by section 178, in cases within section 179 none of the restrictions are applicable.

The view of the learned Subordinate Judge that the plaintiff, as purchaser of this tenure at a sale for arrears of revenue, is not bound by the terms of the *kabuliyat* creating the tenure is not supported at the Bar and cannot be accepted.

The result is that, in my opinion, the conclusion arrived at by the Court below is erroneous and this appeal must be allowed and the suit dismissed with costs throughout.

BEACHCROFT, J.—I agree.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 246 OF 1916.

September 26, 1917.

Present:—Mr. Batten, A. J. C.

MAHADEO AND ANOTHER—PLAINTIFFS—APPLICANTS

versus

KEWALRAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s 23—Public policy—Promise not to bid at excise auction, validity of.

NAZIR *v.* AMAR CHAND.

An agreement to abstain from bidding at an excise auction is not void under section 23 of the Contract Act as being against public policy.

Sit Kauk v. *Ah Kun*, U. B. R. (1897-01) Vol. II, 317, dissented from.

Hari Balkrishna Joglekar v. *Naro Moreshvar Joglekar*, 18 B. 342; 9 Ind. Dec (N. s.) 736, *Doorga Singh* v. *Sheo Pershad Singh*, 16 C. 194; 8 Ind. Dec. (N. s.) 129, *Gobind Chundra Gangopadhya* v. *Sherajunnissa Bibi*, 13 C. L. R. 1, *Gobindo Chandra Jha* v. *Shyam Lal Jha*, 1 C. L. J. 85, *Ambika Prasad Singh* v. *Whitwell*, 6 C. L. J. 111, relied upon.

Application for revision of the decree of the Judge, Small Cause Court, Nagpur, dated the 10th August 1916.

Mr. *S. C. Dutta Chowdhury*, for the Applicants.

Mr. *W. E. Puranik*, for the Respondants.

JUDGMENT.—In this case the consideration for the promissory note was the plaintiff's promise to abstain from bidding at an excise auction. The lower Court has dismissed the plaintiff's suit on the ground that the consideration was against public policy within the meaning of section 23 of the Contract Act. He relies on a case reported as *Sit Kauk* v. *Ah Kun* (1). The learned Pleader for the respondents has procured this work for me and I have read the ruling. I cannot regard it as containing a sound statement of the law or to be of greater authority than the cases reported as *Hari Balkrishna Joglekar* v. *Naro Moreshvar Joglekar* (2), *Doorga Singh* v. *Sheo Pershad Singh* (3) and *Gobind Chundra Gangopadhya* v. *Sherajunnissa Bibi* (4) referred to by the learned Judicial Commissioner. The judgment appears to have been based chiefly on old editions of text books which are now obsolete. Besides the cases already referred to, the case for the applicants is supported by *Gobind Chundra Gangopadhya* v. *Sherajunnissa Bibi* (4), *Gobindo Chandra Jha* v. *Shyam Lal Jha* (5) and *Ambika Prasad Singh* v. *Whitwell* (6). The law on the subject has been exceedingly well summed up by Mookerjee, J., in *Ambika Prasad Singh* v. *Whitwell* (6). It would be impossible to state the law more fully. In this case the sole allegation is that the consideration was a promise not to bid. There is no allegation of anything more than this or that the price unduly fell down or anything else of the kind. The objection of the defendants fails and the plaintiffs are entitled to a decree for the balance due to them. I agree with the lower Court's view as to the re-payments and I also agree that there should be no interest. The result is that the plaintiffs should be given a decree for Rs. 56-3-0. The parties will bear their own costs throughout.

Order accordingly.

(1) U. B. R. (1897-01), Vol. II, 317.
(2) 18 B. 342; 9 Ind. Dec. (N. s.) 736.
(3) 16 C. 194; 8 Ind. Dec. (N. s.) 129.
(4) 13 C. L. R. 1.
(5) 1 C. L. J. 85.
(6) 6 C. L. J. 111.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 976 OF 1911.

November 15, 1917.

Present:—Mr. Justice Shadi Lal

NAZIR—DEFENDANT—APPELLANT

versus

AMAR CHAND AND OTHERS—PLAINTIFFS—RESPONDENTS.

Custom—Alienation—Male proprietor, powers of—Exchange, whether transfer.

An exchange is a transfer of property and its validity must be determined in the same way as that of any other transfer. [p. 224, col. 2.]

A male proprietor cannot be reduced to the level of a widow, and the canon by which a transaction effected by him should be judged is whether it is a fair and *bona fide* one, such as may be regarded as an act of good management.

An exchange effected by a male proprietor would be binding upon his reversioners, if it is beneficial to the persons interested in the estate.

Second appeal from the decree of the District Judge, Hoshiarpur, dated the 2nd February 1917, affirming that of the Munsif, 1st Class, Hoshiarpur, dated the 20th May 1916, decreeing the claim.

Mr. *Nand Lal*, for the Appellant.

Mr *Sundar Dass*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the reversioners of one Finu for possession of ancestral land transferred by him to the appellant Nazir in exchange for a plot of land belonging to the latter. Now, there can be no manner of doubt that an exchange is a transfer of property, and that its validity must be determined in the same way as that of any other transfer. The judgment

of a Division Bench of this Court in *Nihali* v. *Lehna* (1) no doubt lays down that a widow is not authorised by custom to effect an exchange of land held by her on the usual life-tenure except for necessity. The judgment further contains certain observations to the effect that she cannot effect an exchange, even if the transaction is for the benefit of the estate. Now, these observations may be applicable to the case of a widow, but I do not think that it can be laid down that a male proprietor governed by the Customary Law can in no case make an exchange to improve the estate or to benefit the person interested therein. A male proprietor cannot be reduced to the level of a widow, and the canon by which a transaction effected by him should be judged is whether it is a fair and *bona fide* one, such as may be regarded as an act of good management.

The learned District Judge holds that the argument urged on behalf of the defendant "that the transaction was not made *mala fide* or to injure the reversioners and that the exchange was beneficial to Finu" is beside the point. I am unable to concur in this view. It seems to me that the transaction would be binding upon the reversioners, if it is beneficial to the person interested in the estate. As regards the beneficial nature or otherwise of the transaction, the learned Judge simply refers to the finding of the Court of first instance, and does not expressly record his own opinion on the subject. I consider that that is the crux of the matter, and a clear finding after a proper consideration of the evidence should be recorded thereon.

I accordingly accept the appeal, and setting aside the decree of the lower Appellate Court remit the case for re-decision with reference to the foregoing remarks. The Court-fee on the memorandum of appeal shall be refunded, and other costs shall abide the event.

Appeal accepted;
Case remanded.

(1) 9 Ind. Cas. 675; 2 P. R. 1911; 46 P. L. R. 1911; 27 P. W. R. 1911.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 3230 OF 1915.

November 22, 1917.

Present:—Justice Sir Charles Chitty, Kt., and Mr. Justice Smither.

JIBAN KRISHNA CHAKRAVARTI—PLAINTIFF—APPELLANT

versus

RAMESH CHANDRA DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Specific performance of contract—Contract embodied in solenamah, *whether can be enforced after* solenamah *set aside by Court.*

Where a suit for specific performance of a contract to grant a lease was brought on the basis of an agreement embodied in a *solenamah* filed in Court which was subsequently set aside by the Court:

Held, that there was no contract subsisting which the plaintiff could put before the Court for enforcement. [p. 226, col. 2.]

Held, further, that in such a case the plaintiff could not fall back upon some verbal agreement to grant the lease. [p 226, col. 2.]

Appeal against the decree of the District Judge, Chittagong, dated the 3rd August 1915, reversing that of the Munsif, 1st Court, at that place, dated the 14th September 1914.

FACTS appear from the judgment.

Mr. *B. C. Mitter* (with him Babu *Khitish Chandra Sen*), for the Appellant.—There was an agreement between the plaintiff and the defendants Nos. 1 to 3 that the la ter would grant a lease to him, and that agreement was embodied in a *solenamah* filed in Court but subsequently set aside by the Court. The present suit is for enforcement of the contract to grant the lease.

[CHITTY, J.—When the *solenamah* has been set aside the contract embodied therein is no longer subsisting.]

That view has been taken by the Courts below. But I rely upon a verbal agreement between the plaintiff and the defendants as to the lease which was to be given, and the plaintiff wants specific performance of that agreement.

Babu *Jogendra Nath Mukherjee* (with him Babu *Probodh Kumar Das*), for the Respondents.—The judgment of the Courts below is concluded by findings of fact. The contract was embodied in a *solenamah* which was set aside by the Court and so there was no contract subsisting which the plaintiff could enforce. It has been found by the

Courts below that there was no contract existing independently of the *solenamah* and so the plaintiff cannot fall back upon any verbal agreement to grant a lease. Admittedly the contract is bound up in the *solenamah* and that *solenamah* having gone the contract must go with it.

Mr. *B. C. Mitter* in reply.

JUDGMENT.

CHITTY, J.—In my opinion this appeal should fail on the short ground that the contract on which the plaintiff sued was embodied in the *solenamah* filed on 14th July 1910, and that that *solenamah* having been set aside by this Court there was no contract subsisting which the plaintiff could put before the Court. The learned Counsel for the plaintiff-appellant conceded that if the Court held that the *solenamah* was the contract between the parties he had no case. The plaintiff in seeking specific performance of an agreement to lease as against defendants Nos. 1 to 3 alleged in his plaint that there was an agreement with the plaintiff that defendants Nos. 1, 2 and 3 would grant a *patta* to him in his own name at a *jama* of Rs. 13 per annum from the date of the execution of the said *solenamah*. That appears to me to be an obvious device to get out of the difficulty, which arose, of the *solenamah* being no longer enforceable. It is to be noted that the Munsif, who decided in favour of the plaintiff, stated in his judgment that the *solenamah* and the *solenamah* alone was the contract between the parties. He says: "During the pendency of the appeal, the present plaintiff and the defendants came to terms and it was arranged that the plaintiff would hold the land as a *kaimidar rayait* under the defendants on an annual rental of Rs. 13. The terms were embodied in a *solenamah* which was filed in Court and according to which the appeal was disposed of and the decree prepared." Later in his judgment he says: "There is no evidence worth the name that there was any other contract besides what was embodied in the *solenamah*." The learned District Judge appears to have taken the same view. He says: "This contract was embodied in a *solenamah* filed in Suit No. 467 of 1908 brought by defendants Nos. 1 to 3 for ejectment against Bankim and Pulin, sons and heirs of Sarbanund Barua, the former under-tenant in possession." Later he says: "Admittedly the contract is bound up in the *solenamah*. There is no contract existing independently of the *solenamah*. The *solenamah* has been set aside and the contract must, I think, go with it." That being the case, it seems to me to follow as a matter of course that the *solenamah* having been set aside by the Court the plaintiff could no longer enforce it as a subsisting contract. Nor do I think that he can fall back, as he now endeavours to fall back, upon some verbal agreement between him and the defendants Nos. 1 to 3 as to the lease which was to be given. In his plaint he says that the lease was to be in his own name, but the contract in writing which he took and accepted was for a lease in the name of his minor clients Bankim and Pulin, who, he now says were his *benamidars*. This, in my own opinion, is sufficient to dispose of the plaintiff's case. But the learned District Judge has given other reasons which would also prevent the Court from granting the plaintiff the relief which he claims, namely, specific performance of the contract. I do not think that it is necessary for me to go into those matters but I think that I ought to say that, in my opinion, the whole circumstances of the case are altogether discreditable to the plaintiff. He purported to buy the interest of his minor clients from their mother while the suit was going on. He allowed the suit to continue and prosecuted it nominally for them but really for himself. He then procured this *solenamah* also for his own interest. It will be a matter for further consideration whether his conduct as a Pleader should not be reported to the Full Court for such action as the Full Court may think fit to take against him. I need not go into that at the present time. I am of opinion that the plaintiff certainly cannot be allowed the equitable relief which he claims. It would indeed be unfortunate if the Court were bound in law to grant relief to a man who has behaved as the plaintiff has behaved. I would accordingly dismiss the appeal with costs.

SMITHER, J.—I agree that the appeal should be dismissed with costs.

Appeal dismissed.

MOHAMMAD NIAZ KHAN *v.* MOHAMMAD ADREES KHAN.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1280 OF 1915.

January 16, 1918.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.

MOHAMMAD NIAZ KHAN AND OTHERS —PLAINTIFFS—APPELLANTS

versus

MOHAMMAD ADREES KHAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Sale—Pre-emption, right of, whether can be defeated—Construction of document.

Where a transaction in its nature is a sale, the vendor and vendee cannot defeat the right of pre-emption arising under the Muhammadan Law by dressing it up in the garb of a lease.

In determining the real nature of the transaction the Court is entitled to take into consideration the sum paid down, the amount of the rent reserved and the value of the property.

Second appeal against the decree of the District Judge, Ghazipore, dated the 4th May 1915.

Mr. *Muhammad Ishaq Khan*, for the Appellants.

Dr. *S. M. Sulaiman* (with him Mr. *Iqbal Ahmad*), for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought for pre-emption, under the Muhammadan Law. The property transferred is a small piece of land in the town of Zamania. The transfer was made in the form of a perpetual lease. The amount paid down was the sum of Rs. 250 and a nominal rent of 2 annas per annum was reserved. The Court of first instance decreed the suit, holding that there was a sale and that the plaintiff had a right. The lower Appellate Court held that pre-emption under the Muhammadan Law did not apply to the case of leases, accordingly without deciding the other issues the lower Appellate Court reversed the decree of the Court of first instance and dismissed the suit. We think, reading the judgment of the lower Appellate Court, that the learned District Judge never intended to overrule the finding of the Court of first instance that the transaction though carried out in the form of a lease was in reality a sale. We think that he intended to decide that a Muhammadan could make the transfer *in the form of a lease*, notwithstanding that the real intention of the parties was a sale and so to defeat pre-emption, in other words, that such devices are not unknown in the Muhammadan Law and are legitimate. In our opinon the Court was entitled and bound on the issue being raised to consider at the instance of the plaintiff claiming pre-emption what was the real nature of the transaction. It was entitled to consider the sum which was paid down, the smallness of the rent and the value of the property, and if after considering all these matters it came to the conclusion that the transaction was in truth and fact a sale, it should hold that the right of pre-emption arose and proceed to consider whether the plaintiff by due observance of the requirements of the Muhammadan Law was entitled to get the property. If the Court came to the conclusion that in truth and substance—and not merely in form—the transaction was a lease, then the suit should be dismissed on the ground that the Muhammadan Law does not apply to transfers by way of leases. It has been more than once decided in this Court that where a custom of pre-emption prevails upon sale, the vendor and vendee cannot defeat the pre-emptor by dressing up the transaction in the garb of a lease. The same thing has been held in the Punjab, where apparently the right of pre-emption is regulated by Act. We can see no good reason why the same principle should not apply to cases where the right is one under the Muhammadan Law. It is clear that the case must go back to the lower Appellate Court. We accordingly allow the appeal, set aside the decree of the lower Appellate Court and remand the case to that Court with directions to re-admit the appeal upon its original number in the file and proceed to hear and determine the same according to law, regard being had to what we have stated. Costs here and heretofore will be costs in the cause.

Appeal allowed; Case remanded.

GOPI RAM *v.* RAM DHAN.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1988 OF 1916.

October 30, 1917.

Present:—Mr. Justice Shadi Lal and Mr. Justice LeRossignol.

GOPI RAM—PLAINTIFF—APPELLANT

versus

RAM DHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Registration Act (XVI *of* 1908), *s.* 17 (1) (h)—*Document relinquishing rights in property—Registration—Construction of documents, principles of.*

A document relinquishing rights in immoveable property of the value of Rs. 100 or upwards and indicating a clear intention that the title should pass at once, is a conveyance and not merely an agreement to convey and is compulsorily registrable [p. 229, col. 1.]

In determining the nature of a transaction the document evidencing it should be considered as a whole and the intention of the parties should be gathered not from isolated sentences but from the whole of the instrument. [p. 228, col. 2.]

Second appeal from the decree of the District Judge, Kulu, at Dharamsala, dated the 19th May 1916, affirming that of the Subordinate Judge, Kulu, at Nagar, dated the 17th February 1916, dismissing the claim.

Lala *Moti Sagar*, R. S., for Bakhshi *Tek Chand*, for the Appellant.

Dr. *Gokal Chand Narang*, for the Respondents.

JUDGMENT.—The question for determination in this second appeal is, whether the deed dated the 16th March 1910, executed by Daya Ram in favour of the plaintiff, Gopi Ram, is a conveyance or merely an agreement to convey. There can be no doubt that it relates to immoveable property of more than Rs. 100 in value; and would require a compulsory registration, if it effected a transfer of the property.

It must be remembered that Daya Ram and his two brothers were the reversioners to the estate of their collateral Teju (the owner of the property in dispute) who had no male issue, and that they had already succeeded in obtaining a decree declaring the adoption by him of his daughter's son as void. This decree was obtained in 1907, and it appears that during the pendency of the suit Teju died in May 1906. The impediment created by the adoption having thus been removed, the reversioners had only to institute a suit for possession of the property; and it appears that, so far as they were concerned, there was no reasonable doubt as to the success of their suit. It was at this stage that Daya Ram executed the instrument in question; the consideration being the payment by Gopi Ram of one-third of the costs already incurred in the declaratory suit relating to adoption, and one-third of the costs to be incurred in the contemplated suit for possession.

Now, it is a cardinal principle of interpretation that in determining the nature of a transaction the document evidencing it should be considered as a whole, and the intention of the parties should be gathered not from isolated sentences but from the whole of the instrument. This canon we have observed in ascertaining the meaning of the parties, and upon a careful examination of all the terms of the deed in the light of the comments made by the learned Counsel, we have reached the conclusion that Daya Ram intended to transfer at once his entire interest in the estate to Gopi Ram. It is true that the document is not happily worded, but the language used by the executant, when taken with the circumstances set out above, leads to the inference that he intended that his nephew Gopi Ram should step into his shoes.

At the very outset the document states in very clear terms that Daya Ram relinquishes his rights in favour of Gopi Ram; and this appears to be the operative part, so far as the question of the title is concerned. The rest of the deed deals with the delivery of possession when obtained, and specifies the rights and obligations of the parties in the event of the non-fulfilment of his part of the bargain by either of them. It is to be observed that in case Gopi Ram did not obtain possession of the property, he was to get, not damages for the breach of the contract, but one-third of the price of the entire land. This clearly shows that Gopi Ram was treated to be the owner of the property from the date of the execution of the document. In the event of his failure to pay his share of the costs of the suit, his title was liable to be defeated and he was to be deprived of the possession of the property. It is only the penultimate sentence which creates some slight doubt in the matter. It states that if Gopi Ram fulfils the aforesaid con-

ditions, then *jab qabza Mussammi Gopi Ram ko milega us waqt khud qabzi kar ke waris mutazakkara bala ke hoga.* Now, this sentence is not only couched in cryptic language, but is wholly redundant; and we do not think that a sentence of this kind can be availed for the purpose of overriding the earlier clauses of the instrument, which indicate a clear intention that the title should pass at once.

The learned Counsel on both sides have cited a large number of authorities in support of their respective contentions, but we consider it unnecessary to refer to them here, because, as the learned gentlemen themselves have pointed out, the decision in each case must depend upon its own peculiar circumstances. There is no dispute as to the principle of the law to be followed in a matter of this kind; and the question which arises in each case is, as stated above, whether the instrument amounts to a conveyance of the property or confers only a right to demand a conveyance. Upon a careful perusal of the document before us we are not prepared to dissent from the findings of the lower Courts that it is a conveyance of immoveable property of the value of more than Rs. 100 and that it is consequently compulsorily registrable.

As regards the contention that the plaintiff should be afforded an opportunity to prove his claim for the recovery of the money spent by him in litigation, we observe that the plaint contains no prayer for a money decree nor even a prayer for a general relief such as is usually found in almost every plaint. It further appears that no request for amendment was made to the Court of first instance, and it seems to us that the proposed amendment, if allowed, would alter the nature of the suit. In these circumstances we do not think that there is any adequate ground for allowing the amendment of the plaint especially at this late stage, and the plaintiff must stand or fail by the relief claimed in the plaint.

For the aforesaid reasons we confirm the decree of the lower Appellate Court and dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 337 OF 1916.

January 4, 1918.

Present:—Mr. Justice Richardson and Mr. Justice Beachcroft.

ABDUR RAHAMAN AND ANOTHER—OBJECTORS—APPELLANTS

versus

AMIR SHARIF AND OTHERS—DECREE-HOLDERS AND AMIR ALI MIYA—JUDGMENT-DEBTOR—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXVIII, rr. 9, 11—Attachment before judgment, whether ceases on dismissal of suit—Appeal, whether revives order of attachment.

An attachment before judgment comes to an end when the suit is dismissed. [p. 231, col. 1.]

In order to avoid all possible doubt and difficulty, the Court should when dismissing a suit make an order under Order XXXVIII, rule 9, Civil Procedure Code, withdrawing the attachment before judgment. But even if an order directing withdrawal of attachment is not made, on the dismissal of the suit, the attachment before judgment ceases to exist, and it does not revive when an appeal is lodged. [p. 232, col. 1.]

In a suit brought by the plaintiff the property of the defendant was attached before judgment. The Trial Court dismissed the suit without making any order as to the withdrawal of the attachment. On appeal, the suit was decreed. In the interval, the property attached was transferred by a private sale. The decree-holder then applied for the execution of his decree by the sale of the property without applying for its re-attachment:

Held, that as the property had ceased to be under attachment after the dismissal of the suit by the Trial Court, the Court had no jurisdiction to direct it to be sold without being first attached. [p. 231, col. 2.]

Appeal against the order of the District Judge, Chittagong, dated the 1st September 1916, reversing that of the Munsif, Cox's Bazar, dated the 7th March 1916.

FACTS of the case appear from the judgment.

Babu *Chandra Sekhar Sen*, for the Respondents.—Under section 102 of the Civil Procedure Code no second appeal lies in this case, because the value of the original suit is less than Rs. 500.

Babu *D. L. Kastagir*, for the Appellants.—The case comes under section 47 of the Code, and, therefore, a second appeal lies. Even if no second appeal lies there is this Rule, and your Lordships can interfere under section 115, Civil Procedure Code.

The property of the defendant was attached before judgment, and when the plaintiff's suit was dismissed by the Trial Court, the

attachment was not formally withdrawn by the Court although it should have done so under Order XXXVIII, rule 9 of the Code. The question then is, whether the dismissal of the suit made the order for attachment before judgment *functus officio*. The cases decided under section 488 of the Civil Procedure Code of 1882, corresponding to Order XXXVIII, rule 9, of the Code of 1908 show clearly that on the dismissal of the suit the attachment comes to an end, and this is so, even though the Court omits to make any formal order withdrawing the attachment. Refers to Order XXXVIII, rules 9 and 11, and *Shaikh Moheeoodeen* v. *Shaikh Ahmed Hossein* (1), *Ram Chand* v. *Pitam Mal* (2) and *Sasirama Kumari* v. *Meherban Khan* (3). Having regard to the above authorities it is clear that the learned Judge's construction of Order XXXVIII, rule 9, is obviously wrong. So the property which had been attached before judgment and which was sold away after the dismissal of the suit cannot be sold in execution of the decree obtained by the opposite party in appeal.

Babu *Chandra Sekhar Sen*.—If the case is treated as being one under section 115, Civil Procedure Code, then no question of jurisdiction is involved in this case. The Court of Appeal below had jurisdiction to decide the question of law involved in the case, and when it has decided that question whether that decision is right or wrong, it cannot be interfered with in revision.

On the merits, my submission is that the attachment continued even after the dismissal of the suit because the Court, when it dismissed the suit, did not withdraw the attachment. The cases cited in support of the appellant's case were decided under the old Code of 1882 and do not apply to a case decided under the Code of 1908, because the introduction of the word "subsequently" in rule 11 of Order XXXVIII has made a change in the law. Rule 9 of Order XXXVIII provides that the Court shall make an order withdrawing the attachment so that if the Court does not withdraw the attachment, it must be taken to be subsisting even after the dismissal of the suit and until the disposal of the appeal.

Babu *D. L. Kastagir* in reply.

JUDGMENT.

RICHARDSON, J.—A preliminary point is taken in this appeal that no appeal lies under section 102, Code of Civil Procedure. We are of opinion that this objection is good and that the appeal must be dismissed.

The appellant, however, succeeded in obtaining a Rule from this Court which raises the same question as is raised in the appeal. The question turns on the provision contained in rule 9 of Order XXXVIII, Code of Civil Procedure. The rule runs as follows: "Where an order is made for attachment before judgment, the Court shall order the attachment to be withdrawn when the defendant furnishes the security required together with security for the costs of the attachment or when the suit is dismissed." It appears that on the 19th September 1911, certain property belonging to the defendant in the suit out of which these proceedings arise was attached before judgment. The suit was dismissed by the Trial Court on the 20th November 1911. On appeal the suit was decreed on the 28th January 1913. In the interval the property attached before judgment had been purchased at a private sale by the appellant, or rather the petitioner. In 1915 the decree-holder applied for execution of his decree by the sale of the property, on the footing that the attachment before judgment subsisted and that it was unnecessary for him to apply for re-attachment of the property. It is obvious that he was bound to frame his application for execution in that way because if the attachment before judgment did not subsist, the property having been purchased by the petitioner could not be attached or sold in execution. The point made on behalf of the decree-holder is that when the first Court dismissed the suit it omitted to carry out the direction in rule 9 of Order XXXVIII of the Code that the Court should at the same time order the attachment to be withdrawn. If that order had been made, there can be no doubt that the attachment would not have subsisted and would not have been revived

(1) 14 W. R. 384.
(2) 10 A. 506; A. W. N. (1888) 195; 6 Ind. Dec. (N. S.) 340.
(3) 9 Ind. Cas. 918; 13 C. L. J. 243 at p. 247.

by the fact that on appeal the decree of dismissal was set aside and the suit was decided in the plaintiff's favour. As authority for that, if authority is needed, we may refer to the case of *Sesirama Kumari* v. *Meherban Khan* (3) decided by Mookerjee and Coxe, JJ. The argument is that the Court having omitted to make an order withdrawing the attachment, the attachment continued. This point was decided by the learned Munsif against the decree-holder and by the learned District Judge in his favour. With great respect to the latter I agree with the learned Munsif. The observations made by Mr. Justice Mahmud in the case of *Ram Chand* v. *Pitam Mal* (2) are as applicable to the present Code as to the previous Code and in my opinion they correctly state the law. In principle, as pointed out by Mr. Justice Mookerjee in the first case cited, the attachment before judgment should come to an end when the suit is dismissed. And I agree with Mr. Justice Mahmud when he says, speaking of the Code of 1882, that the part of the Rule requiring the Court to remove the attachment was never intended to be more than directory. There is no doubt that in order to avoid all possible doubt and difficulty the Court should, when dismissing a suit, at the same time make the order directing the attachment to be withdrawn. But even if the order is not made, in my opinion, on the dismissal of the suit the attachment before judgment falls to the ground.

Some attempt was made to argue that rule 11 of Order XXXVIII has made some change in the law by reason of the word "subsequently" which appears in that rule. The rule is as follows.—"Where property is under attachment by virtue of the provisions of this Order and a decree is subsequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution of such decree to apply for a re-attachment of the property". But that rule cannot be read in the way in which the learned Pleader for the respondent seeks to read it. It applies only where the property is under attachment and a decree is passed subsequently. It is begging the question to say that the property remains under attachment after the suit has been dismissed or that it revives when an appeal is lodged. If the property is not under attachment at the date of the appeal, this rule can have no application even though a decree be subsequently made in favour of the plaintiff

It is obvious that if the suit is dismissed and no appeal is preferred, the attachment, whether an order withdrawing it is made or not, must cease, and I cannot see that the filing of an appeal makes any difference.

For the reasons indicated, the judgment of the District Judge is, in my opinion, erroneous and must be set aside. The Rule is accordingly made absolute.

It has been suggested that no question of jurisdiction arises which justifies us in interfering with the District Judge's order under section 115, Code of Civil Procedure. But clearly if the property is not under attachment, the District Judge had no jurisdiction to direct it to be sold without being first attached. The question raised is, therefore, one which falls within the scope of section 115.

The result is that the Rule must be made absolute and the order of the Court below set aside. The petitioner is entitled to his costs which are assessed at one gold *mohur*.

BEACHCROFT, J.—I agree.

Rule made absolute.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 63 OF 1915.

March 8, 1917.

Present:—Mr. Ormond, Offg. Chief Judge, and Mr. Justice Parlett.

ABDUL BARI CHOWDRY AND OTHERS—DEFENDANTS—APPELLANTS

versus

M. JOAKIN—PLAINTIFF—RESPONDENT.

Principal and surety—Contribution, suit for—Surety, liability of, to contribute to payment of principal's debt.

Where the Chairman of a Company under an agreement very beneficial to himself financed the Company with money borrowed from a third person and at the request of the latter some of the Directors executed a pro-note as sureties, whereby, along with the Chairman, they made themselves jointly liable for the payment of the loan:

Held, that the sureties were not liable to contribute to the sum realised by the creditor from the principal [p 232, col 2: p. 233, col. 1]

Mr. *N. M Cowasjee* (with him Mr. *Halkar*), for the Appellants.

ABDUL BARI CHOWDRY *v.* JOAKIN.

Mr. *N. M. Burjorjee* (with him Mr. *Banurji*), for the Respondent.

JUDGMENT.—The plaintiff is the Receiver of the Estate of Ashan Ali who died in December 1908. Ashan Ali was the promoter and Chairman of the Bengal Steam Navigation Company. The defendants were three of the Directors of the Company. On the 1st of July 1908 Ashan Ali and the three defendants executed Exhibit N, a pro-note for Rs. 75,000 in favour of a Chetty. The Chetty obtained a decree for the balance due on that pro-note, which was Rs. 50,000 (Rs. 40,000 principal and Rs. 10,000 interest), against Ashan Ali and the three defendants. He realised from the estate of Ashan Ali Rs. 32,080-10 3 and the plaintiff now sues the three defendants for $\frac{3}{4}$ths of that sum by way of contribution. His case is that the pro-note was executed on behalf of the Company which has no assets. The defendants' case is that they executed Exhibit N as sureties for Ashan Ali. The plaintiff obtained a decree on the Original Side of this Court, and the defendants now appeal.

Ashan Ali was a banker and financed the Company under an agreement with the Company, which was very beneficial to himself. On the 3rd of April 1906 he borrowed from the Chetty under a pro-note Exhibit I Rs. 10,000 and on the 12th April 1906 he borrowed from the Chetty upon a pro-note Exhibit 2 Rs. 70,000; and that Rs. 80,000 was used for the purposes of the Company. On the 1st of January 1907 Ashan Ali by his pro-note Exhibit 3 in favour of the Chetty renewed the two pro-notes Exhibits 1 and 2. In the Company's books there are entries of the 7th of January 1907 which would show that the Company received on that date Rs. 80,000 from the Chetty and that the Company had paid Rs. 80,000 to Ashan Ali. On the 4th of March 1907 a Director wrote to Ashan Ali on behalf of the Company asking him to pay this Rs. 80,000 debt owing by the Company to the Chetty as he had sufficient funds of the Company in his hands to do so, and on the 18th May 1907 the request was repeated. On the 21st of April 1908 the Company paid off Rs. 5,000 of this debt to the Chetty. On the 1st of July 1908 Exhibit N was executed because the Chetty required payment from Ashan Ali; and in the Company's books entries in an account with the Chetty on that date would show that the amount borrowed on the pro-note in the 1st of January 1907 was paid in full, and that Rs. 75,000 was borrowed by the Company on a pro-note from the Chetty. After the death of Ashan Ali between the 23rd of March 1909 and the 7th of July 1909 the Company paid to the Chetty Rs. 35,000 on account of principal owing under Exhibit N.

It is clear that before Exhibit N, Ashan Ali was alone personally liable to the Chetty for the money borrowed by him. The Chetty was never a creditor of the Company and he never agreed to accept the Company as his debtor. The entries in the Company's books are to that extent misleading. The defendants, no doubt, knew of the entries in the Company's books of the 7th January 1907, but there is nothing to show that they did not realize the actual position, *viz.*, that the Company was not in fact liable to the Chetty but that the Company had agreed with Ashan Ali to pay, on his behalf to the Chetty direct, the amount owing on his pro-note.

It would be doubtful, after the Company's letters of 4th March and 18th May 1907, whether Ashan Ali, if he had paid the Chetty, could have claimed to be repaid by the Company. But assuming that he could have done so, the fact that the Company had promised Ashan Ali to pay this debt of his to the Chetty, and the fact that the defendants with Ashan Ali jointly executed Exhibit N in favour of the Chetty, would not show, in the absence of an express agreement to that effect, that the defendants undertook to share with Ashan Ali his ultimate loss in the event of his paying his debt to the Chetty and not being able to recover it from the Company. When the defendants executed Exhibit N they promised the Chetty to pay Ashan Ali's debt. The Company's debt to Ashan Ali was a separate and distinct matter; and there is nothing to show that the defendants, by agreement with Ashan Ali, signed Exhibit N as if it were the renewal of a debt due by the Company to the Chetty when Exhibit N was executed, Ashan Ali was a wealthy man, whereas the Company was in a moribund condition. The defendants, although they were some of the Directors of the Company, had a personal liability for the debt for the renewal of

which the pro-note was executed. There was little risk in standing surety for Ashan Ali, but an almost certain loss if they undertook personal liability on behalf of the Company. The renewal of the old debt was at the instance of the Chetty to whom Ashan Ali was alone liable. *Prima facie* the defendants would merely be sureties to the Chetty for Ashan Ali's debt; and the entries in the Company's books are not sufficient to show that the defendants executed this pro note on behalf of the Company. The entries in the Company's books of the 1st of July 1903 do not carry the case any further for the plaintiff. It is clear that the Company's method of book-keeping was that when a pro-note was renewed it was entered as if the old debt was paid off and a fresh sum borrowed. The effect of those entries would merely be this: that the Company, having undertaken to pay the debt on behalf of Ashan Ali to the Chetty direct under the old pro note, undertook to do the same under the renewed pro-note. And the payment of Rs. 35,000 by the Company to the Chetty in 1909 would be in pursuance of that agreement. We allow the appeal and dismiss the plaintiff's claim with cost in both Courts.

Appeal allowed.

CALCUTTA HIGH COURT.

CIVIL SUIT No. 397 OF 1916.
Civil APPEAL No. 77 OF 1916.
March 28, 1917.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir Asutosh Mookerjee, KT.

PREMSUK DAS ASSARAM—DEFENDANT—APPELLANT

versus

UDAIRAM GUNGABUX—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XII, r. 6—Portion of claim admitted, effect of Judgment on admission—Appeal - Discretion exercised by Court, when open to correction in appeal—Interpretation of Statutes—Indian Act based on English Act, construction of—English decisions, whether binding.

A Court has jurisdiction under Order XII, rule 6, Civil Procedure Code, to enter judgment for the plaintiff in respect of a portion of the claim admitted by the defendant, with liberty to the plaintiff to proceed with the suit in the ordinary way as to remainder of the claim. [p. 234, col 2; p. 235, col. 1.]

Per *Mookerjee, J.*—A judgment on admission by the defendant under Order XII, rule 6, Civil Procedure Code, is not a matter of right, it is in the discretion of the Court, so that if a case involves questions which cannot be conveniently disposed of on a motion under the rule, the Court may, in the exercise of its discretion, refuse the motion. The discretion is judicial and an erroneous exercise thereof may be open to correction by a Court of Appeal which, however, on well-established principles, will be slow to interfere, unless either of the parties has been manifestly and unfairly prejudiced [p. 236, cols. 1 & 2.]

Order XII, rule 6, Civil Procedure Code, cannot be restricted in its operation to cases where the plaintiff accepts the admission of the defendant in its entirety or where the claim is severable into distinct portions and the defendant admits his liability in respect of one such fragment of the claim. [p. 237, col. 1.]

In considering the construction of a section in an Indian Act which is professedly based on and in fact reproduces the language of an English enactment the Courts in India are, in practice if not in theory, bound by the decisions of the English Court of Appeal [p. 236, col. 2.]

Appeal from the judgment of Mr. Justice Fletcher, dated the 22nd May 1916.

Mr. *S. R. Das* (with him Mr. *P. N. Chatterjee*), for the Appellant.

Mr. *N. Sircar* (with him Mr. *S. Ghose*), for the Respondent.

JUDGMENT.

SANDERSON, C. J.—This is an appeal by the defendant against the judgment of Fletcher, J., whereby he directed that judgment should be entered for the plaintiffs for Rs. 4,500 with interest and costs, and that the plaintiffs were to be at liberty to prove their claim in respect of the balance of the claim in suit in the ordinary way.

This judgment was given upon a motion made by the plaintiff firm under Order XII, rule 6.

The suit was for Rs. 6,813-1-0, and, if necessary, for an account of the dealings and transactions between the parties and for an order on the defendant firm to pay to the plaintiff firm what on the taking of such accounts might be found due by the defendant firm to the plaintiff firm.

It was alleged in the statement of claim that the plaintiff firm had been acting as commission agents in Calcutta for the defendants on terms set out therein. That on the last adjustment of accounts, *viz.*, on 25th March 1915, a sum of Rs. 9,329-5-6 was found to be due from the defendants to the plaintiffs. That the business continued until 15th October 1915, at which time the accounts showed a balance of Rs. 6,038-5-6 due to the plaintiffs and that with the interest thereon up to 4th April 1916 amounting to Rs. 774-11-6, the total due

at the time of institution of the suit was Rs. 6,813-1-0.

The material points of the defence are paragraphs 3, 4 and 5. In paragraph 3 the defendant alleged that he denied that "there was any adjustment on the 9th day of *Chayet* 1972, corresponding with 25th day of March 1915, or that Rs. 9,329-5-6 was found due by the defendant firm to the plaintiff firm, the fact being that the last adjustment took place sometime in March or April 1914 in respect of dealings between the parties for the *Sumbat* year 1970 and since then there was no other adjustment. Shortly prior to the said adjustment the plaintiffs had sent certain goods of the value of Rs. 4,500 or thereabouts to the defendants which had not been ordered by the defendants." Then he proceeded to say that "shortly thereafter the plaintiff firm sent their accounts of the dealings for the *Sumbat* year 1970 and Badri Dass Jalooka, *gomastha* of the plaintiff firm, came to adjust the accounts for the *Sumbat* year 1970. The defendant Assaram Agarwalla told the said Badri Dass Jalooka to take back the unordered goods. Whereupon Budri Dass Jalooka asked Assaram to sell those goods, and in the next accounts between the parties the plaintiff firm would not charge any interest on the price of the unordered goods and would also pay to the defendant firm all losses to be incurred by them in the sale of those goods."

In paragraph 4 the defendant said, "with reference to the Exhibit A annexed to the plaint the defendant firm states that the item of Rs. 9,329-5-6 on the debit side of the said exhibit is not correct, the fact being that a much smaller sum was due to the plaintiff firm at the end of the *Sumbat* year 1971, inasmuch as the same will be reduced by the interest charged by the plaintiff firm on the said sum of Rs. 4,500 and by the losses incurred by the defendant firm on the sale of the unordered goods aforementioned."

Then in paragraph 5 he said: "With reference to the 7th and 8th paragraphs the defendant firm state that on an account being taken of the dealings between the parties during the years 1970, 1971 and 1972 it will be found that the sum of Rs. 4,500 or thereabouts is due to the plaintiff firm from the defendant firm besides interest on the sum."

On these pleadings the application was made by the plaintiffs for leave to enter judgment for Rs. 4,500 with interest on the ground of the admissions contained in the statement of defence.

It was not denied by the defendants at the hearing of the application that the plaintiffs were entitled to judgment for Rs. 4,500 and interest, but the defendants alleged that if such judgment were obtained, the plaintiffs should not be allowed to proceed with the suit as to the remainder of their claim.

Fletcher, J., decided that the plaintiffs were entitled to judgment for Rs. 4,500 and interest and further that they should be at liberty to prove their claim to the balance, and consequently this appeal was lodged by the defendants.

The learned Judge in his judgment said "In this case there is no doubt that the defendant admits that Rs. 4,500 is due to the plaintiff. I asked the learned Counsel appearing for the defendant whether he still admitted that Rs. 4,500 was due to the plaintiff, and he said he did so. The admissions need not necessarily be made in the pleadings, they can be made otherwise, and under Order XII, rule 6, a verbal admission is sufficient to enter up judgment provided the Court is satisfied that the admission was in fact made. That being so, there cannot be any doubt that in this case there was a clear admission that Rs. 4,500 was due."

Now Order XII, rule 6, provides as follows: "Any party may at any stage of a suit, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the Court for such judgment or order as upon such admissions he may be entitled to without waiting for the determination of any other question between the parties; and the Court may upon such application make such order or give such judgment, as the Court may think just."

I assume from the above mentioned extract from the judgment that the learned Judge satisfied himself that there was a clear and unambiguous admission by the defendants that in any event Rs. 4,500 was due from them to the plaintiffs. Assuming that to be so, I am of opinion that the learned Judge had jurisdiction to enter judgment for that amount, and it was

in his discretion, having regard to the nature of the case and the allegations contained in the pleadings and the admission made in Court, whether he would allow the plaintiffs to proceed to prove the remainder of their claim.

I do not think that the case of *United Telephone Co.* v. *Danohoe* (1) covers the point raised in this case. The above-mentioned case was an action for infringement of a patent and the defendant admitted ten instances of infringement, but denied he had committed any others: the plaintiffs thereupon moved for judgment upon the admissions in the pleadings: in the Court of first instance the Vice-Chancellor granted an injunction against infringement by the defendant of the plaintiffs' patent, but he refused an enquiry as to damages. The Court of Appeal held that the plaintiffs were entitled to an enquiry as to damages, but that it must be limited to the instances of infringement admitted; and that the judgment having been obtained upon a motion for judgment upon the pleadings, the plaintiffs were bound to take the negative as well as the affirmative allegations therein.

The question whether the Judge, who in the first instance heard the application, would have had jurisdiction to give judgment on the admissions and to allow the plaintiffs to proceed to prove the rest of their claim as to the other alleged infringements, if such an application had been made, was not before the Court.

The case of *Andrews* v. *Patent Assurance Co. of Ireland* (2) does not decide that the Judge hearing the application had no jurisdiction to make the order asked for in that case; it amounts to a decision merely that having regard to the circumstances of that case and the form of the pleadings, the Judge was entitled to exercise his discretion and to decide that the plaintiff ought not to have judgment for the £62 and yet proceed to trial of the remainder of the case.

This being a matter of discretion, we ought not to interfere unless it is clear that the discretion was wrongly exercised.

In this case I cannot say that it is clear that the discretion of the learned Judge has been wrongly exercised.

The main question which remains to be tried is, whether the arrangement alleged by the defendants in their defence to have been made with respect to the unordered goods was in fact made, and, if so, how much must be deducted in respect thereof from the plaintiffs' total claim.

This seems to be an issue independent of the other part of the claim, and even if it were decided in favour of the defendants it would not, having regard to the above-mentioned admission made by the defendants in Court, reduce the plaintiffs' claim below Rs. 4,500.

With regard to the question of costs, I think that the plaintiffs should not at present be given the costs of the suit, but that these costs should be reserved until the trial, when they will be in the discretion of the Judge who tries the matters which remain for decision.

The plaintiffs are entitled to the costs of the application for judgment. For these reasons in my judgment the appeal should be dismissed on the main point raised therein, but that the decree as to costs should be varied in the manner above mentioned.

There will be liberty to apply with respect to the question of costs to the learned Judge on the original side in the event of the parties not proceeding to the trial of the remainder of the plaintiffs' claim.

I think that the parties should bear their own costs of this appeal.

MOOKERJEE, J.—This is an appeal by the defendant from a judgment on an application by the plaintiff under Order XII, rule 6, of the Civil Procedure Code, 1908. The plaintiff firm instituted this suit for the recovery of a sum of money from the defendant firm in respect of a commission agency. The plaintiff firm alleges that accounts had been adjusted between them on the 25th March 1915, when a sum of Rs. 9,329 5 6 was found due from the defendant firm, that thereafter business was continued on the same terms and conditions as before down to the 15th October 1915, and that on the 4th April 1916, when the suit was instituted, an aggregate sum of Rs. 6,813-1-0 inclusive o interest was recoverable from the defendant. The written statement of the defendant firm denied the alleged adjustment of accounts,

(1) (1886) 31 Ch. D. 399; 55 L. J. Ch. 480; 54 L. T 34; 34 W. R. 326.

(2) 18 Ir. L. R. 115.

mentioned a transaction on terms other than those previously arranged and contained an admission that if an account were taken of the dealings between the parties and credit allowed from all payments made, the sum of Rs. 4,500 or thereabouts would be found due to the plaintiff firm besides interest on such sum. Thereupon on the 19th May 1916, the plaintiff firm applied to the Court under Order XII, rule 6, for judgment for Rs. 4,500 with interest thereon according to the admission of the defendant firm. Mr. Justice Fletcher heard the application on the 22nd May. In answer to a question put by the Court to Counsel for the defendant whether he still admitted that Rs. 4,500 was due to the plaintiff, an answer was given in the affirmative. The Court thereupon proceeded to give judgment for the plaintiff for Rs. 4,500 with liberty to the plaintiff to prove in the ordinary way the claim for the difference. The plaintiff was also awarded the costs of the application and the costs of the suit. The defendant has appealed to this Court on the ground that the Court could not or at any rate should not have given judgment to the plaintiff under Order XII, rule 6. It is consequently necessary to examine the terms of the rule and determine its exact scope.

Order XII, rule 6, which reproduces Order XXXII, rule 6, of the English rules is as follows:—

"Any party may at any stage of a suit, where admissions of fact have been made either on the pleadings or otherwise, apply to the Court for such judgment or order as upon such admissions he may be entitled to without writing for determination of any other question between the parties: and the Court may, upon such application, make such order or give such judgment as the Court may think just."

The rule, it will be observed, is expressed in comprehensive terms, and the only requisite for a judgment under the rule in favour of the plaintiff is that admission of facts should have been made by the defendant, either on the pleadings or otherwise. It would be obviously improper for the Court to read into the rule qualifications which may restrict its application. But a judgment on admission is not a matter of right, it is in the discretion of the Court, so that if a case involves questions which cannot be conveniently disposed of on a motion under the rule, the Court may in the exercise of its discretion refuse the motion. The discretion is judicial and an erroneous exercise thereof may be open to correction by a Court of Appeal which, however, on well-established principles will be slow to interfere, unless either of the parties has been manifestly and unfairly prejudiced. See the observation of Jessel, M R, in *Mellor* v. *Sidebottom* (3). Subject to these observations I cannot hold that any crystallised rules can be formulated to regulate the exercise of the discretion vested in the trial Court. It has been urged, however, that such rules are deducible from cases in the reports and reference has specially been made to the decision in *United Telephone Co.* v. *Danohoe* (1), which arose under Rules of Supreme Court Order XXXII, rule 6, and *Andrews* v. *Patent Assurance Co. of Ireland* (2), which turned upon the construction of Rrules of Supreme Court (Irish) Order XXXII, rule 6. It may be observed that the Irish rule is identical in terms with the English rule. These cases, though not binding upon us as authorities, are valuable guides in the interpretation of the rule in our Code, for as observed by White, C. J., in *Messrs. Lovelock and Lewes* v. *Malabar Timber and Saw Mills, Ltd.* (4), in considering the construction of a section in an Indian Act which is professedly based on an English enactment, which in fact reproduces the language of the English enactment, we are in practice, if not in theory, bound by the decision of the English Court of Appeal. The cases mentioned, however, do not assist the appellants. In the first case the defendant in an action for infringement of a patent admitted certain instances of infringement but denied that he had committed any others. The plaintiffs thereupon moved for judgment upon the admission in the pleadings. Bacon, V. C., granted a perpetual injunction but refused an enquiry as to the damages. The plaintiffs appealed and contended that a direction might be added for an enquiry as to the damages sustained by them by reason of the infringement mentioned in the plead-

(3) (1877) 5 Ch. D. 342; 46 L. J. Ch. 398; 37 L. T. 7; 25 W. R 401.

(4) 18 Ind. Cas. 997; 13 M. L. T. 282.

ings. The Court of Appeal ruled that they were entitled to an enquiry as to the instances of infringement admitted in the pleadings, but as to no others. This decision is not an authority for the proposition that the plaintiff might not have joined issue and set down the action for trial as regards the infringements not admitted by the defendant. The decision in *Andrews* v. *Patent Assurance Co. of Ireland* (2) seems at first sight more favourable to the contention, of the appellant, but upon closer examination turns out to be an authority only for the proposition that the Court has a discretion to exercise in relation to applications for judgment on admissions and may impose terms if relief be given. The case is not an authority for an inflexible rule that the plaintiff who applies for judgment upon an admission must always take the admission as a whole or must ignore the admission and proceed to trial. In my opinion, it would be lamentable if the discretion, which for the best of reasons has been left free and untrammelled by the Legislature, were to be crystallised by judicial decisions, as it would become in course of time by one Judge attempting to prescribe definite rules with a view to bind other Judges in the exercise of the discretion, which must be applied with due regard to the varying circumstances of each particular case. I must consequently decline to interpret Order XII, rule 6, so as to restrict its operation to cases where the plaintiff accepts the admission of the defendant in its entirety or where the claim is severable into distinct portions and the defendant admits his liability in respect of one such fragment of the claim. I do not also feel pressed by the argument that if a decree is made first on admission in respect of one portion of the claim and then on investigation as to the remainder, there may ultimately be two decrees in the same suit. I see nothing objectionable in principle to such a result, specially in view of the provisions of Order XXIV which treats of payments into Court. In my opinion, the case before us falls within the scope of Order XII, rule 6, and sufficient grounds have not been assigned to induce us to hold that the order made by Mr. Justice Fletcher was unjust to the defendant. The direction for costs was, however, inappropriate and I agree that subject to modification in that respect as indicated in the judgment of the learned Chief Justice, the order should be affirmed.

Order affirmed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 286 OF 1914.

November 7, 1914.

Present:—Sir Henry Drake-Brockman, KT., J. C.

BALA—DEFENDANT—APPLICANT

versus

VITHU—PLAINTIFF—NON-APPLICANT.

Cattle Trespass Act (I of 1871), Chap. V, s. 22—Suit for damages for illegal seizure, whether barred—Burden of proof.

In cases where a Statute provides a special remedy for a right or liability already existing, unless the Statute contains words which either expressly or by necessary implication exclude the common law remedy, the person suing has his election to pursue either that or the statutory remedy. [p. 238, col. 2]

In a suit for damages for illegal seizure of cattle the onus lies on the defendant to prove that the seizure was justifiable in law. [p. 238, col. 1.]

Such a suit is not barred by reason of Chapter V of the Cattle Trespass Act. [p. 238, col. 1.]

Nomaz Mollah v. *Lall Mohun Tagadgeer*, 15 W. R. 279, *Shuttrughon Das Coomar* v *Hokna Showtal*, 16 C. 159; 8 Ind. Dec. (N. S.) 106, followed

Aslem v. *Kalla Burzi*, 2 C. L. R. 344, not followed.

Application for revision of the decree of the Judge, Small Cause Court, Wardha, dated the 23rd July 1914.

Mr. *M. R. Bobde*, for the Applicant.

JUDGMENT.—This application arises out of a suit brought on the Small Causes side of the Sub-Judge's Court at Wardha to recover damages for the illegal impounding of the non applicant's cattle. The learned Judge threw on the defendant the burden of justifying the admitted seizure and confinement of the cattle and disbelieving the evidence adduced to prove that the animals when seized were eating hay belonging to the defendant's employer decreed the claim

This Court is asked to interfere on three grounds, which may be briefly stated thus:—

(1) The burden lay on the plaintiff to prove the illegality he alleged.

(2) The suit is barred by reason of Chapter V, Cattle Trespass Act, 1871.

(3) The defendant's witnesses should have been believed.

The first contention is rested on section 101 of the Indian Evidence Act, which runs as follows:—

"Whoever desires any Court to give judgment as to any legal right or liability dependent on its existence of facts which he asserts, must prove that those facts exist."

Now it is true that the plaintiff has included in his plaint a statement that the seizure of his cattle was illegal. His story is that when taken they were lying under a tree in the village jungle. *Prima facie* to deprive a man of his property by disturbing his possession is to do him a legal wrong and so to give him a cause of action in tort. To use the words of the Privy Council in *Rogers* v. *Rajendro Dutt* (1), such an act "prejudicially affected the plaintiff in some legal right." The defendant sought to justify the seizure in the manner already stated, and had no evidence been given on either side, the defendant, who in substance stated the affirmative, would have failed, section 102 of the Indian Evidence Act being applicable. I hold, therefore, that the onus was correctly laid by the lower Court.

Upon the second point the authorities are opposed to the applicant's contention. I refer to *Nomaz Mollah* v. *Lall Mohun Tagadgeer* (2) and *Shuttrughon Das Coomar* v. *Hokna Showtal* (3). In the former the provision of law considered was section 14 of the Act III of 1857 (an Act relating to trespasses by cattle), but the terms of that section correspond closely with those of Chapter V in the Cattle Trespass Act, 1871. *Aslem* v. *Kalla Burzi* (4), the only case which favours the applicant, was not apparently argued before the High Court, a consideration which weighed with the Judges who decided the later Calcutta case above cited. The applicant relies on *Jagannath* v. *Khuba* (5), where, however, the Statute to be considered creates a liability not existing at common law and gives also a particular remedy for enforcing it. The present case belongs to an entirely different class, which consists of cases where a special remedy is provided for a right or liability already existing. In the latter class, unless the Statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. This general rule finds expression in section 91, Civil Procedure Code, which lays down that Courts shall have jurisdiction to try all suits of a Civil nature excepting suits of which the cognizance is either expressly or impliedly barred. It was applied in *Krishna* v. *Reade* (6), where it was held that the summary remedy provided by Act IX of 1861 does not bar a suit by a Hindu father to recover possession of his minor son alleged to be illegally detained by the defendant, a view which was also taken by Broughton, J., in the earlier case of *In the matter of the petition of Kashi Chunder Sen* (7). I would also refer to the comparatively recent decision of a Full Bench of the Madras High Court in *Zamindar of Eettayapuram* v. *Sankarappa Reddiar* (8), which affirms the correctness of the following general principle laid down in an earlier Full Bench decision:—

"When a Statute is confirmatory of a pre-existing right, the new remedy is presumed as cumulative or alternative unless an intention to the contrary appears from some other part of the Statute."

With regard to the difficulty noticed in *Aslem* v. *Kalla Burzi* (4), namely, that Chapter VII of the Cattle Trespass Act, 1871, reserves the right of filing a Civil suit only in the case specified, I think the Legislature clearly intended to make the special remedy afforded by the Act in that case cumulative, while leaving the remedy under Chapter V as merely an alternative one.

There remains the merits of the applicant's defence. As to these I have to

(1) 8 M. I. A. 103 at p. 136; 13 Moo. P. C. 209; 3 L. T. 160; 9 W. R. (Eng.) 149; 2 W. R. P. C. 51; 1 Suth. P. C. J. 413; 1 Sar. P. C. J. 755; 19 E. R. 469; 15 E. R. 78; 132 R. R. 82.

(2) 15 W. R. 279.

(3) 16 C. 159; 8 Ind. Dec. (N. S.) 106.

(4) 2 C. L. R. 344.

(5) 4 Ind. Cas. 795; 5 N. L. R. 176.

(6) 9 M. 31; 3 Ind. Dec. (N. S.) 418.

(7) 8 C. 266; 10 C. L. R. 91; 6 Ind. Jur. 359; 4 Ind. Dec. (N. S.) 169.

(8) 27 M. 483.

observe that the person who took the animals to the pound, *viz.*, the defendant, himself did not enter the witness-box, while his witnesses admittedly did nothing to prevent the trespass by the plaintiff's cattle though working close by. The lower Court had the great advantage of noticing the demeanour of those witnesses and I am not prepared to upset his decision that they had been tutored.

The application fails on all points and is dismissed without notice to the opposite party.

Application dismissed.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 102 OF 1916.

March 15, 1917.

Present:—Mr. Justice Maung Kin.

MAUNG NGE—APPELLANT

versus

MAUNG ZIN BA AND ANOTHER—RESPONDENTS.

Buddhist Law, Burmese—Succession—Exclusion from inheritance, requisites for.

Mere non-attendance on a deceased during his or her illness is not sufficient to exclude those who would ordinarily inherit from him or her. The law requires that on the part of the person sought to be excluded, there must be conduct such as constitutes an intention on his part to destroy the natural tie between him and the deceased. [p. 240, col. 1.]

Mr. *Ba Dun*, for the Appellant.

Mr. *Po Han*, for the Respondents.

JUDGMENT.—The respondents are brother and sister and the appellant is their brother. They had another sister, Ma Thi, who is dead. The respondents were older and the appellant younger than Ma Thi. On her death, the respondents sued the appellant for their respective shares in the property left by her. The appellant set up his daughter, Ma Saw Mya, as an adopted daughter of the deceased and Ma Saw Mya was added as a party defendant. The parties then went to trial on the following issues:—(1) Whether Ma Saw Mya was an adopted daugther of Ma Thi or not; (2) To what share is each of the parties entitled? The contest was concentrated on the first issue, but in the evidence it appears that the appellant and Ma Thi, were not on speaking terms for some considerable time owing to a law-case they had between them. It also appears that Ma Thi, who had been ailing for four or five years past, apparently not seriously, for witnesses say that she was ill off and on, took ill seriously one day and died the same day.

The trial Court held that Ma Saw Mya was not adopted and that as the appellant had neglected to assist Ma Thi during her illness, he was not entitled to inherit. But it proceeded to say that appellant's daughter and a daughter of one of the respondents so assisted and the funeral obsequies were performed out of Ma Thi's money and it thought, apparently because of these latter facts, that the appellant and the respondents should share the estate of Ma Thi equally.

The lower Appellate Court held that the appellant's claim was extinguished through failure to attend on the deceased during her last illness but allowed the decree of the trial Court to stand, as the respondents had not appealed. It also held that Ma Saw Mya was not adopted by Ma Thi.

Ma Saw Mya has not appealed. The appellant now urges that he being the younger brother of Ma Thi and the respondents being her elder brother and sister, he excludes them and that the lower Courts were wrong in not giving him the whole of the property.

It has been urged before me by the learned Counsel for the respondents that the appellant was not on speaking terms with the deceased for some considerable time before her death owing to a law-suit between them, that he did not attend on the deceased during her illness and that he did not contribute towards the expenses of the funeral and that these facts clearly show that the fraternal relationship between them had been intentionally and deliberately severed by the appellant.

We are not in a position to know who was in fault with regard to the litigation, to whom was solely due the fact that the sister and brother were not on speaking terms. If the sister was in fault and to her was solely due the estrangement between them, the appellant cannot be blamed. It must be remembered that Ma Thi had not

the right to exclude her brother by any conduct on her part towards him. It must be shown that the appellant was guilty of conduct which in law is sufficient to exclude him. In other words, he must be proved to have forfeited his ordinary right by his own misconduct. If Ma Thi was to blame for the estrangement we cannot expect the appellant to be at her bedside during her illness, especially as she took ill suddenly and died. It is not denied that he went to the house after her death. As regards the funeral expenses, it seems no one contributed towards them and they were paid, as has been rightly held by the trial Court, out of Ma Thi's property. I am unable to hold that mere non-attendance on a deceased during his or her illness excludes those who would ordinarily inherit from him or her. The law requires that on the part of the person sought to be excluded there was conduct such as constitutes an intention on his part to destroy the natural tie between him and the deceased. See the cases of *Maung Chit Kywe* v. *Maung Pyo* (1) and *Maung Sein* v. *Maung Kywe* (2).

For the reasons given above I am unable to hold that the appellant could be excluded at all. The result is that he is entitled to the whole of the estate. As the younger brother of the deceased he excludes the respondents, her elder brother and sister.

The appeal is allowed with costs.

Appeal allowed.

(1) U. B. R. (1892-96), II, 184.
(2) 4 L. B. R. 291.

PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 220 OF 1917.
February 5, 1918.

Present :—Mr. Justice Chapman and Mr. Justice Atkinson.

KHOKA MARWARI—APPELLANT

versus

RAMCHANDRA MARWARI AND OTHERS—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XXXVIII, rr. 1 to 6—Attachment before judgment— Procedure—General allegation against defendant, whether sufficient.

When a party seeks to obtain an order of attachment before judgment, he must by definite evidence satisfy the Court that there is reasonable cause for believing that the judgment-debtor is about to dispose of the whole or part of his property with a view to defeating his creditors. It is not sufficient to make only general allegations. [p. 24, col. 2.]

Appeal from a decision of the Subordinate Judge, Bhagulpore.

Mr. *Hasan Imam* (with him Mr. *Naresh Chandra Sinha*), for the Appellant.

Mr. *Pugh* (with him Mr. *Bankim Chandra Mitter*), for the Respondents.

JUDGMENT.

CHAPMAN, J.—In this case the suit was instituted on the 11th of April 1917; and on the 14th of April the Court heard an application for an attachment of the defendant's property before judgment. Notice was issued, or purported to issue, on the defendant and on the 21st of April 1917, the date fixed for the disposal of the application, an order was made in the absence of the defendant for the attachment of the defendant's property before judgment. On the 30th of April, the defendant filed an objection to the attachment before judgment, in which he denied the allegations made by the plaintiffs and objected to the attachment upon the ground that he had no notice of it. After some adjournments the matter was disposed of on the 14th of August; and the attachment before judgment was vacated by the Court on two grounds: the *first* ground being that the defendant had no notice of the proceeding for attachment; and the *second* ground being that at the time that the order for attachment was made there was no evidence before the Court, either by affidavit or otherwise, that the defendant was about to dispose of or remove any part of the property within the meaning of Order XXXVIII, rule 5. An appeal has been filed before this Court against the order setting aside the attachment before judgment and directing that the attached properties be at once released. It is urged on behalf of the respondents that no appeal lies.

It is conceded that an appeal could only lie under Order XLVII, rule 7, sub-rule 1, clause (*a*)—that is to say, an appeal would lie to this Court on the ground that the application for review could not be entertained by the Subordinate Judge inasmuch as he was not the Subordinate

Judge who made the order for attachment, unless the application for review was based on the ground of discovery of new and important evidence or on the ground of clerical or arithmetical mistake. It is conceded, however, by the appellant that the order of the Subordinate Judge must be upheld inasmuch as, upon his finding that the previous order for attachment was without notice to the defendant, and upon his finding that the notice had been suppressed, it was the obvious duty of the learned Subordinate Judge to vacate the order made by his predecessor. It is immaterial, therefore, whether an appeal lies in this case or not. In any case the order of the learned Subordinate Judge must stand, inasmuch as it was the proper order to make having regard to his finding that the notice had not been served upon the defendant and that the process of the Court had been suppressed.

The only question for our consideration is whether there should be a direction by this Court that the Subordinate Judge should entertain the application for attachment before judgment. He has not in fact entertained it. He has merely held that his predecessor was wrong on the materials then before him in issuing an order of attachment before judgment. It appears, however, that since the passing of that order of attachment, there has been some evidence on the record, however scanty it might be, to support the application for attachment before judgment; and I think that the proper procedure for the learned Subordinate Judge was, after vacating the order of his predecessor, to proceed to dispose of the application for attachment before judgment on the evidence before him. Therefore, I think it desirable to direct that the application for attachment before judgment should be disposed of in the proper way. I do not wish to suggest that there are upon the record materials which any Court should hold as sufficient to support the application for attachment before judgment; but I am of opinion that the application should be disposed of in the proper way. The appeal before us has failed on the grounds taken in the memorandum of appeal and is dismissed with costs.

ATKINSON, J.—I concur. I only wish to add one word with regard to what I believe to be important, having regard the construction to be put upon Order XXXVIII, rules 1 to 6. In my opinion when a party seeks to obtain an order of attachment before judgment, he must, by definite evidence, satisfy the Court that there is reasonable cause for believing that the judgment-debtor is about to dispose of the whole or part of his property with a view to defeating his creditors. It is not sufficient, as in this case, to make general allegations. The petitioners in this case have done no more than state generally that they have "ascertained that in order to avoid and delay realization of money that would be decreed in favour of the plaintiffs the defendants are about to dispose of the property mentioned in the schedule annexed." A general statement of this sort without any evidence to support it is, in my opinion, wholly insufficient to prove any intention on the part of the defendant to dispose of any part of his property with a view to defeat his creditors; or to warrant the Court in making an order of attachment before judgment.

I, however, agree with my learned brother that the application for attachment before judgment should be disposed of in the regular way upon the evidence now on the record. This will not, of course, debar the plaintiffs from adducing such additional evidence relative to the state of things existing at the date of the application for attachment as the learned Subordinate Judge may think admissible.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 114 OF 1915.

June 21, 1916.

Present:—Mr. Mittra, A. J. C.

MADHORAO—PLAINTIFF—APPLICANT

versus

ABDUL GAFUR—NON-APPLICANT.

Cattle, illegal seizure of—Damages, suit for—Burden of proof.

THATHAMANGALAM PARAKAT SAMU MENON *v.* VALIA NAMBIDI.

In a suit for damages for wrongful seizure of cattle the burden lies on the defendant to prove that the seizure was legal.

Revision petition against the judgment and decree of the Judge, Small Causes Court, Drug, in Suit No. 546 of 1914, dated the 30th January 1915.

Mr. *M. R. Bobde*, for the Applicant.

Mr. *G. P. Dick*, for the Non-Applicant.

JUDGMENT.—The plaintiff sues for damages for wrongful impounding of his cattle by the defendant. The latter admits the seizure, but pleads that he was justified in law as he found the cattle grazing in his jungle. The lower Court has found that there is no satisfactory evidence to show that the cattle were grazing in the defendant's jungle. It also found that the plaintiff has failed to prove that the seizure took place when the cattle were grazing in the plaintiff's jungle and, therefore, dismissed the suit. The defendant's costs were disallowed as he failed to prove his allegation. The sole question is whether the burden of proof lies on the plaintiff to prove that the seizure was illegal or whether it is for the defendant to justify his seizure. The applicant for revision relies on an unreported ruling of this Court: *Bala* v. *Vithu*, Civil Revision No. 285 of 1914 (1), which supports the view that it was for the defendant to justify the seizure. I entirely agree with the view taken by Sir Henry Drake-Brockman in the latter case. I may point out that this is not a case of tort based on absence of legal process where an improper order has been procured from a competent authority. In such a case the burden lies heavily on the plaintiff to establish his case. This is an instance of self-help in abatement of nuisance which the law allows. But the party taking the law into his own hands must justify his act, just as under the Penal Code the burden of proof lies on the party relying on the right of private defence. To hold otherwise would be contrary to principle. On the finding of the lower Court, the plaintiff is entitled to a decree for Rs. 19-12-0. The decree of the lower Court is set aside and a decree for Rs. 19-12-0 with costs in both Courts will be passed. I allow Rs. 16 as Pleader's fee.

Decree set aside.

(1) 44 Ind. Cas. 237.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 674 OF 1916.

November 6, 1917.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

THATHAMANGALAM PARAKAT SAMU MENON AND ANOTHER—DEFENDANTS NOS. 5 AND 8—APPELLANTS

versus

VENGANNAT SWAROOPAM RAJA VASUDEVA RAVI VARMA STYLED VALIA NAMBIDI AND OTHERS—PLAINTIFF AND REMAINING DEFENDANTS—RESPONDENTS.

Malabar Compensation for Tenants' Improvements Act (I Mad. of 1900), ss. 4, 9 to 12—Conversion of forest into paddy fields—Tanks and channels dug by tenant, claim for value of—Method of valuation—Absence of specific provision in contract, effect of—Scope of s. 9 - Trees of spontaneous growth on plot reserved for landlord, whether 'improvements.'

Per *Curiam* (*Seshagiri Aiyar, J., dubitante*). A tenant is entitled, under Madras Act I of 1900, to compensation for reclaimed lands only at the rates specified in the contract between the parties. He cannot, ignoring the valuation under the contract, resort to section 9 for appraising compensation for tanks and channels dug by him in land, which, at the time of the demise, was a forest. [p. 243, cols. 1 & 2.]

In all matters which are provided for by the contract, the parties are governed by it. [p. 243, col. 1.]

Kunhalloor Puthia Veettil Rayarappa v. *Parkum Punnisseri Kelappa*, 39 Ind. Cas. 741; 40 M. 594; 32 M. L. J. 110; (1917) M. W. N. 195; 21 M. L. T. 245; 5 L. W. 617, followed.

Per *Seshagiri Aiyar, J.*—Section 9 deals with cases where, at the time of demise, the land was of some value and an additional value was imparted to it by the labour of the tenant. The section is intended to apply to cases where the Court has to fix the entire valuation under the Act, ignoring the contract, if any, between the parties. There cannot be first a valuation under the contract and a further valuation invoking the aid of section 9. [p. 243, col. 2.]

A tenant is not entitled to claim as improvements the value of trees of spontaneous growth standing on land reserved for the use of the landlord. [p. 244, col. 1.]

Per *Napier, J.*—After the tenant has been given compensation at the rate fixed in the contract, he cannot for the purpose of valuing the improvements made by the construction of tanks and channels import the increase in the value of the annual net produce as a factor in ascertaining the value. The compensation for the value of tanks and channels must be ascertained under section 11. [p. 244, cols. 1 & 2.]

Second appeal against the decree of the Court of the Subordinate Judge, South Malabar at Calicut, in Appeal Suit No. 954 of 1914, preferred against the decree of the Court of the District Munsif, Alattur, in Original Suit No. 192 of 1913.

Mr. *Kutti Krishna Menon*, for the Appellants.

Mr. *C. V. Anantha Krishna Aiyar*, for the Respondents.

JUDGMENT.

SESHAGIRI AIYAR, J.—The case has occupied more time than the importance of the points to be decided in the appeal demands. The reason is that we have to construe an Act which does not err on the side of being very clear or explicit. After listening to the arguments of Mr. Kutti Krishna Menon and after giving my best consideration to sections 9 to 12 of Madras Act I of 1900, I am not sure that my decision is quite correct. It may be attributable to obtuseness, but one cannot help feeling that the Act is calculated to confuse even clearer minds than mine.

I shall proceed to deal with the points which have been argued. First of all, I shall take Mr. Anantha Krishna Aiyar's memorandum of objections. After the decision in *Kunhalloor Puthia Veettil Rayarappa* v. *Parkum Punnisseri Kelappa* (1), in all matters which are provided for by the contract, the parties are governed by it: consequently, in respect of Vettukanom for the reclaimed lands, the tenant is not entitled to anything more than what has been given in Exhibit A. By reclamation the forest has been converted into *nilams* or paddy fields. Till that stage is reached, the tenant is not entitled as compensation to more than Rs. 7 per plot of one *para* (seed) area. Mr. Kutti Krishna Menon contended that as there is nothing in the contract regarding tanks and channels, Exhibit A is not conclusive as regards his client's right to them. Mr. Anantha Krishna Aiyar did not seriously dispute this position under section 4 of the Malabar Compensation for Tenants' Improvements Act. Tanks and channels are improvements, and when it is found that the tenant has expended labour in digging those tanks and making those channels, he is entitled to be paid compensation for that labour. The further point raised by Mr. Kutti Krishna Menon, so far as I am able to understand him, is, this: Under the contract the tenant is entitled to Rs. 7 for reclamation. Under the Act, he is entitled to the value of the labour spent by him in digging the tanks and constructing the channels. He is entitled further under section 9 of the Act to have the tanks and channels valued by the process mentioned in section 9. I am unable to agree with the learned Vakil, though I have come to the conclusion against him with some hesitation. On the face of it, section 9 seems to deal with cases where, at the time of demise, the land was of some value and an additional value was imparted to it by the labour of the tenant.

That is the plain reading of the section. When the land was let under the demise Exhibit A and under the previous demises, it was of no value to the landlord as paddy fields. Therefore, *prima facie*, section 9 has no application. Moreover, section 9, as I understand it, is intended to apply to cases where the Court has to fix the *entire* valuation under the Act ignoring the contract, if any, between the parties. You cannot have first a valuation under the contract and a further valuation invoking the aid of section 9. That, to my mind, is a good answer to Mr. Kutti Krishna Menon's contention. As I have said, this conclusion is by no means free from doubt. However, that is my present impression.

The next question is whether the tenant is entitled to the valuation of the timber utilised by him for building farm houses and granaries. Here again, the contract makes it clear that if any timber is to be used by the tenant from the forest of the landlord, he is not entitled to the value of that timber. From a common sense point of view, it seems to me impossible to uphold the view that you can take the landlord's property and compel him to pay for what you have taken from him. Therefore, in fixing valuation for the farm houses, the value of the timber should be excluded. That disposes of Mr. Anantha Krishna Aiyar's memorandum of objections.

On the appeal itself, Mr. Kutti Krishna Menon contended that his client is entitled to the value of the improvements in respect of the trees of spontaneous growth standing on the demised land. He has drawn our attention to the case of *Narayani*

(1) 39 Ind. Cas. 741; 40 M. 594; 32 M. L. J. 110; (1917) M. W. N. 195; 21 M. L. T. 245; 5 L. W. 617.

Amma v. *Kunchukutti Amma* (2), in which it was held that the Act has nothing to do with the ownership of trees but that it has regard only to the value of improvements to be paid at the time of eviction. But that question of law does not arise in the present case, for this simple reason. Under the contract, a certain portion of the demised land is reserved for the landlord's use and he is entitled to have the trees thereon cut by himself and removed: only when the forest thus reserved is denuded of trees the tenant is given liberty to enter upon it and to make it cultivable land. He has no other right in respect of this reserved plot of land. So far as we are able to see, these trees of spontaneous growth in respect of which improvements were claimed are to be found in the reserved plot. Mr. Kutti Krishna Menon wanted to argue that some of the trees were outside of that area, but this question was not raised in the lower Courts and we cannot allow it to be argued now. As, under the contract, the plot is reserved solely for the use of the landlord, the tenant is not entitled, on eviction, to the value of the trees of spontaneous growth standing thereon. For these reasons I would dismiss the second appeal with costs and allow the memorandum of objections. The learned Vakils state that on the principles stated by us, they will be in a position to fix the valuation in this Court. Therefore, it is not necessary to send the case down.

The decree of the lower Appellate Court will be modified and the amount agreed to by the learned Vakils in pursuance of the principles enunciated in our judgment will be entered in the place of the amount decreed by the Courts below. Parties to pay and receive proportionate costs throughout.

NAPIER, J.—I wish to add a few words on the points argued on section 9. It is urged by Mr. Anantha Krishna Aiyar that, after the tenant has been given under the terms of the contract compensation for reclamation at 7 rupees per plot, he cannot for the purpose of valuing the improvement made by construction of tanks and channels import the increase in the value of the annual net produce as a factor in ascertaining the value. In my opinion this contention must prevail. The section gives the tenant compensation based on the increased outturn if that works out at higher value than the costs of the improvements. It is admitted that the improvements paid for under the contract cannot be used for the purpose of comparison under section 9, clause 2, and the tenant wishes, of course, to exclude it, but as I am satisfied that part of this net increase has already been compensated for under the contract, he cannot use this increase at all and section 9 does not apply. The compensation for construction of tanks and channels must be ascertained under section 11. In other respects I agree with the judgment of my learned brother.

Decree modified.

M. C. P.

(2) 40 Ind. Cas. 247; 32 M. L. J. 541; 21 M. L. T. 271; (1917) M. W. N. 309.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 417 OF 1917.

January 30, 1918.

Present:—Justice Sir Ali Imam, KT.

Musammat BATULAN—DEFENDANT NO. 4—APPELLANT

versus

NIRMAL DAS—PLAINTIFF AND *Musammat* KABULAN AND OTHERS—DEFENDANTS NOS. 1 TO 3—RESPONDENTS.

Specific Relief Act (I of 1877), s. 22—Specific performance of contract, suit for—Delay, effect of—Abandonment, failure to enforce registration, whether amounts to.

Mere delay in the institution of a suit for specific performance of a contract to sell land is not sufficient to defend the claim. The delay must be of such a character as to give rise to an inference of the abandonment of the right or should disclose some prejudice to the defendant. [p. 246, col. 1.]

The failure of the plaintiff to obtain compulsory registration of the deed in his favour is not of itself sufficient to prove abandonment. [p. 246, col. 2.]

Appeal from a decsion of the District Judge, Patna.

Mr. *Bankim Chandra Mitra*, for the Appellant.

Mr. *Sambhu Saran*, for the Respondents.

JUDGMENT.—The plaintiff instituted this suit for the specific performance of a contract entered into by him and defendants Nos. 1 and 2 on the 25th of June 1912. Evidently the agreement to sell 4½ annas share of Salempur Chatura Lakhraj took place 2 or 3 days before this date.

On the 27th of June defendants Nos. 1 and 2 executed a deed of sale in favour of the plaintiff, but this deed was not registered. On the 17th of October 1912 the sum of Rs. 71 out of the consideration money settled at Rs. 75 between the parties was paid by the plaintiff to the defendants Nos. 1 and 2. On the 24th of February 1914 defendants Nos. 1 and 2 executed a deed of sale in favour of defendant No. 4 and sold the property in suit with some other properties. Three months after it transpired that defendant No. 3 also was supposed to have some interest in the property and a supplementary deed of sale was executed by defendants Nos. 1 to 3 in favour of defendant No. 4 in respect of the same properties.

The suit of the plaintiff was instituted on 1st October 1915. The Munsif of Barh who tried the suit dismissed it, but on appeal the learned Judge of Patna has reversed the decision of the Munsif and has decreed the suit in favour of the plaintiff.

The learned Vakil appearing before me on behalf of defendant No. 4 urges the following points on which, he submits, I should hold the judgment of the learned District Judge to be incomplete and insufficient.

Firstly, it is contended that issue No. 2 framed by the Munsif dealing with the question of limitation in this case has not been considered by the learned Judge. The learned Munsif found on this point against the plaintiff, on the ground that the agreement to sell having been made two or three days before the 15th of June 1912, and the plaint having been filed on the 1st October 1915, the suit would be barred under Article 113 of the Limitation Act inasmuch as the suit was instituted three years after the agreement to sell took place. The learned Munsif disbelieved the plaintiff's case with reference to the allegation that there was a subsequent agreement to execute the deed or to register it in October 1912, and hence he found that the suit was instituted after 3 years of the agreement. If it be held that more than 3 years had passed since the date fixed for the performance of the contract and no suit had been instituted, Article 113 would no doubt govern the case. But the finding of fact arrived at by the learned District Judge with reference to the subsequent agreement to execute the deed and to register it would clearly take this case out of the mischief of Article 113 of the Limitation Act. The learned Judge in his judgment holds that the payment of Rs. 71 and the execution of the receipt Exhibit 2 have been proved. The learned Judge also accepts the evidence of the plaintiff on the point of the passing of a portion of the consideration money, namely, Rs. 71 to the defendants Nos. 1 and 2. Exhibit 2, which is the receipt for this money, has been duly proved and accepted as genuine by the learned Judge. This receipt and the findings of the learned Judge on this point put the matter beyond a shadow of doubt as regards the payment made on the 17th October 1912. On this finding it would be impossible to hold that limitation applies to the case of the plaintiff. On the 17th October 1912 there was the acceptance of a part of the consideration money by the defendants Nos. 1 and 2. This by itself is sufficient to show that the time for the performance of the contract was some day subsequent to the 17th October 1912, when that payment was made. If so, the suit would be within time. As a mattter of fact the refusal to register the deed according to the plaint did not take place till the 27th October 1912. If that be so, then if Article 113 of the Limitation Act is to apply to this case it would apply from the date of this refusal, namely, the 27th October 1912, and not before. In this connection paragraph 12 of the plaint is significant inasmuch as one of the various dates when the cause of action in this case is stated to have actually arisen is the 27th October 1912.

The learned Vakil appearing on behalf of defendant No. 4 contends that the learned Judge has not taken up the question of limitation as an issue in the case and dealt with it properly. It is true that the judgment of the learned Judge has not dealt with this question of limitation ex-

haustively, but I find that the principal elements constituting the issue of limitation in this case have, as a matter of fact, received the learned Judge's consideration and the findings to which I have made reference are sufficient in themselves to show that Article 113 of the Limitation Act has no application to the present case.

The next point to which my attention has been drawn by the learned Vakil appearing on behalf of the defendant-appellant is the question of laches on the part of the plaintiff in instituting this suit. It is pointed out that although the refusal to register the deed took place on the 27th October 1912, the plaintiff showed no sign of instituting his suit till almost the close of the year 1915 and that this delay on his part might be considered as an indication that he had abandoned all idea of pressing his claim for specific performance of the contract entered into between himself and the defendants Nos. 1 and 2. Delay cannot in this case be disputed, but the question is whether this delay by itself is sufficient to justify me to hold that the plaintiff has been guilty of laches. As I have held before, the suit is not barred by limitation. Therefore, the delay is not such as is not permitted by the law. On the authority of *Kissen Gopal Sadaney* v. *Kally Prosonno Sett* (1), mere delay is not sufficient. The delay must be of a character as to give rise to an inference of the abandonment of the right or should disclose any prejudice to the defendant. The learned Munsif who framed the issue on this question found it against the defendant. The learned Judge who heard the appeal has not dealt with this question. It has been contended that the learned Judge should have done so and that the case for that reason should be referred to the learned Judge for disposal after he has considered it. I am not disposed to agree to this prayer, inasmuch as nothing has been shown how the delay in instituting the suit has either prejudiced the defendants or amounts to an abandonment of the right of the plaintiff to ask for specific performance of the contract. The defendant No. 4 is a near relative of defendants Nos. 1 to 3. The finding of the learned Judge is that the defendant has failed to prove that she was a *bona fide* purchaser for value without notice to the plaintiff's equitable title.

Considering the circumstances of the case. I have no doubt that defendant No. 4 was well aware of the major portion of the consideration money having been paid by the plaintiff to defendants Nos. 1 to 2. There is, therefore, no reason to think that there was any valid reason for defendant No. 4 to believe that the plaintiff had abandoned his claim.

My attention has been drawn to the fact that there was no attempt on the part of the plaintiff to apply for compulsory registration of the deed of sale Exhibit 1 and that this ought to be sufficient in itself to leave the defendant No. 4 under the impression that the plaintiff had no intention of proceeding with the agreement that was entered into in June 1912. I am not satisfied that, the plaintiff not having asked for compulsory registration, this in itself is sufficient to justify any inference against him with reference to his abandonment of the claim by conduct. Morever, I find nothing in the written statement of defendant No. 4 to show that there was, apart from the delay, anything in the conduct of the plaintiff to suggest abandonment. The only paragraph of the written statement to which my attention has been drawn is paragraph 11. I am unable to find how the allegations in paragraph 11 can justify my holding that there have been such laches on the part of the plaintiff as to induce the exercise of the discretion vested in this Court under section 22 of the Specific Relief Act in favour of the plaintiff. In the circumstances I am also unable to accept the contention that in this case on the question of laches there is any necessity for the case to be referred back to the learned Judge who heard the appeal.

The learned Vakil appearing on behalf of the defendant-appellant has pressed upon me the consideration that I should rule out the relief for the specific performance of the contract

(1) 33 C. 633.

and grant to the plaintiff relief No. 4, which is in the alternative. The alternative relief sought by the plaintiff is evidently subject to the condition that should the Court find any difficulty in passing a decree for the specific performance of the contract, then the alternative relief might be granted. The learned District Judge found no difficulty in giving a decree for specific performance of the contract and I confess I see no difficulty in my way. No sufficient reason has been placed before me as to why in the absence of any particular difficulty the relief sought in the first instance should not be granted and that the relief in the alternative should be considered as the right and proper one in this case.

The appeal is dismissed with costs.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

SPECIAL SECOND CIVIL APPEAL No. 56 OF 1916

December 7, 1916.

Present:—Mr. Justice Rigg

MAUNG THIN—APPELLANT

versus

MA ZI ZAN—RESPONDENT.

Evidence Act (*I of* 1872), *ss.* 74, 83—*Survey maps, evidentiary value of.*

Survey maps are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible and valuable evidence of the state of things at the time they were prepared. They are not conclusive and may be shown to be wrong: but in the absence of evidence to the contrary they may be judicially received in evidence as correct when made.

Jagadindra Nath Roy v. *Secretary of State*, 30 C. 291; 30 I. A. 44; 7 C. W. N. 193; 5 Bom. L. R. 1 (P. C.), followed.

Mr. *Broadbent*, for the Appellant.

Mr. *Maung Po Han*, for the Respondent.

JUDGMENT.—The appeal in this case has been argued with the appeals in cases Nos. 57 and 58. Aung Min sold the appellant some land on which the respondents in these appeals have houses, and the appellant sued for ejectment. The question for decision in each case is whether the land used for house sites was so used by permission of Aung Min who claims it as owner. The only evidence that Aung Min owned the land and gave permission to the respondents to occupy it is his own statement, coupled with the survey map, which shows the land as Aung Min's property. With reference to survey maps, their Lordships of the Privy Council said in *Jagadindra Nath Roy* v. *Secretary of State for India* (1) that they were "official documents prepared by competent persons, and with such publicity and notice to persons interested as to be admissible and valuable evidence of the state of things at the time they were prepared. They are not conclusive and may be shown to be wrong; but in the absence of evidence to the contrary, they may be judicially received in evidence as correct when made." In the present case a reference to the map shows that the houses have been built at the apex of a holding shown as Aung Min's, where a P. W. D. road begins to cross the railway line.

There is evidence to show that the respondents have encroached on that road. The total area in dispute only amounts to a fraction of an acre in extent, and it would be very easy for a mistake to occur in a map dealing with a holding which terminates in the manner Aung Min's does. On the other hand, there is the evidence of aged and respectable elders which goes to show that the disputed sites have been occupied by various persons for years and were originally waste land. There is not the slightest evidence that Aung Min was paid any rent for the sites. In the circumstances I have no doubt that the judgment appealed against was correct. The appeal is dismissed with costs.

Appeal dismissed.

(1) 30 C. 291; 30 I. A. 44; 7 C. W. N. 193; 5 Bom. L. R. 1 (P. C.).

MUTHU BHATTER *v.* MRITHUNJAYA BHATTAR.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 872 OF 1916

AND

CIVIL MISCELLANEOUS PETITION No. 2597 OF 1916.

March 2, 1917.

Present:—Mr. Justice Spencer.

MUTHU BHATTAR—DEFENDANT No. 1—PETITIONER

versus

MRITHUNJAYA BHATTAR AND ANOTHER—PLAINTIFF AND DEFENDANT No. 2—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 152—Clerical mistakes and slips in decree or order, correction of, during pendency of appeal—Court, power of, to amend—Jurisdiction.

Clerical errors or slips in a decree or order can be corrected by the Court which passed it, although an appeal against the same is pending in a superior Court. The proper Court to correct them is the Court in which the errors were made. [p. 249, col. 1.]

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the District Court, Madura, dated the 14th April 1916, in Amendment Petition No. 274 of 1916 to amend the revised decree of the said Court as per order dated the 26th February 1916, in Review Petition No. 76 of 1916, in Appeal Suit No. 101 of 1914 (Original Suit No. 137 of 1913 on the file of the Additional District Munsif's Court, Madura).

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to amend the order of the District Court, Madura, dated the 26th February 1916, in Review Petition No. 76 of 1916, in Appeal Suit No. 101 of 1914, and also the revised decree, dated the 26th February 1916, in the said Appeal Suit (Original Suit No. 137 of 1913 on the file of the Additional District Munsif's Court, Madura).

FACTS.—*A* instituted a suit against *B* and *C* for recovery of possession of a house from *B*, on the strength of a sale-deed executed in his favour by *C*. He also prayed in the alternative for the return of the purchase-money in case *C* his vendor were found to have no title. *B* claimed the house as his ancestral property and if that were found against, he relied on title by adverse possession for more than the statutory period. The District Munsif found that the title to the house was in *C* and that *A*, his vendee, was entitled to recover and accordingly gave *A* a decree for possession, observing that in this view it became unnecessary for him to consider and find the issue raising the question of alternative relief, *viz.*, the return of purchase-money. On appeal the District Judge held that *B* had acquired title to the house and that *A* was not entitled to recover. He, however, dismissed the suit without considering the question of alternative relief, the consideration of which had become necessary by his finding on the question of title. *A* thereupon preferred a second appeal to the High Court and also a review petition in the District Court, claiming in both the alternative relief to which he had become entitled in the view which the District Judge had taken as to his right to the main relief. The second appeal was admitted and was confined to the relief against *C*, who alone was made the respondent. The District Judge allowed the review petition, but in his order by a mistake put "1st defendant" (*B*) for "2nd defendant" (*C*), so that the order directing *C* to make good the purchase-money read as an order directing *B* to return the same, which the District Judge could not have meant. Similarly, "2nd defendant" (*C*) was held to be an unnecessary party, while what was meant and alone could have been meant was that the 1st defendant (*B*) was an unnecessary party. *A* thereupon withdrew the second appeal, which was consequently dismissed. Meanwhile, *B* had put in a petition for the amendment of this accidental slip in the District Court but the District Judge, while recognising the mistake, held that he had no power to correct it as the second appeal was pending in the High Court. *B* thereupon preferred a Civil Revision Petition against the order of the District Judge and also prayed the High Court by a simultaneous Civil Miscellaneous Petition to correct the mistake itself in case it should agree with the District Judge that he had no jurisdiction to amend.

Messrs. *K. S. Ramabhadra Ayyar* and Mr *S. Subramania Ayyar*, for the Petitioner.

Messrs. *K. Jagannatha Ayyar*, *K V. Sesha Aiyangar* and *K. V Krishnasami Ayyar*, for the Respondents.

JUDGMENT.

IN CIVIL REVISION PETITION No 872 OF 1916.

The District Judge was mistaken in thinking that he had no power to correct a clerical

error occurring in his Review Order because of the pendency of a second appeal in this Court.

The clerical errors alleged in the affidavit, which was before the Judge, consisted of the words: "1st defendant" occurring where the words "2nd defendant" were intended and *vice versa*.

This was a matter to be dealt with under section 152 of the Code of Civil Procedure and that section distinctly provides that where such clerical errors arise from any accidental slip, the Court (that is, the Court in which they have occurred) may correct them *at any time*.

I set aside the District Judge's order and direct him to pass fresh orders according to law after giving notice to the parties concerned. The parties will bear their own costs of this application.

IN CIVIL MISCELLANEOUS PETITION
No. 2597 OF 1916.

The proper Court to correct clerical errors is the Court in which the errors were made. The petition is dismissed.

Order set aside.

M. C. P.

CALCUTTA HIGH COURT.

RULE *Nisi* No. 502 OF 1917.
August 13, 1917.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

NILKANTHA RAI—DECREE-HOLDER—PETITIONER

versus

GOSTA BEHARI CHATTERJEE AND OTHERS—JUDGMENT-DEBTORS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), ss. 63, 73, O. XXI, r. 57—Execution—Attachment—Discontinuance of execution case at instance of claimant, effect of—Attachment of property by two Courts—Sale by Court of inferior grade—Procedure—Rateable distribution

Where an execution case is discontinued, not by reason of default on the part of the decree-holder, but at the instance of an unsuccessful claimant who has instituted a suit to contest the validity of the order in the claim case, the attachment effected at the instance of the decree-holder continues to be in force. [p. 249, col. 2.]

Where the same property is attached in execution of two decrees, one passed by a Court of superior grade and the other by a Court of inferior grade, the sale should be held by the Court of superior grade. Where, however, the Court of inferior grade has actually held the sale in ignorance of the fact that proceedings in execution have already been taken in the Court of superior grade and that the property brought to sale was subject to a legally subsisting attachment effected in the latter Court, the proper procedure is to move the District Judge to transfer the proceeds realised by the sale held by the Court of inferior grade to the Court of superior grade. If this procedure is adopted, full effect is given to the intention of the Legislature. The Court of superior grade in essence adopts the sale held by the Court of inferior grade as if it were a sale held by itself and the sale-proceeds are then rateably distributed in accordance with the provisions of the Code. [p. 250, cols. 1 & 2.]

Rule against the order of the Sub-Judge, 1st Court, Burdwan, in Execution Case No. 180 of 1917.

Dr. *Dwarka Nath Mitter* and Babu *Rishendra Nath Sarkar*, for the Petitioner.

Babus *Ram Charan Mitter* and *Jyotish Chandra Sarkar*, for the Opposite Party.

JUDGMENT.—This Rule raises a question of the relative rights of two rival decree-holders to participate in the sale-proceeds of the property of their common judgment-debtor. The petitioner obtained a decree for money against his judgment debtor in the Court of the Subordinate Judge on the 17th March 1916. At his instance, writ of attachment was issued and served. A claimant appeared on the scene, but his objection was overruled. The claimant then sued for cancellation of the order and obtained an injunction restraining the petitioner from proceeding with execution of his decree till the suit had been decided. The Subordinate Judge thereupon stayed the sale and proceeded to dismiss the execution case. It appears to have been erroneously assumed that the effect of this order was, under rule 57 of Order XXI of the Code, to cancel the attachment effected by the petitioner. The execution case was discontinued, not by reason of default on the part of the decree-holder, but at the instance of an unsuccessful claimant who had instituted a suit to contest the validity of the order in the claim case. In these circumstances, we must assume that the attachment effected at the instance of the petitioner is still in force. Meanwhile, proceedings had been taken by the opposite party, another creditor of the same judgment-debtor, for realization of his dues. The sale at his instance was fixed for the 20th April 1917. The petitioner applied to the Subordinate Judge and prayed that he might communicate with the Munsif with a view to get the sale stayed. The letter was sent, but reached the Munsif after the sale had already been held in his Court.

The petitioner then asked the Subordinate Judge to attach the sale-proceeds deposited in the Court of the Munsif and to distribute them rateably. This application was dismissed. The petitioner now contends that the assets should be rateably distributed by the Subordinate Judge amongst all persons qualified under section 73, Code of Civil Procedure, inclusive of himself.

The petitioner is not entitled to rateable distribution under section 73, which provides that where assets are held by a Court and more persons than one have, before the receipt of such assets, applied to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons. In this case, the petitioner did not apply for execution of his decree to the Court which held the assets. Indeed, he was not competent to make such an application, as the decree obtained by him in the Court of the Subordinate Judge could not possibly be executed by the Munsif. Nor has he been able to obtain the benefit of the principle recognized in section 63, which provides that where property, not in the custody of any Court, is under attachment in execution of decrees of more Courts than one, the Court, which shall receive or realize such property and shall determine any claim thereto and any objection to the attachment thereof, shall be the Court of the highest grade or, where there is no difference in grade between such Courts, the Court under whose decree the property was first attached. If the petitioner had been able to apply in time to the Subordinate Judge under this section, the sale might have been held in his Court. That event, however, has not happened. The sale has actually been held by the Munsif, and is a valid sale, as is clear from section 63 (2), which provides that nothing in the section shall be deemed to invalidate any proceeding taken by a Court executing one of such decrees. The position thus is that in the events which have happened, neither section 63 nor section 73 applies.

The question next requires consideration, whether, in the actual circumstances of the case, it is still possible for the Court to give relief to the petitioner. The Legislature undoubtedly contemplated that, where, as here, the same property has been attached in execution of two decrees, one passed by a Court of superior grade and the other by a Court of inferior grade, the sale should be held by the Court of superior grade. Here, however, the Court of lower grade has actually held the sale in ignorance of the fact that proceedings in execution had already been taken in the Court of higher grade and that the property brought to sale was subject to a legally subsisting attachment effected in that Court. But the true intention of the Legislature may still be carried out in substance, if the course pointed out in *Bykant Nath Shaha* v. *Rajendro Narain Rai* (1) is adopted. There, the same property was sold in execution successively by a Munsif and by a Subordinate Judge, and the question arose as to the validity of the title acquired by the subsequent purchaser The Court observed that the Subordinate Judge, instead of holding a second sale, should rather have accepted the sale held by the Munsif and have required a transfer of the deposit in his Court of the assets realized, so that they might be rateably distributed amongst all the decree-holders. The same view was adopted in *Patel Naranji Morarji* v. *Haridas Navalram* (2), where Sir Charles Sargent, C. J., observed in similar circumstances that the petitioner might have applied to the District Judge to transfer the proceeds realized by the sale held by the second class Subordinate Judge to the Court of the first class Subordinate Judge. If we compare the observations in the two cases just mentioned, it becomes obvious that Sir Charles Sargent pointed out the correct procedure to be followed in cases of this character, namely, the Subordinate Judge is not to direct the Munsif to transmit the proceeds to his Court, but should move the District Judge to have the proceeds so transferred. If this procedure is adopted, full effect is given to the intention of the Legislature. The Subordinate Judge in essence adopts the sale held by the Munsif as if it were a sale held by himself and the sale-proceeds are then rateably distributed in accordance with the provisions of the Code We feel no doubt that the Court has inherent

(1) 12 C. 333 at p. 338; 6 Ind. Dec. (N. S.) 227.
(2) 18 B. 458; 9 Ind. Dec. (N. S.) 815.

power to adopt the procedure we have described to effectuate the ends of justice and that this course should have been followed in the present case.

The result is that this Rule is made absolute, and the order of the Subordinate Judge set aside. We direct that the sale proceeds be transferred from the Court of the Munsif to the Court of the Subordinate Judge to be rateably distributed by him amongst the decree-holders who have qualified themselves under section 73, Code of Civil Procedure, including the present petitioner. We make no order as to the costs of this Rule.

Rule made absolute.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 56 OF 1917.

December 20, 1917.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Kumaraswami Sastri.

VAIRAPPA THEVAN AND ANOTHER—DEFENDANTS—APPELLANTS

versus

SUBBIAH THEVAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11, O. XXXIV, rr. 1, 2, 3, 10—Mortgage—Redemption suit—Preliminary decree, payment under—Mesne profits, suit for, after date of payment, maintainability of—Remedy of plaintiff—Res judicata.

A suit lies for mesne profits after date of payment under a preliminary decree in a suit for redemption of mortgage, the mortgagor's remedy not being confined to a claim for adjustment of accounts at the time of the passing of the final decree. [p. 252, col 1.]

Sakari Datta v. *Sheikh Ainuddy*, 6 Ind. Cas. 336; 14 C. W. N. 1001; 12 C. L. J. 620, approved.

Papla Chakrapani Chettiar v. *Ramaswamy Thenkondan*, 42 Ind. Cas. 230, *Rukhminibai* v. *Venkatesh*, 31 B. 527; 9 Bom. L. R. 958, distinguished.

Second appeal against the decree of the Temporary Subordinate Judge, Tanjore, in Appeal Suit No. 54 of 1916, preferred against that of the Court of the District Munsif, Tiruturaipundi, in Original Suit No. 143 of 1913.

FACTS appear from the judgment.

Mr. *K. Bashyam Aiyangar*, for the Appellants.—No separate suit for mesne profits is maintainable. Under Order XXXIV, rule 10, Civil Procedure Code, the parties to a mortgage have the right to claim an adjustment of accounts at the date of the final decree. The accounts include a claim for mesne profits which have accrued due after payment of the amount of redemption. That is a matter for enquiry in the suit itself and as the relationship of mortgagor and mortgagee continues till the date of the final decree, the parties resort to the only statutory remedy provided by Order XXXIV, rule 10, Civil Procedure Code. *Vide Papla Chakrapani Chettiar* v. *Ramaswamy Thenkondan* (1) and *Rukhminibai* v. *Venkatesh* (2).

Mr. *C. S. Vencatachariar*, for the Respondents, argued *contra*. It was urged that, on payment of the redemption amount under the preliminary decree, the mortgagor acquires a right to immediate possession and subsequent possession by the mortgagee is wrongful, which makes him liable to the mortgagor in damages. A separate suit for future mesne profits is not barred under the language of the rule. The cases cited do not put a restrictive interpretation on the rule. The mortgagor can elect to ask for adjustment of accounts, but his failure to do so does not operate as *res judicata* for preferment of a fresh claim.

JUDGMENT.—The previous suit was for redemption. A preliminary decree was passed on the 30th September 1909, which gave a month for the payment by the mortgagor. The payment was actually made on the 29th October 1909. The final decree was passed on the 13th December 1912. The present suit is for mesne profits between the 29th October 1909 and the date of the suit. Both the lower Courts, following *Sakari Datta* v. *Sheikh Ainuddy* (3), gave plaintiff a decree.

In second appeal Mr. Bashyam Aiyangar argued that the claim is barred by *res judicata*. His contention is that as Order XXXIV, rule 10, provides for an adjustment of the amount due on the occasion of passing the final decree, the relationship of mortgagor and mortgagee subsists till then and the only remedy open to the mortgagor is to claim a settlement of accounts in the passing of the final decree and not to sue separately for the mesne profits. The question is whether the mortgagor is compellable to adopt this course indicated by the learned Vakil.

(1) 42 Ind. Cas. 230.
(2) 31 B. 527; 9 Bom. L. R. 958.
(3) 6 Ind. Cas. 336; 14 C. W. N. 1001; 12 C. L. J. 620.

It was recently held by a Full Bench of this Court, that a claim for future mesne profits can be sued on separately. It is not seriously disputed that a decree for redemption is practically a decree for possession, subject to the condition of paying a certain amount fixed by the Court. Therefore when that amount has been paid, the mortgagor is entitled to possession and the retention of possession by the mortgagee is that of a wrong-doer. This is the view taken in *Sakari Datta* v. *Sheikh Ainuddy* (3) and we agree with that decision. Under Order XXXIV, rule 1 (*a*), the moment the amount ascertained by the preliminary decree is paid into Court, the mortgagor acquires a right to the property. There is nothing more to be done by way of adjustment. Moreover, in this case, the possession of the property was to be in lieu of interest. Therefore no question of further accountability arises. *Vide* section 77 of the Transfer of Property Act.

Our attention was drawn to a decision of Abdur Rahim and Bakewell, JJ., in *Papla Chakrapani Chettiar* v. *Ramaswamy Thenkondan* (1). The learned Judges held in that case that the Court had power, even after the preliminary decree, to adjust the rights of the parties. It was neither argued nor decided that the mortgagor is bound to claim this adjustment and that if he did not do so, his right to mesne profits will be barred as *res judicata*. *Rukhminibai* v. *Venkatesh* (2), which was strongly relied on by the learned Vakil for the appellants, was a case in which tender was before decree. No payment was made under the decree and consequently the present question is unaffected by that decision.

The other cases quoted do not decide that the mortgagor's only remedy is to claim an adjustment before the passing of the final decree.

We think the decision of the lower Appellate Court is right and dismiss the second appeal with costs.

Appeal dismissed.

M. C. P.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 155-B OF 1916.

September 9, 1917.

Present:—Mr. Mittra, A. J. C.

KRISHNAJI—PLAINTIFF —APPELLANT

versus

BALIRAM AND ANOTHER—DEFENDANTS —RESPONDENTS.

Execution—Small Cause Court, whether can attach and sell preliminary decree for foreclosure of immoveable property—Civil Procedure Code (Act V of 1908), O. XXI, r. 66—Notice, provision for, whether mandatory—Failure to give notice, effect of.

A Small Cause Court can attach and sell a preliminary decree for foreclosure of immoveable property. [p. 253, col. 2.]

The provisions for notice under Order XXI, rule 66, of the Civil Procedure Code are directory and not mandatory: they have not been enacted for the benefit of the judgment-debtor but with a view to ascertain the exact rights which should be set forth in the proclamation for sale. [p. 254, col. 1.]

Appeal from the decree of the 3rd Additional District Judge, West Berar, Akola, dated the 13th November 1915, in Appeal No. 25 of 1915.

Mr. *V. Bose*, for the Appellant.

Mr. *G. V. Kukade*, for the Respondents.

JUDGMENT.—The defendant No. 1 obtained a simple money-decree against the plaintiff Krishnaji in the Court of Small Causes at Akola and in execution thereof attached a preliminary decree for foreclosure obtained by the plaintiff against one Naru. The decree was sold at a Court sale and purchased by the 2nd defendant. The present suit has been instituted for a declaration that the sale is null and void on various grounds, two only of which are pressed in this second appeal. The plaintiff's case is that the Small Causes Court had no jurisdiction to sell the preliminary decree for foreclosure, which according to his contention was immoveable property. It is also urged that the sale took place without notice being given to him as required by Order XXI, rule 66. In the alternative the plaintiff claims damages against the 1st defendant. The plaintiff's suit has been dismissed by both the Courts below.

On behalf of the plaintiff-appellant a number of cases has been cited to show that a mortgage of immoveable property is immoveable property within the meaning of the

KRISHNAJI v. BALIRAM.

Civil Procedure Code for the purposes of execution. Except the case of *Musammat Bhawani Kuar* v. *Gulab Rai* (1), which was a case under Act VIII of 1859, none of the cases cited before me is a case where the mortgage had merged in a decree. I may, however, point out that the weight of authority is distinctly in favour of the view taken by this Court in *Balwant Rao* v. *Musammat Ratna Bai* (2), where it was held that a sale of mortgage debt in pursuance of attachment made under section 268 of the Code of 1882 is a legal and valid sale and the collateral security will pass to the auction-purchaser even when the sale was made by a Court of Small Causes. In addition to the cases cited therein, I need only refer to *Tarvadi Bholanath* v. *Bai Kashi* (3) and *Nataraja Iyer* v. *South India Bank* (4). As regards usufructuary mortgages, there might conceivably be a difference of opinion and the point would apparently depend upon whether there was an enforceable debt secured by mortgage. See *Ramasami Moopan* v. *Srinivasa Iyengar* (5), explaining and distinguishing *Manilal Ranchhod* v. *Motibhai Hemabhai* (6). Their Lordships of the Privy Council have held that a suit for foreclosure is a suit to enforce payment of money charged upon immoveable property within the meaning of Article 132 of the Limitation Act: *Vasudeva Mudaliar* v. *Srinivasa Pillai* (7). Therefore, a mortgage by conditional sale may be regarded as a debt charged upon immoveable property.

As I have already pointed out, we are concerned here not with a mortgage but with a decree. Order XXI, rule 53, clearly deals with the mode in which decrees are to be attached and dealt with in execution proceedings. They are a class by themselves whether the decree is one regarding moveable or immoveable property. Order XXI, rule 54, which deals with immoveable property, clearly refers to immoveable property other than that in which the rights are merged in a decree. The corresponding sections to rules 53 and 54 of Order XXI in the repealed Code are sections 273 and 274. Schedule II of the repealed Code shows that section 274 (Order XXI, rule 54) was not made applicable to Provincial Courts of Small Causes and section 273, corresponding to Order XXI, rule 53, was made applicable so far as it relates to decrees for moveable property. It is clear that under the old law a Court of Small Causes could not attach immoveable property nor a decree affecting immoveable property. One prohibition in this respect is contained in Order XXI, rule 82, which says that sales of immoveable property in execution of decrees may be ordered by any Court other than a Court of Small Causes. I have already held that a decree relating to immoveable property is not immoveable property within the meaning of the Chapter relating to execution. There is nothing, therefore, in the present Code to prevent a Small Cause Court attaching and selling a decree for immoveable property. The contention that section 7 bars the jurisdiction of the Small Cause Court is unsound. It merely lays down that a Small Cause Court shall not exercise jurisdiction in suits excepted from its cognizance, nor shall it exercise jurisdiction in the execution of decrees in such suits, but the suit in which the preliminary decree for foreclosure was attached and sold was a suit within the cognizance of the Small Causes Court. Order L, rule 1, makes inapplicable to Small Cause Courts so much of the First Schedule as relates to the execution of decrees against immoveable property. But this does not prevent the attachment of decrees affecting immoveable property. Order XXI, rule 53, contemplates an attachment and sale of all decrees other than those for the payment of money or for sale in enforcement of a mortgage or charge [*Gopal Nanashet* v. *Joharimal* (8), *Delhi and London Bank, Ld.* v. *Partab Singh* (9)]. In view of the amendment made by the Act of 1908 the principle laid down in these cases, though applicable, must be read subject to the amendment now introduced. In other words, in the case

(1) 1 A. 348; 1 Ind. Jur. 704; 1 Ind. Dec. (N. S.) 238.
(2) 14 C. P. L. R. 5.
(3) 26 B. 305; 4 Bom. L. R. 18.
(4) 13 Ind. Cas. 91; 37 M. 51; 10 M. L. T. 503; (1911) 2 M. W. N. 590; 22 M. L. J. 105.
(5) 28 Ind. Cas. 284; 39 M. 389; 28 M. L. J. 338.
(6) 10 Ind. Cas. 812; 35 B. 288; 13 Bom. L. R. 233.
(7) 30 M. 426; 11 C. W. N. 1005; 4 A. L. J. 625; 6 C. L. J. 379; 2 M. L. T. 333; 9 Bom. L. R. 1104; 17 M. L. J. 444; 34 I. A. 186 (P. C.).
(8) 16 B. 522; 8 Ind. Dec. (N. S.) 827.
(9) 28 A. 771; 3 A. L. J. 585; A. W. N. (1906) 237; 1 M. L. T. 247.

of a decree for sale the only procedure laid down for its attachment and realisation is that contained in the earlier part of Order XXI, rule 53. Such a decree can no longer be sold, but the decree itself is to be executed, and the assets realised to be made available to the person entitled to attach the decree. The procedure adopted in the case was correct.

As regards the appellant's contention that he was not served with a notice under Order XXI, rule 66, I agree with the lower Court that this was only an irregularity. The provision for notice is directory, not mandatory. It does not seem to have been enacted for the benefit of the judgment-debtor but with a view to ascertaining the exact rights which should be set forth in the proclamation for sale. Notice to the judgment-debtor, any more than to the decree-holder, is not a condition precedent to the sale, as argued before me. It is merely a matter of procedure enacted in the interests of the auction-purchaser. In any case, it is only an irregularity which if it had in any way prejudiced the judgment-debtor might have entitled him to have the sale set aside. The description given in the sale proclamation was a perfectly correct description. Therefore, the case cited [*Ravaneshwar Prasad Singh* v. *Baijnath Ram Goenka* (10)] has no application. The appellant cannot maintain a suit to have the sale declared null and void on this ground.

As regards the claim for compensation it does not merit serious consideration. It was no part of the decree-holder's duty to give notice under Order XXI, rule 66, to the judgment-debtor. Therefore the absence of a notice gives rise to no cause of action against the decree-holder any more than it would give rise to a cause of action against the auction-purchaser.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

(10) 28 Ind. Cas. 699; 42 C. 897; 2 L. W. 355; 19 C. W. N. 481; 17 M. L. T. 321; 21 C. L. J. 412; 13 A. L. J. 501; 28 M. L. J. 583; 17 Bom. L. R. 442; (1915) M. W. N. 559; 42 I. A. 79.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 85 OF 1916.

August 31, 1917.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

CHANDI CHARAN NATH—DEFENDANT—APPELLANT

versus

Srimati SOMLA BIBI—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII B. C. of 1885), ss. 49, 85—Lease from year to year—Ejectment—Notice—Lease in contravention of s. 85—Grantor, whether can question ease—Estoppel by representation, plea of.

In 1891 plaintiff granted an under-*raiyati* lease to the defendant. The lease was not for any specified term, but was described as a *harsana patta* (yearly lease). The plaintiff stated that she had a *raiyati* interest in the land and the defendant was enjoined to have an entry made in the Survey and Settlement Record that the grantor possessed a *raiyati* right and the grantee himself a *harsana* right:

Held, that the lease was terminable by a notice to quit under section 49 (*b*) of the Bengal Tenancy Act. [p. 255, col 2.]

Per *Mookerjee, J.*—It is of the very essence of an annual tenancy that it is terminable by the landlord on notice to quit. [p. 255, col. 2.]

Section 49 of the Bengal Tenancy Act prescribes no form of notice, nor does it give any indication as to the length of notice. An under-*raiyat* is protected from ejectment until the end of the agricultural year in which a notice to quit is served upon him by his landlord, and this indicates the time when it becomes obligatory upon him to leave. [p. 255, col 2.]

Per *Beachcroft, J.*—A sub-lease by a *raiyat* for a period exceeding nine years, whether registered or not, is void, and can be questioned by the grantor or a person claiming through him. [p. 260, col. 2.]

(Case-law discussed).

Estoppel by representation only arises where the representation is as to a matter of fact. [p. 258, col. 2.]

It is absolutely necessary to plead estoppel if it is intended to rely upon it. [p. 257, col. 2; p. 258, col. 1.]

Where a *raiyat* giving a permanent sub-lease in contravention of the provisions of section 85 (2) of the Bengal Tenancy Act induces his lessee to accept it on the faith of a representation that his own status is such as to validate such a sub-lease, he cannot afterwards be allowed to prove in a suit against his lessee that his status was other than it was in the first instance represented to be. [p. 257, col. 2.]

Letters Patent Appeal against the decree of Mr. Justice Newbould, dated the 27th March 1916, in Appeal from Appellate Decree No. 3069 of 1914.

Babu *Probodh Kumar Das*, for the Appellant.

Babu *Chandra Sekhar Sen*, for the Respondent.

JUDGMENT.

MOOKERJEE, J.—This is an appeal under

clause 15 of the Letters Patent from the judgment of Mr. Justice Newbould in a suit for ejectment. On the 20th February 1891 the plaintiff granted an under *raiyati* lease to the defendant. The lease was not for any specified term, but was described as a *barsana patta* (yearly lease). The grantor stated that she had a *raigati* interest in the land under a grant from her superior landlord, dated the 26th November 1838; and the grantee was enjoined to have an entry made in the Survey and Settlement Record that the grantor possessed a *raiyati* right and the grantee himself a *harsana* right. On the 12th April 1911 the plaintiff served a notice upon the defendant calling upon him to quit the land at the end of six months. On the 14th August 1911, she instituted the present suit to eject the defendant who had not left the land in spite of the notice to quit. The Court of first instance dismissed the suit on the ground that the tenancy was permanent and was valid and operative as between grantor and grantee. Upon appeal, the Subordinate Judge held that a permanent lease registered in contravention of section 85 (2) of the Bengal Tenancy Act was of no effect, and that the defendant was consequently liable to be ejected on service of notice to quit. The suit was accordingly decreed and that decree has been affirmed by Mr. Justice Newbould.

On a perusal of the lease, it is obvious to me that it was not intended to be and is in no sense a permanent lease. It is throughout described as a lease from year to year. The case appears to have been argued in the Courts below on the erroneous assumption that it was a permanent lease, because the interest was treated as heritable. No question, consequently, arises whether a permanent lease registered in contravention of section 85 (2) of the Bengal Tenancy Act is ineffectual for all purposes between grantor and grantee, a question which has led to some divergence of judicial opinion in this Court, nor is it necessary to consider the question of the applicability of the doctrine of estoppel to this case, for here both the parties knew and stated explicitly that the grantor was a *raiyat* [*Bamandas Bhattacharyya* v. *Nilmadhab Saha* (1)]. If, then, we assume that the lease was operative between lessor and lessee, obviously this furnishes no answer to the claim for ejectment, for it is of the very essence of an annual tenancy that it is terminable by the landlord on notice to quit. Ordinarily, the landlord has to give a six months' notice ending with a year of the tenancy, but in the case of agricultural tenancies of the description now before me, the provision for notice is to be found in section 49 of the Bengal Tenancy Act. That section contemplates two classes of cases, namely, *first*, where an under-*raiyat* holds under a written lease for a specified term, and, *secondly*, where an under *raiyat* holds either without a written lease or under a written lease which is not for a specified term [*Raj Kumari Debi* v. *Barkatulla Mandal* (2)]. The defendant is an under-*raiyat* of the second description [*Mohendra Nath Sepai* v. *Parbutty Charan Dass* (3), *Komaruddi* v. *Sreenath Chowdhury* (4) and *Indugazi Doctor* v. *Chandra Kali Sundrani* (5)]. The landlord has complied with the requirements of section 49 (*b*). The notice was served just before the expiry of 1272 M. S., the tenant was bound to quit by the end of 1273, that is, on the 13th April 1912, and the suit was instituted some months later. The only possible objection which can be taken to the notice is that it called upon the tenant to quit at the end of six months from the date of its service, but as pointed out by Jenkins, C. J., in *Harifulla Guin* v. *Benode Behary Mondol* (6), section 49 prescribes no form of notice nor has it given any indication as to the length of notice, and the Chief Justice added that it would be deplorable to introduce into matters of this kind the intricacies of English Law as prevailing in the Presidency Towns. The under-*raiyat* is protected from ejectment until the end of the agricultural year in which a notice to quit is served upon him by his landlord, and this indicates the time when it becomes obligatory upon him to leave. I am of opinion that the tenancy in this case was terminable, was, in fact and in law, validly terminated by a notice under

(1) 35 Ind. Cas. 754; 20 C. W. N. 1340; 24 C. L. J. 541; 44 C. 771.

(2) 12 Ind. Cas. 161; 39 C. 278 at p. 283; 14 C. L. J. 407; 16 C. W. N. 6.
(3) 8 C. W. N. 136.
(4) 8 C. W. N. 136.
(5) 8 C. W. N. 139.
(6) 19 Ind. Cas. 557; 17 C. W. N. 932.

section 49 (*b*), and the plaintiff was, at the date of the institution of the suit, entitled to recover possession of the land from the defendant.

The appeal must accordingly be dismissed with costs.

BEACHCROFT, J.—The plaintiff in this suit sued to eject the defendant from certain land. She alleged that her status was that of a *raiyat*, that she gave the defendant a lease of the land in suit, that the lease could not confer a permanent right on defendant or in fact any right for a period exceeding 9 years, and that on the expiry of the 9 years she served defendant with a notice to quit. The defence was that the lease was a permanent one, that the Bengal Tenancy Act did not apply and that no notice was served.

The Munsif held that the Bengal Tenancy Act applied and that notice was served. But as the lease contained provisions for devolution by inheritance, he considered it would be inequitable to allow the plaintiff to recede from the terms of the contract made by her and dismissed the suit.

On appeal the findings of the Munsif as to service of notice and as to the applicability of the Bengal Tenancy Act were not disputed. The Subordinate Judge also upheld the view that the *patta* in terms created a permanent tenancy. But he considered himself bound by certain decisions of this Court to hold that the *patta* could not be given in evidence and that the lease could not be proved by oral evidence. He, therefore, decreed the suit. It may here be noted that even if there had been a finding as to a tenancy created otherwise than by the *patta*, it would have been of no avail to the defendant in view of the finding as to the service of notice.

On appeal to this Court the decree of the Subordinate Judge was upheld by Newbould, J., and the present appeal is against that learned Judge's decision.

Before Newbould, J., the appeal appears to have been argued on the footing that the sub-lease granted by the plaintiff was a permanent one and before us also it was argued by both sides on that supposition. That being so, I propose to deal with the matter as if the sub lease in terms purported to create a permanent tenancy.

The position then is that the plaintiff, who is a *raiyat*, having given the defendant a sub-lease for a period exceeding 9 years, has succeeded in ejecting him on the plea that the lease cannot be valid for a period exceeding 9 years.

The main argument that has been addressed to us is that the plaintiff was estopped from denying that her status was such as to make her competent to grant the lease. A second point taken is that section 85 (2) of the Bengal Tenancy Act was enacted for the benefit of the landlord, and, therefore, no one else but the landlord of the *raiyat* could question the validity of the sub-lease.

It will, therefore, be necessary to deal with the two questions of estoppel and of the scope of section 85 (2).

In regard to section 85 (2) two views have been taken, one, that it was enacted for the benefit of the superior landlord and, therefore, no one else can question the validity of a lease for a period exceeding 9 years, and certainly not the *raiyat* who has granted the lease, who will be estopped from doing so; the other, that whether the intention of the Legislature was to protect only the landlord or not, and the view has been expressed that it was intended also to protect the *raiyat*, the section is framed in such wide terms as to make a lease for a period exceeding 9 years absolutely invalid.

That the *raiyat* is not estopped from denying the validity of such a lease has been held in more than one case in this Court. In the case of *Fazel Sheikh* v. *Keramuddi Sheikh* (7) the question was directly raised and answered in the negative. That was a case between the purchaser in execution of a money decree of the right, title and interest of the *raiyat* and the sub-lessee. The purchaser would be bound by the same estoppel as the original *raiyat*. It was held that no question of estoppel arose, because the plaintiff (the purchaser) was not bound by a sub-lease void in law and which his predecessor-in-interest was not empowered to grant. The report does not set out the nature of the arguments advanced on the question of estoppel, but the decision would appear to rest on the principle that there can be no estoppel against a Statute, which

(7) 6 C. W. N. 916.

was the ground on which the argument of estoppel was again rejected in the case of *Telam Paramanik* v. *Adu Shaikh* (8). This was a case between two persons both of whom had permanent sub-leases from the same *raiyat*, the defendants being later in point of time. The defendant was in possession and pleaded the invalidity of plaintiff's title under the permanent lease. If the doctrine of estoppel would have prevented this plea from the *raiyat* who granted the sub lease to defendant, it would also have prevented the defendant from raising the plea, and it was accordingly argued that the *raiyat* could not have raised the plea. This argument was rejected. In the case of *Manik Borai* v. *Bani Charan Mondal* (9) it was hinted, though it was not necessary to decide the point, that the principle that there could be no estoppel against a Statute might defeat a plea of estoppel as between the grantor and grantee.

In the case of *Telam Paramanik* v. *Adu Shaikh* (8) the question of estoppel was certainly not argued in the form in which it is now put forward, and possibly in the earlier case cited it may have been based on the principle that a grantor may not derogate from his own grant.

The argument in the present case is based on the doctrine of estoppel by representation. It is that the plaintiff having represented herself to hold a status which would enable her to grant a permanent lease, she cannot be allowed to turn round and say that her status was other than that represented. In support of the argument reliance was placed on the case of *Bamandas Bhattacharyya* v. *Nilmadhab Saha* (1). In that case the lessee endeavoured to establish the position that his lessor was not a tenure-holder as the lease indicated, but an occupancy *raiyat* and, therefore, that the lease was void under section 85 of the Bengal Tenancy Act. That is the converse case to the present. It was held that the lessee having got possession from his lessor was estopped from denying the validity of his lessor's title. That decision cannot help the appellant in the present case. Landlord's estoppel and tenant's estoppel are based on entirely different considerations. It is also open to question whether the rest of the judgment can be regarded as an authority in favour of the appellant. For having decided the question of estoppel, which was enough to dispose of the appeal, except as regarded the question of damage, the learned Judges proceeded to support their conclusion by an argument based on the converse case, in which they assumed the very point which is now under discussion. They then referred to a number of cases dealing with the construction of section 85 of the Bengal Tenancy Act and remarked that as between the grantor and grantee the rule of estoppel applies when the elements essential to attract its operation are proved to exist. At the proposition expressed in those terms it is impossible to cavil, no authority is required to support it. The question is what are the elements essential to attract its operation.

It was not, however, necessary in my opinion for the appellant to invoke the support of this case to establish a well-settled proposition. If he required an authority it would have been sufficient to quote the words of Lord Selborne, L. C., in *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (10) as to representations being treated as true if another person relying on them has altered his situation. And subject to any question as to admissibility in evidence by reason of the registration law, I have no doubt that if it be found as a fact that a *raiyat* giving a permanent sub-lease in contravention of the provisions of section 85 (2) has induced his lessee to accept it on the faith of a representation that his own status was such as to validate such a sub-lease, he will not afterwards be allowed to prove in a suit against his lessee that his status was other than it was in the first instance represented to be. As to the doctrine I have no doubt, as to its application to the present case there is considerable difficulty.

In the first place, the estoppel was not pleaded in the written statement. One reason possibly is that the defence taken to the plaintiff's claim that the lease was not valid for more than nine years was that the Bengal Tenancy Act did not apply. It is absolutely necessary to plead estoppel if it

(8) 18 Ind. Cas. 791; 17 C. W. N. 468.
(9) 10 Ind. Cas. 469; 13 C. L. J. 649.
(10) (1873) 6 H. L. 352; 43 L. J. Ch. 269; 22 W. R. 194.

is intended to rely on it. This is not a technical rule of pleading, but a matter of substance. For if estoppel is pleaded it may be possible for the other side to show that there could be no estoppel, the real facts being known. It was particularly necessary that the plea should be taken in this case, for the document itself raises a doubt as to the grantor's competency to grant a permanent lease.

As a necessary consequence of the absence of the plea, there is no finding and presumably no evidence that such a representation as indicated above was made and relied on. Nor are we told even now what is the representation which was made as to the plaintiff's status. It is said the representation is made in the document itself. It does not necessarily follow that it was on the faith of that statement that the sub-lessee accepted the lease. In fact the representation must have been made before the document was drafted, but if any was made which considering the general knowledge that villagers have of each other's affairs cannot be predicated as a matter of certainty, it is a reasonable assumption in favour of the appellant that the statement in the document is identical with the representation made and accepted. Now what is the representation contained in the document? The whole document has not been translated for us, but a portion has, and that portion contains a passage which indicates the representations. It runs: "In the Survey Record you should record my right as *raiyati* and yours as *harsana*", *i. e.*, the plaintiff was making it clear that her status was that of a *raiyat*. Now ordinarily a *raiyat* cannot give a sub-lease for more than nine years but there is one class of *raiyats*, which is not subject to the bar, *viz.*, *raiyats* holding at fixed rates. It has been held that such *raiyats* coming under section 18 of the Bengal Tenancy Act are not subject to the provisions of section 85. In fact that decision was given long after the sub-lease in question, at the date of which the question was an open one. *Raiyats* holding at fixed rates are a small and exceptional class. What we have then at most is that the status of the plaintiff was said in the document to be that of a class the members of which could only in exceptional cases grant permanent sub-leases, while the large majority of the class were subject to the provisions of section 85.

Estoppel by representation only arises when the representation is as to a matter of fact. It can, therefore, only be effectively pleaded in this case, if we can say that the plaintiff represented herself to be a *raiyat* at fixed rates and the defendant believing that representation was thereby induced to take the permanent lease. On the facts before us it is impossible to assume that she made any such representation. That being so, the appellant's argument based on estoppel, in my opinion, fails.

There remains the other question whether the *raiyat*, the grantor of the lease, can avail himself of the bar created by section 85 (2). In the case of *Bamandas Bhattacharyya* v. *Nilmadhab Saha* (1) a number of cases bearing on section 85 were quoted as affirming the view that a lease granted in contravention of section 85 was operative as between grantor and grantee. The list given is not exhaustive, as will appear from a reference to the reports of some of the cases cited, and with all respect to the learned Judges I venture to question the accuracy of the conclusion which they drew from the cases cited. There are following cases in connection with section 85 in chronological order:—

Srikant Mondul v. *Saroda Kant Mondul* (11), *Gopal Mondal* v. *Eshan Chunder Banerjee* (12), *Madan Chandra Kapali* v. *Jaki Karikar* (13), *Fazel Sheikh* v. *Keramuddi Sheikh* (7), *Ramgati Mandul* v. *Shyama Charan Dutt* (14) and *Ali Mohammad* v. *Nayan Rajah Bhuiya* (15), this case though decided in 1903 was not reported till 1912; *Basaratulla Mundle* v. *Kasirunnessa Bibi* (16), *Bipin Behari Hati* v. *Amirta Lal Bhattacharji* (17), *Tamijuddi* v. *Asgar Howladar* (18), *Manik Borai* v. *Bani Charan Mondal* (9), *Arab Ali* v. *Rachimaddi* (19), *Abdul Karim* v. *Abdul*

(11) 26 C. 46; 13 Ind. Dec. (N. S.) 633.
(12) 29 C. 148.
(13) 6 C. W. N. 377.
(14) 6 C. W. N. 919.
(15) 13 Ind. Cas. 912; 15 C. L. J. 122; 16 C. W. N. 620 *note*.
(16) 11 C. W. N. 190.
(17) 3 Ind. Cas. 685; 9 C. L. J. 76.
(18) 1 Ind. Cas. 942; 36 C. 256; 13 C. W. N. 183.
(19) 10 Ind. Cas. 562; 13 C. L. J. 656.

Rahman (20), *Jarip Khan* v. *Durfa Bewa* (21), *Telam Pramanik* v. *Adu Shaikh* (8), *Mohim Chandra Dey* v. *Baidya Nath* (22), *Gonesh Mondol* v. *Thanda Namasundrani* (23), *Janaki Nath Hore* v. *Prabhasini Dasi* (24) and *Lani Mia* v. *Muhammad Easin Mia* (25).

Some of these cases were referred to by Carnduff, J., in the case of *Telam Pramanik* v. *Adu Shaikh* (8) and the learned Judge pointed out that those cases were not authorities for the construction of sub-section (2) of section 85. And it is obvious that cases in which the question before the Judges was the effect to be placed on other sub-sections of section 85 can be no authorities on the question before us, and if the learned Judges in those cases were led into making remarks referring to section 85 (2), such remarks can at most be *obiter dicta*.

Four of the cases in the above list, *viz.*, Nos. 2, 3, 8 and 11 [*Gopal Mandal* v. *Eshan Chunder Banerjee* (12), *Madan Chandra Kapali* v. *Jaki Karikar* (13), *Bipin Behari Hati* v *Amirta Lal Bhattacharji* (17), *Arab Ali* v. *Rachimaddi* (19)], which dealt with section 85 (3), may, therefore, at once be eliminated from our consideration.

Then there is a class of cases in which the lease was for 9 years only but there was a covenant for renewal. In the 6th of the above cases [*Ali Mohammad* v. *Nayan Rajah Bhuiya* (15)] it was held that section 85 was not a bar as the lease was not for more than nine years. That was followed in case No. 18 [*Lani Mia* v. *Muhammad Easin Mia* (25).] In *Tamijuddi* v. *Asgar Howladar* (18) also the lease was not one for more than 9 years and the contest was between the superior landlord and the sub-lessee. In that case, therefore, the Judges did not have to consider the present question, *viz.*, the validity of a lease for more than 9 years, when raised as between the grantor and grantee. These three cases may, therefore, be eliminated.

In the first case on the list [*Srikant Mondul* v. *Saroda Kant Mondul* (11)] the Court decided that a sub-lease for more than 9 years was altogether void. The case was, however, between the superior landlord and the sub lessee and the Court had not to consider whether the grantor could question the validity of the lease.

Nor is the 17th case, that of *Janaki Nath Hore* v. *Prabhasini Dasi* (24), an authority on the question before us. There the question arose between the purchaser of a holding in execution of a rent decree who is not a representative of the original *raiyat*, and the sub lessee. It was pointed out that no considerations such as might apply between grantor and grantee, applied to the case.

This reduces the list of cases to which reference need be made to nine. In *Fazel Sheikh* v. *Keramuddi Sheikh* (7) the contest was between the sub-lessee and the successor-in interest of the *raiyat*. It was held that the permanent lease was altogether void in view of the express provisions of section 85 (2) and that the successor-in-interest of the grantor could question its validity.

In *Ramgati Mandul* v. *Shyama Charan Dutt* (14) the contest was between the superior landlord and the sub-lessee. In this case the superior landlord was a *raiyat*; he gave a sub-lease, and his lessee again gave a sub-lease. As between the two lowest lessees section 85 could not apply, as it applies only to sub-leases by a *raiyat*. But in order to ascertain the title of the lowest lessee the Court had to consider the validity of the permanent sub-lease granted by the *raiyat* and the learned Judges held, again at the instance of the grantor, that it was invalid.

In *Basaratulla Mundle* v. *Kasirunnessa Bibi* (16) the lease was for a period of 9 years with a covenant for renewal. On a suit to eject the sub-lessee after the expiry of the term of 9 years, it was argued that the sub-lessee was protected by the covenant for renewal and that section 85 (2) could be enforced only on behalf of the superior landlord. This argument was negatived by Geidt, J.

In *Manik Borai* v. *Bani Charan Mondal* (9) the sub-lessee of the *raiyat* had been dispossessed by some persons other than the

(20) 13 Ind. Cas. 364; 16 C. W. N. 618; 15 C. L. J. 672.
(21) 15 Ind. Cas. 476; 17 C. W. N. 59; 16 C. L. J. 144.
(22) 29 Ind. Cas. 879; 21 C. L. J. 478.
(23) 38 Ind. Cas. 489; 24 C. L. J. 539.
(24) 30 Ind. Cas. 898; 19 C. W. N. 1077; 22 C. L. J. 99; 43 C. 178.
(25) 33 Ind. Cas. 448; 20 C. W. N. 948.

grantor of the sub-lease. It is not stated under what title these persons claimed, but in one passage in the judgment it is stated that the contest was between the under-*raiyat* (*i.e.*, the sub-lessee) and a trespasser who had no title, and it was, therefore, "unnecessary to consider whether the validity of a sub-lease granted by a *raiyat* in contravention of section 85 could be questioned by the grantor." That being so, the case is not an authority for the question now before us, for though in another part of the judgment there is an expression of opinion that the question could only be raised by the superior landlord, the case was disposed of on the ground that "the plaintiff had a subsisting interest when the action was commenced."

In *Abdul Karim* v. *Abdul Rahman* (20) the contest was between the *raiyat* and his lessee. It was held that the lease was a permanent one and that the contract was valid in law, so far as the contracting parties were concerned. Carnduff, J., was a party to this decision and he subsequently in *Telam Paramanik* v. *Adu Shaikh* (8) expressed the opinion that the case had been wrongly decided and that the authorities quoted in support of the proposition stated therein were in fact not authorities for the proposition.

In *Jarip Khan* v. *Durfa Bewa* (21) it was held that a sub-lease for more than 9 years, which had been registered in contravention of section 85 (2), must be treated as not registered and that there was, therefore, no proof of the title of the person who claimed under the sub-lease. The effect of this decision was the same as the effect of *Fazel Sheikh* v. *Keramuddi Sheikh* (7) and other cases on the same lines *viz.*, that a sub lease for more than 9 years is absolutely void. To the same effect was the case of *Telam Paramanik* v. *Adu Sheikh* (8), where the question was raised between the grantee and a transferee of the grantor.

In *Mohim Chandra Dey* v. *Baidya Nath* (22), a case between the *raiyat* and his lessee, it was held following *Jarip Khan* v. *Durfa Bewa* (21) and *Telam Paramanik* v. *Adu Sheikh* (8) that the lease was a nullity, and that acceptance of rent could not ratify a lease which was initially void. The learned Judges did not state whether they approved or not of the view taken in the two cases cited; this case, therefore, does not add to the authority of those cases. The only point worthy of note is that one of the Judges *viz.*, Coxe, J., was a party to the decision in *Manik Borai* v. *Bani Charan Mondal* (9) and if he intended to hold in the last mentioned case that the question of validity of the lease could not be raised as between grantor and grantee, he had apparently modified his view in 1914.

Gonesh Mondal v. *Thanda Bamasundrani* (23) also does not lend authority either way. Fletcher, J., pointed out that there were two classes of case, one in which the sub-lessee was precluded from proving his lease, as exemplified by *Jarip Khan* v. *Durfa Bewa* (21), and one in which he was able to rely on possession to prove his tenancy independently of his lease, as exemplified by *Manik Borai* v. *Bani Charan Mondal* (9). He had to see whether the facts of the case before him brought it within the first or the second class, and finding it to be within the latter, he considered the decision referred to had to be followed. This case is not an authority for the proposition that the *raiyat* cannot question the validity of the sub-lease.

The result of the cases appears to be this. The document creating the lease cannot be given in evidence if the lease is for more than 9 years, whether the document has been registered or not, and the lease is void. This is undisputed, with this exception that the lease may perhaps be operative as against the grantor or a person claiming title from him. As to this point four different Judges in four cases [*Fazel Sheikh* v. *Keramuddi Sheikh* (7), *Ramgati Mandul* v. *Shyama Charan Dutt* (14), *Basaratulla Mundle* v. *Kasirunnessa Bibi* (16), and *Telam Paramanik* v. *Adu Shaikh* (8)], have held that the grantor or a person claiming from him can question the validity of the lease and that it is not operative against him. In only one case [*Abdul Karim* v. *Abdul Rahman* (20)], in which it has been necessary to decide the point has the contrary been held and one of the Judges who took part in that decision subsequently took precisely the opposite view.

The authorities, therefore, point to this that the validity of the lease can be

questioned by the grantor, and that this view should have been taken is not surprising when, to use the words of Jenkins, C. J., "the Legislature saw fit to carry out the particular purposes indicated in sub-section (2) by a provision which must of necessity have been of universal application. In forbidding registration it forbade for all purposes the production of the document as evidence and withheld from it any ability to affect immoveable property." And though the Act has been extensively amended since three out of the four cases, to which I have just referred, were decided, section 85 has remained untouched.

I regret that I am compelled to take a view, which allows a man to profit by violating his own contract. The view may be taken that a person deserves no sympathy, who taking a lease for more than 9 years with his eyes open deliberately attempts to evade the law. The knowledge that he may be penalised by his grantor is perhaps the best deterrent, though it is not conducive to honesty to permit advantage to be taken of an evasion of the law by one who has himself been a party to it. However, the Statute is so worded that, in my opinion, the conclusion to which I have come cannot be avoided. I, therefore, agree that the appeal should be dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.
SPECIAL BENCH.
CIVIL CASE NO. 22 OF 1915.
June 19, 1915.

Present:—Mr. Justice Rattigan, Mr. Justice LeRossignol and Mr. Justice Leslie Jones.

Seth RUSTOMJI—VENDOR—PETITIONER

versus

EMPEROR THROUGH COLLECTOR, LAHORE—RESPONDENT.

Stamp Act (II of 1899), s. 2 (10), Sch I, Art. 23—"Conveyance," meaning of—Letter reciting previous sale and admitting receipt of consideration, whether conveyance—Interpretation of Statutes—Fiscal enactments.

The Stamp Act is a fiscal Act and must be rigorously construed in favour of the public, whenever any ambiguity arises. [p. 262, col. 1.]

A conveyance is an instrument which transfers property from one person to another. [p 261, col. 2.]

A document ran as follows:—

"I am enclosing herewith the original sale-deed in respect of the land measuring 38 *kanals*, 18 *marlas*, *Khasra* No. 3388, in *Mauza* Mozang, situate on Jail Road, which I have sold to you for the sum of Rs. 1,000 and in respect of which I have already received the purchase-money from you:"

Held, (1) that the document was a mere letter reciting an earlier sale and an earlier receipt of the consideration for that sale; [p. 262, col. 1.]

(2) that at most it was a receipt for the consideration money and an admission of the sale, but was not in itself the instrument of sale or conveyance; [p. 262, col. 1.]

(3) that had for the words "which I have sold" the words "which I hereby sell" been substituted, the document would have been an instrument of sale; [p. 262, col. 1.]

(4) that therefore the document was not a conveyance and was not liable to stamp duty. [p. 262, col. 1.]

Case referred under section 57 of the Indian Stamp Act (II of 1899) by the Financial Commissioners, Punjab, with their Letter No. 3289, dated the 28th April 1915, for the orders of the Chief Court of the Punjab.

Mr. *K. J. Rustomji*, for the Petitioner.

JUDGMENT.—In reference under the Indian Stamp Act, section 57, we are asked to decide whether the document "A", which is in the form of a letter, is a "conveyance" within the meaning of section 2 (10) of the Indian Stamp Act. The document runs as follows:—

MADAM AND SIRS,

I am enclosing herewith the original sale-deed, dated 22nd October 1904, in respect of the land measuring 38 *kanals*, 18 *marlas*, *Khasra* No. 3388, in *Mauza* Mozang situate on Jail Road, Lahore, which I have sold to you for the sum of Rs. 1,000 and in respect of which I have already received the purchase-money from you.

Yours faithfully,
J. RUSTOMJI.

"Conveyance" is defined in Wharton's Law Lexicon as 'an instrument which transfers property from one person to another."

Section 2 (10) of the Indian Stamp Act attempts no precise definition of the term, but provides that the term shall include every instrument by which property moveable and immoveable, is transferred *inter vivos*. Applying these tests to the document

under consideration, we are quite unable to hold that it is a conveyance.

The Stamp Act is a fiscal Act and must be rigorously construed in favour of the public, whenever any ambiguity arises.

The document is a mere letter, reciting an earlier sale and an earlier receipt of the consideration money for that sale.

It is at most a receipt for the consideration money and an admission of the sale, but it is not in itself the instrument of sale or conveyance.

Had for the words "which I have sold" the words "which I hereby sell" been substituted, the document would have been the instrument of sale.

In its present condition, the document A, we hold, is not a "conveyance", and is not liable to be charged with stamp duty as a "conveyance."

Reference disposed of.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 514 OF 1917.

February 5, 1918.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Mullick.

NARAIN SINGH—DEFENDANT NO. 1 —APPELLANT

versus

BABA *alias* GABHRAIL URAON AND ANOTHER—PLAINTIFFS, *Srimati* DEORATI KUER—DEFENDANT NO. 2—RESPONDENTS.

Chota Nagpur Tenancy Act (VI of 1908), s. 139 (5) —Wrongful dispossession of tenant—Suit to recover possession in Civil Court, whether maintainable—Jurisdiction—Evidence—Inadmissible evidence admitted at request of parties, whether can be objected to in appeal —Interpretation of Statutes—Retention of old provision, effect of.

Where a tenant has been wrongfully dispossessed of his holding, he may bring a suit for possession of the land in the Civil Courts. Section 139 (5) of the Chota Nagpur Tenancy Act is no bar to such a suit. The word 'application' in the section does not include suits. [p. 264, col. 1.]

Where the parties themselves request either that certain evidence which is not in itself admissible as evidence, if objections are taken, should be considered by the Court or where they request that the Judge should himself put questions to witnesses, it does not lie in the mouth of either party, who asks that that course should be taken, afterwards to question it in appeal. [p. 263, col. 1.]

In construing a Statute the Court is entitled to look at the course of legislation up to the date of the Statute, and if the words of a previous Statute are re-enacted it may be assumed that it was intended that the law should be continued as it previously existed. [p. 263, col. 2; p. 264, col. 1.]

Appeal from a decision of the Subordinate Judge, Ranchi, dated the 1st March 1916.

Mr. *Atul Krishna Ray*, for the Appellant.

Messrs. *S. N. Palit* and *U. C. Laha*, for the Respondents.

JUDGMENT.

MILLER, C. J.—In this case defendant No. 1 appeals from a decision of the Subordinate Judge of Ranchi and he contends that the decision ought to be set aside on two grounds. The first is that the Court had no jurisdiction to try the case, although neither before the Munsif nor before the lower Court of Appeal was any such objection taken. The second ground upon which he asks us to allow this appeal is that the learned Munsif who tried the case originally went himself and inspected the locality concerning which the dispute took place and although it is not contended that he had no power to go and make an inspection of the locality, it is contended that in the course of that inspection the Munsif took evidence by asking questions from an old man called Chilgu and based his decision entirely or at all events largely upon the evidence so obtained. The facts of the case quite shortly appear to be these:—

The plaintiff many years ago, about the year 1901 I think it is, settled upon certain waste lands described in the survey as plot No. 613 in Mauza Saheda with the intention of converting them into his *korkar*. No objection was apparently taken by the *malik* at that time nor indeed for many years afterwards and, therefore, he contends that no objection having been taken for two years he is entitled to occupancy rights in respect of that land, he having a few years ago converted it into cultivable land. The original *malik* appears to have died and was succeeded by defendant No. 2. In the year 1908 a Survey and Settlement took place in which the lands in question were entered in the Record of Rights as the *ghair mazrooah khas* of the *malik* and no objection was apparently taken to that

by the plaintiff. The reason given in the judgment of the Court below for the plaintiff taking no objection is that at that time the land had not been entirely brought under cultivation and the plaintiff did not think that it was necessary that he should assert his rights at that time or that he was entitled to get his name entered in the survey record as having any right or title to the land. Then according to the plaintiff he grew crops on the land and shortly before this suit was instituted in 1915. Defendant No. 1, who claimed to have taken settlement from the present *malik* defendant No. 2, appears to have destroyed the crops and disputed the plaintiff's right or title to any occupancy at all. The Munsif at the trial having heard evidence upon the application of the plaintiff made a personal inspection of the land in question with a view to ascertaining how far the plaintiff's evidence was accurate, to the effect that he had erected *bunds* on the land and had carried out other works with a view to reducing the land to a state fit for cultivation. During the course of that inspection according to the Munsif's report of what took place, it appears that both parties asked the Munsif to question this old man Chilgu who was either the headman of the village or one of the oldest inhabitants, and from the evidence given by Chilgu the learned Munsif was confirmed in the impression, which he seems from his judgment to have arrived at apart from this evidence, that the plaintiff had erected a *bund* or embank ment whereby the land in this plot No. 613 was materially assisted in being redeemed to a state of cultivation. Now where the parties themselves request either that certain evidence, which is not in itself admissible as evidence if objections are taken, should be considered by the Court or where they request that the Judge should himself put questions to witnesses, I cannot see that it lies in the mouth of either of the parties, who ask that that course should be taken, afterwards to question it on appeal if it should turn out that the result of the evidence is against them, and therefore in my opinion this part of the appeal must fail.

The next objection which is taken is that this being a suit to recover possession the Court, that is to say, the Court of the Munsif in which the suit was originally brought, had no jurisdiction to try it because under the Chota Nagpur Tenancy Act of 1908 which applies to suits with respect to the land in question it is provided in section 71 that if any tenant is ejected from his tenancy or from any portion thereof in contravention of section 68, he may within a period of one year from the date of such ejectment present to the Deputy Commissioner an application praying to be replaced in possession of such tenancy or portion; and the Deputy Commissioner may, if he thinks fit, after making a summary enquiry replace him in possession in the manner described in section 68. That section says that no tenant shall be ejected from his tenancy or any portion thereof except in execution of a decree, or in execution of an order of the Deputy Commissioner passed under this Act. Then section 139 of the same Act provides as follows: "The following suits and applications shall be cognizable by the Deputy Commissioner, and shall be instituted and tried or heard under the provisions of this Act, and shall not be cognizable in any other Court, except as otherwise provided in this Act, namely," and then follow eight different classes of suits or applications which it is said shall be tried only by the Deupty Commissioner. No. 5 is "All applications to recover the occupancy or possession of any land from which a tenant has been unlawfully ejected by the landlord or any person claiming under or through the landlord." It is said that sub-section 5 applies to the present case and therefore the suit is barred, because it could only be tried under that sub-section by the Deputy Commissioner. Reliance was placed upon the earlier legislation, both the Act of 1859, section 23 (6) and the Chota Nagpur Procedure Act of 1879, section 37, clause 6, in which suits of this nature were only cognizable by the Deputy Commissioner and it is said that there is no difference between the word suits and the word applications used in section 139 of the present Act and that it was intended merely to re-enact the law as it previously existed. In construing a Statute I think one is certainly entitled to look and see the course of legislation up to that time and if the words of the previous Statute are re-enacted, it may be assume

that it was intended that the law should be continued as it previously existed. But in the present case section 139 of the Act of 1908 seems to my mind clearly to draw a distinction between suits and applications and the reasons seem to me to be clear. The word application in the section merely refers to certain summary procedure, at all events in sub-section 5 which provides that in case where tenants are ejected they may at once and without the delay and expense of bringing a suit be—if they make out their case—put in possession of the disputed property. But having regard to the fact that the word suits is also used in many of the sub-sections in the same section, I cannot believe that it was intended in the present Act that not only applications such as those I have described should be confined to the Deputy Commissioner's Court alone but also suits which claimed not only to be put in possession but also included claims for declarations and matters of that sort. In the present case it is noticeable that not only did the plaintiff seek the relief of being put in possession of the disputed land, but he sought a decree adjudicating upon his *korkar* rights and claimed also any other reliefs to which he was entitled in the opinion of the Court. In any case I do not think that section 139, sub-section 5, of the Act in question was intended to bar a suit being brought in some other Court besides that of the Deputy Commissioner. The matter has already been the subject of judicial decision in a case which came before the High Court of Calcutta in 1910 and the judgment of Woodroffe and Carnduff, JJ., appears in *Khetra Nath* v. *Paru Beuri* (1). Both these learned Judges were agreed that the word application in the section under consideration did not include and was not meant to include suits such as that which has been brought in the present case. I think on both grounds this appeal must fail and must be dismissed with costs. The costs, which the respondents have to pay in respect of their unsuccessful application for security, will be set off against the costs they recover in the appeal. We assess the appellant's costs of that application at one gold *mohur*.

MULLICK, J.—I agree.

Appeal dismissed.

(1) 9 Ind. Cas. 478: 15 C. W. N. 387; 13 C. L. J. 260.

PUNJAB CHIEF COURT.

CIVIL PETITON No. 991 OF 1915.

July 13, 1916.

Present:—Sir Donald Johnstone, KT., Chief Judge.

JAI CHAND—DEFENDANT—PETITIONER

versus

SARDAR SINGH—PLAINTIFF AND Mr. E. D. DIGNASSE AND OTHERS—DEFENDANTS—RESPONDENTS.

Negotiable Instruments Act (XXVI of 1881), s. 56—Promissory note, transfer of balance due upon, validity of.

The object of section 56 of the Negotiable Instruments Act is simply to prevent a promissory note from being transferred for a portion only of the sum at the time due upon it. It has no application to the transfer of the whole of the balance due upon a promissory note.

Petition, under section 25 of Act IX of 1887, for revision of the decree of the Judge, Small Cause Court, Lahore, dated the 12th August 1915, decreeing the claim.

Kanwar *Dalip Singh*, for the Petitioner.

Mr. *Lal Chand Mehra*, for the Respondents.

JUDGMENT.—In this case the lower Court has stated the facts. It has held that at the time when the promissory note in suit was endorsed in favour of plaintiff, defendant No. 1 did, as a matter of fact, owe Rs. 315-2-0, and it finally absolved defendants Nos. 2 and 3 from liability and gave a decree against defendant No. 1 alone The grounds for revision seemed to me to require argument and consideration, and I have now heard arguments. It is urged on behalf of the defendant-petitioner that, under section 56 of the Negotiable Instruments Act, such a promissary note as this could not be endorsed over to the plaintiff or to any one. This I think is incorrect. This is not a case in which a portion only of what is due is endorsed over or transferred. Plaintff freely admits that out of Rs. 1,000 of the promissory note only Rs. 313-2-0 remained due. Plaintiff does not propose to make a separate claim for the remaining Rs. 686-14-0, but takes that as wiped out. The object of section 56 is simply to prevent a promissory note from being transferred for a portion only of the sum at the time due upon it. Nothing of the kind happened here. There

does not appear to be any ground for revision and I dismiss the petition.

Petition dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2983 OF 1914.

January 15, 1918.

Present:—Mr. Justice Richardson and Mr. Justice Beacheroft.

NOGENDRA LAL CHOWDHURY—DEFENDANT No. 1—APPELLANT

versus

FANI BHUSAN DAS—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 11—Civil Procedure Code (Act V of 1908), O. XXI, rr. 58, 63—Claim rejected for default—Limitation for title suit.

Article 11 of Schedule I of the Limitation Act applies in a case where a person sues to establish his right to property in respect of which a claim preferred by him under Order XXI, rule 58, Civil Procedure Code, has been dismissed for default and without investigation. [p. 266, col. 1.]

The language of Article 11 of Schedule I of the Limitation Act of 1908 is more comprehensive than the language of the preceding Acts and the applicability of the Article cannot be restricted to those cases only in which the claim preferred under Order XXI, rule 58, Civil Procedure Code, has been disallowed after an investigation. [p. 266, col. 2.]

Appeal against the decree of the Subordinate Judge, Chittagong, dated the 28th of May 1914, confirming that of the Munsif, South Raozan, dated the 30th of June 1913.

Dr. *Sarat Chandra Basak* and Babu *Chandra Sekhar Sen*, for the Appellant.

Babu *Jogesh Chandra Roy* for Babu *Mohendra Nath Roy* and Babu *Probodh Kumar Das*, for the Respondent.

JUDGMENT.

RICHARDSON, J.—The only question to which we need address ourselves in this appeal is the question of limitation. In the course of certain execution proceedings the property now in dispute was attached. The present plaintiff preferred a claim to the property under Order XXI, rule 58, Code of Civil Procedure. The claim was rejected and he brought this suit to establish his title to the property and for consequential reliefs. It is not disputed that if the order made in the execution proceedings rejecting the claim was an order within the scope of Order XXI, rule 63, the present suit is a suit of the nature contemplated by that rule and is governed as to limitation by Article 11 of the Limitation Act of 1908. The period of limitation prescribed in such a suit is one year from the date of the adverse order in the claim case. Here the suit was instituted more than a year after the claim was rejected. The defendant No. 1 pleaded, therefore, that the suit was out of time. The contention put forward on the plaintiff's behalf is that the claim having been rejected for default and without investigation, the order of rejection was not an order within Order XXI, rule 63, and Article 11 had no application. The contention proved successful in the Courts below and the appeal before us has been preferred by this defendant No. 1. Now, it may be useful to cite in this connection the language used by Lord Hobhouse in delivering the judgment of the Privy Council in the case of *Sardhari Lal* v. *Ambika Pershad* (1). Lord Hobhouse said:—"The order", that is, the order in the claim case to which he was referring, "was made and it was an order within the jurisdiction of the Court that made it. It is not conclusive; a suit may be brought to claim the property, notwithstanding the order; but then the law of limitation says that the plaintiff must be prompt in bringing his suit. The policy of the Act evidently is to secure the speedy settlement of question of title raised at execution sales and for that reason a year is fixed as the time within which the suit must be brought."

If that was the policy of the law under the Civil Procedure Code of 1877 and the Limitation Act of the same year, it is still more emphatically the policy of the law under the present Civil Procedure Code and the present Limitation Act.

On the plaintiff's behalf reliance has been placed on decisions of this Court under Article 11 of the Limitation Act of 1877, but those decisions are no longer of authority because the language of Article 11 has been altered in the Act of 1908. The change made follows the change made in section

(1) 15 I. A. 123; 15 C. 521; 5 Sar. P. C. J. 172; 12 Ind. Jur. 210; 7 Ind. Dec. (N. S.) 931.

283 of the Code of 1882 now represented by rule 63 of Order XXI. Section 283 ran as follows:—"The party against whom an order under section 280, 281 or 282 is passed may institute a suit to establish the right which he claims to the property in dispute." Rule 63 on the other hand says that where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute. The specific reference to the previous sections or rules has been omitted. A corresponding change has been made in Article 11. The ground, therefore, on which the cases under the previous Limitation Act and the previous Code were decided, that the section specifically referred to in Article 11 and section 283 of the Code required some investigation to be made, is gone. Rule 63 of the present Civil Procedure Code and Article 11 of the present Limitation Act are quite general in their terms. All that is now necessary is that a claim should be preferred under rule 58 and that there should be an order either allowing or rejecting it. The party against whom the order is made may then bring a suit in the language of rule 63 "to establish the right which he claims to the property in dispute" or in the language of Article 11 "to establish the right which he claims to the property comprised in the order", and the suit must be brought within the year allowed by Article 11.

The Courts below have plainly erred in applying the old cases to the present law. Even under the Limitation Act of 1877 there was some difference of opinion on the question whether an order rejecting a claim made without investigation came within Artice 11 or not. In the case of *Jugal Kishore Marwari* v. *Bejoy Krishna Mukherjee* (2) Mookerjee and Beachcroft, JJ., observed in their judgment that though there might be some divergence of judicial opinion there was weighty authority in support of the view that where an application had been dismissed with or without investigation a regular suit, if instituted, must be commenced within one year from the date of such order; and the learned Judges cited reported cases in support of that observation.

(2) 15 Ind. Cas. 683; 16 C. W. N. 882.

The case of *Umacharan Bhattacharjee* v. *Hironmoyee Debi* (3) was decided in 1913, but the Article applied was Article 11 of the Limitation Act of 1877 and the case is of no assistance to the plaintiff. No doubt the learned Judges there held that Article 11 of the Act of 1877 was not applicable where there had been no investigation of the claim. But at the same time they referred to the change which had been made in the language of Article 11 by the Act of 1908 and remarked that the change might have altered the law.

The view we take is supported by the two decisions of the Madras High Court in *Narasimha Chetti* v. *Vijiavala Nainar* (4) and *Ponnusami Pillai* v. *Samu Ammal* (5), in which the learned Judges pointed out that the language of Article 11 of the Act of 1908 was more comprehensive than the language of the preceding Act and refused to restrict the Article to those cases in which an investigation had taken place.

The result is that this appeal must be allowed and the whole suit dismissed with costs, both here and in the Courts below. But the dismissal of the suit will be without prejudice to any right which the plaintiff may have as against the defendant No. 2.

BEACHCROFT, J.—I agree.

Appeal allowed.

(3) 26 Ind. Cas. 943; 18 C. W. N. 770.
(4) 27 Ind. Cas. 944; 2 L. W. 206.
(5) 38 Ind. Cas. 937; 31 M. L. J. 247.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2810 OF 1915.

January 23, 1918.

Present:—Mr. Justice Leslie Jones.

GIRDHARI RAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

MUHAMMAD KARM DAD KHAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Mortgage—Acquisitions by mortgagee—Redemption—Mortgagor, whether can claim possession on redemption.

A mortgagee who has acquired what any stranger or even the mortgagor himself could have acquired equally well despite the mortgage, cannot be compelled to hand over his rights to the mortgagor. [p. 268, col. 2.]

It is, therefore, competent to a mortgagee during the continuance of the mortgage to purchase an absolute occupancy tenure for himself and to treat it as his separate property after the mortgage comes to an end. [p. 268, col. 2.]

Bal Krishen Seth v. *Nandu*, 5 C. P. L. R. 105, *Raja Kishendatt Ram* v. *Raja Mumtaz Ali Khan*, 5 C. 198; 5 C. L. R. 213; 6 I. A. 145; 4 Sar. P. C. J. 17; 3 Suth. P. C. J. 637; Rafique and Jackson's P. C No. 58; 3 Ind. Jur. 426; 3 Shome L. R. 1; 2 Ind. Dec. (N. s) 737 (P. C.), followed.

Ram Brich Narayan Singh v. *Ambika Prosad Singh*, 19 Ind. Cas. 90; 17 C. W. N. 586, distinguished.

Plaintiff's father had mortgaged certain properties to the defendants and the latter during the subsistence of the mortgages bought out a number of occupancy tenants. The plaintiffs redeemed the mortgages by private arrangement but the defendants refused to give possession of the land which had been subject to the occupancy tenures, alleging that they had not acquired these tenancies as mortgagees and that they were, therefore, entitled to retain them for their own benefit. Plaintiffs thereupon claimed possession of these tenancies on payment of the sum for which they had been acquired:

Held, that the mortgagees were entitled to retain the benefit of their acquisitions for themselves and that the plaintiffs' suit must fail. [p. 268, col. 2.]

Second appeal from the decree of the District Judge, Mianwali, dated the 10th May 1915, reversing that of the Munsif, 1st Class, Mianwali, dated the 21st January 1915, dismissing the claim.

The Hon'ble Pandit *Sheo Narain* and Bhagat *Govind Das*, for the Appellants.

Mr. *Nand Lal*, for the Respondents.

JUDGMENT.—This judgment deals with Civil Appeals Nos. 2810 to 2814 of 1915. The plaintiffs in these cases alleged that their father had mortgaged certain properties to the defendants who, while the said mortgages subsisted, bought out a number of occupancy tenants. The plaintiffs redeemed the mortgages in 1908 by private arrangement, but the defendants had refused to give possession of the lands which had been subject to the occupancy tenancies alleging that they had not acquired those tenancies as mortgagees and were entitled to retain them for their own benefit. The plaintiffs, therefore, claimed possession of the said tenancies on payment of the sums for which they had been acquired.

In one of these cases, No. 294, Appeal No. 2814, there was a defence that the occupancy rights had been acquired before the date of the mortgage and the Munsif found that this was so, but he held further that the plaintiffs could not succeed in any case and dismissed all the suits.

The plaintiffs appealed to the District Judge who failed to touch the special question raised in the case of Suit No. 294, and accepting all the appeals granted decrees to the plaintiffs, though obviously Suit No. 294 should have been dismissed if the finding of the Munsif as to the date of acquisition was sustainable.

The defendants have now preferred second appeals to this Court.

It is first necessary to remark that the District Judge held that the acquisitions in suit were made by the mortgagees in their capacity as representatives of the mortgagor, but the finding is not founded on evidence, but rather on conjecture and on section 63 of the Transfer of Property Act. It has not been supported in this Court on the ground that purchase in a representative capacity was established on the merits.

It has been found as a fact by both Courts that the occupancy tenants in the village in which the lands in suit are situate have an unrestricted right of alienation. This finding is now attacked by Counsel for the respondents; but it is based upon an agreement in the *wajib-ul-arz* of the village and that agreement appears to be one which could be enforced under section 111 of the Tenancy Act, despite the provisions of section 56 of the same Act. The finding, therefore, contravenes no provision of law and it is one which must be accepted.

It follows, therefore, that the defendants, even if they had not been mortgagees, could have acquired the occupancy tenancies in dispute.

These being the facts, Counsel for the defendant-appellants has argued that as the tenancies were not necessarily acquired by them *qua* mortgagees but could have been acquired in another capacity, they ought not to be regarded as accessions which the mortgagors can claim. For this proposition he has cited a ruling, referred to as *Bal Krishen Seth* v. *Nandu* (1) in Sanjiva Row's Lawyers' Reference at page 321, in which it appears to have been laid down that it is competent to a mortgagee during the continuance of the mortgage to purchase an absolute occupancy tenure for himself and to treat it as his separate property after the mortgage comes to an end. Though I have

(1) 5 C. P. L. R. 105.

not been able to obtain any report of that judgment it appears to have been based on *Raja Kishendatt Ram* v. *Raja Mumtaz Ali Khan* (2), on which Counsel also relies. In that ruling their Lordships observed that they were not prepared to affirm the broad proposition that every purchase by a mortgagee of a sub-tenure existing at the date of the mortgage must be taken to have been made for the benefit of the mortgagor so as to enhance the value of the mortgaged property and to make the whole including the sub-tenure subject to the right of redemption upon equitable terms: and they gave as an instance a case in which a mortgagee could not be said to have derived from his mortgagor any peculiar means or facilities for making the purchase which would not be possessed by a stranger and might, therefore, be held entitled equally with the stranger to make it for his own benefit. In the particular case before them, however, they held that although the mortgagee might have kept alive certain *birt* tenures which he had acquired, he did not do so but treated them as merged in the mortgaged *taluk*.

This ruling was delivered before the enactment of the Transfer of Property Act, IV of 1882. In *Ram Brich Narayan Singh* v. *Ambika Prosad Singh* (3), following section 63 of that Act, it was held that where the mortgagees during the continuance of a mortgage had bought in some of the *raiyati* holdings, of the *mahal* from the enants, the mortgagor was entitled to treat the purchases as accessions to the mortgaged property within the meaning of section 63 and that the rights of the mortgagee did not depend upon whether he had any special advantage by reason of his position as mortgagee in acquiring the accession. *Raja Kishendatt Ram* v. *Raja Mumtaz Ali Khan* (2) was considered, but it was held that the law as to accession to the mortgaged property is now formulated in section 63 of the Transfer of Property Act.

Counsel for the appellants has not contended that the decision arrived at in *Ram Brich Narayan Singh* v. *Ambika Prosad Singh* (3) was incorrect, but he has urged that it is of no application to the present case because the Transfer of Property Act is not in force in the Punjab; that in this Province we ought, therefore, to fall back upon the principle laid down in *Raja Kishendatt Ram* v. *Raja Mumtaz Ali Khan* (2) and that it should, therefore, be held that as the mortgagees could have acquired as strangers and there is nothing to show that they intended that the occupancy tenancies should merge in the proprietary holdings, they are entitled to retain the tenancies for themselves.

Counsel for the respondents, on the other hand, has argued that *Raja Kishendátt Ram* v. *Raja Mumtaz Ali Khan* (2) is out of date and that as it has been frequently held by this Court that the principles embodied in the Transfer of Property Act should be followed, section 63 of that Act should be applied in the present case. If it is applied, and if *Ram Brich Narayan Singh* v. *Ambika Prosad Singh* (3) is good law, then all the plaintiff's suits must succeed, except perhaps No. 294.

It appears to me, however, that the argument for the appellants must prevail. It cannot be said that section 63 of the Transfer of Property Act expounds any broad principle. As was observed even in *Ram Brich Narayan Singh* v. *Ambika Prosad Singh* (3), it goes further than section 90 of the Indian Trusts Act and there is no reason in equity why a mortgagee who has acquired what any stranger, or even the mortgagor himself, could have acquired equally well despite the mortgage, should be compelled to hand over his rights to the mortgagor.

Raja Kishendatt Ram v. *Raja Mumtaz Ali Khan* (2), on the other hand, does profess to lay down broad principles of equity and good conscience, and it is on those principles that the Courts of this Province, in the absence of any legislative enactment, are bound under section 6 of the Punjab Laws Act, Act IV of 1872, to base their decisions.

It appears to me to be clear that according to the principles expounded in the judgment of the Privy Council the defendants in these cases are entitled to retain the benefit of their acquisitions for themselves.

Accordingly I allow all the appeals and dismiss the suits, but as the point is a novel one and the defendants set up various

(2) 5 C. 198; 5 C. L. R. 213; 6 I. A. 145; 4 Sar. P. C. J. 17; 3 Suth. P. C. J. 637; Rafique and Jackson's P. C. No. 58; 3 Ind. Jur. 426; 3 Shome L. R. 1; 2 Ind. Dec. (N. S.) 737 (P. C.).

(3) 19 Ind. Cas. 90; 17 C. W. N. 586.

pleas which they failed to establish, I direct that the defendants do get only half of their costs throughout.

Appeals accepted.

PRIVY COUNCIL.

APPEAL FROM THE SIND JUDICIAL COMMISSIONER'S COURT.

November 26, 1917.

Present:—Lord Buckmaster, Sir John Edge, Sir Walter Phillimore, Bart., and Sir Lawrence Jenkins.

METHARAM RAMRAKHIOMAL AND OTHERS — APPELLANTS

versus

REWACHAND RAMRAKHIOMAL AND OTHERS—RESPONDENTS.

Hindu Law—Joint family—Self-acquired property—Gains obtained from education received at expense of joint family, whether partible—"Science acquired at the expense of ancestral wealth"—Special and general education—Question of fact.

The rule laid down by the Mitakshara that "what is earned by science acquired at the expense of ancestral wealth must be shared with the whole of the brethren and with the father" does not apply to gains which are the result, not of the education received at the expense of the joint family but of the peculiar skill, mental abilities and individual effort in applying and improving such education exercised by the person educated at the expense of the joint family. There is no authority in the Mitakshara for the contention that gains made personally and without the aid of joint funds by a member of a joint family, who received an ordinary education suitable to his position as a member of the family to which he belonged, should in law be regarded as partible and not as his self-acquired property. [p. 277, col. 1.]

The question whether a member of a joint family who carries on a personal business without detriment to the joint funds carries it on for his own benefit or for the benefit of the family is a question of fact to be determined on the evidence. [p. 277, col. 1.]

Appeal from a decree of the Court of the Judicial Commissioner, Sind (Hayward J. C., and Leggatt, A. J. C.), dated the 24th June 1910, reported as 8 Ind. Cas. 930, confirming that of a single Judge of the Court exercising jurisdiction as the District Court, Karachi.

FACTS.—The facts of the case are sufficiently set out in their Lordships' judgment. The suit was brought by appellants for a declaration that property which one Shewaram purported to devise as self-acquired was the joint property of a Hindu joint family to which he and they belonged and that his Will passed no title to it. Both the lower Courts held that the property in question was self-acquired. Leave to appeal to the Privy Council was granted on the ground that the appeal involved a substantial question of law, which had been expressly left open by the Board in *Pauliem Valoo Chetty* v. *Pauliem Sooryah Chetty* (1), *viz.*, whether a mere general education such as Shewaram received was sufficient according to Hindu Law to constitute his earnings joint family property.

Messrs. *P. O. Lawrence*, *K. C.* and *E. B. Raikes*, for the Appellants.

Messrs. *L. DeGruyther*, *K. C.*, and *G. C. O'Gorman*, for the Respondents.

P. O. Lawrence, *K. C.*, for the Appellants — I put first the broad proposition that a general education imparted at the expense of the family makes the "gains of learning" of the person who receives it partible. The Mitakshara, Chapter I, section IV, clauses 1—11 (Colebrooke's edition, pages 25—28) deals with effects not liable to partition. Clause 1 lays down the general rule that anything acquired by a man himself without detriment to the father's estate does not appertain to the co-heirs. This general rule runs throughout the section: the gains of science are separate only if the science is acquired without use of the father's goods (clause 6). The vernacular of science is *vidya*: science then meant knowledge of the Vedas, the only knowledge of those times: it is equivalent to education. The illustration given in clause 8 is that of science acquired when receiving a foreign maintenance: gains derived from such science are not participable. Science there means any knowledge gained at the family expense, even reading and writing.

[SIR W. PHILLIMORE.—Or do you mean any knowledge or training which is exceptional for his position?]

No. I would put it as any knowledge which has to be paid for.

To the same effect as the Mitakshara is the Mayukha, Chapter IV, section VII, paragraphs 2, 4.

[SIR LAWRENCE JENKINS.—Does the Mayukha apply in Sind?]

(1) 4 I. A. 100; 1 M. 252; 1 Ind. Jur. 323; 3 Suth. P. C. J. 387; 3 Sar. P. C. J. 698; 1 Ind. Dec. (N. S.) 167.

I am rather doubtful: but it merely follows the Mitakshara on this point. The authority of the Mayukha in Western India is discussed in Mayne's Hindu Law, paragraph 28 (page 29 of 8th edition).

[SIR LAWRENCE JENKINS.—I think its authority only extends to Bombay Island and Gujerat. Sind has nothing to do with Gujerat: it is a mere accident of administration that it is associated with Bombay.]

In some of the earlier judgments the Courts came to the conclusion that although science included general education, yet if a son blossomed out into a particular line, his gains from that would not be partible. The first case of importance was *Chalakonda Alasani* v. *Chalakonda Ratnachalam* (2), which laid down that the gains of science were indivisible only when the science was imparted at the expense of persons not members of the learner's family.

It was the case of a dancing girl specially educated at the expense of the joint family for her trade. The District Judge, Mr. Collett, in an elaborate judgment, came to the conclusion, on the Sanskrit authorities, that the gains of the dancing girl were impartible: but his judgment was reversed by the Madras High Court (Phillips and Holloway, JJ.) who held that the gains of science imparted at the family expense are joint property.

[LORD BUCKMASTER.—The only point of the judgment is where they say they are bound by authority. The rest is mere uncertain discussion of texts.]

Holloway, J., at page 78 seems to distinguish between ordinary and extraordinary gains.

In *Dhunookdharee Lall* v. *Gunput Lall* (3) the Calcutta High Court took a contrary view to Madras, and held that the fact of defendant having been educated at the expense of the joint family did not necessarily make his gains acquired by the aid of such education joint: but the facts of the case do not appear from either of the reports.

In *Bai Manchha* v. *Narotamdas Kashidas* (4) the Bombay High Court followed the Madras decision.

(2) 2 M. H. C. R. 56.
(3) 10 W. R. 122; 11 B. L. R. 201 *note*.
(4) 6 B. H. C. R A. C. J. 1.

A later decision in Madras to the same effect was *Durvasula Gangadharudu* v. *Durvasula Narasammah* (5), where it was held that the professional gains of a Vakil who had received a general education at the family expense were joint.

[SIR JOHN EDGE.—The education required for a High Court Vakil must have been less in those days. A High Court Vakil now-a-days requires a very special education, more than is generally understood—more I think than is needed to be called to the Bar.]

Then came the judgment of this Board in *Pauliem Valoo Chetty* v. *Pauliem Sooryah Chetty* (1), where the point was discussed but explicitly left open, and since then there seems to have been a reluctance on the part of the Judges in India to follow the earlier decisions, which I submit are right and would ordinarily be binding. There have been four cases since: *Boologam* v. *Swornam* (6), *Lakshman Mayaram* v. *Jamnabai* (7), where for the first time a distinction is drawn between special and general education, *Krishnaji Mahadev* v. *Moro Mahadev* (8) and *Lachmin Kuar* v. *Debi Prasad* (9).

I submit that all these four later cases were wrongly decided and that the proper interpretation of the article of the Mitakshara laid down in the earlier decisions has not been adhered to. My submission is that the true meaning of "science" is that given to it by the Courts before the Privy Council decision—that it is equivalent to ordinary knowledge.

[SIR W. PHILLIMORE.—May not the test be whether there has been any *plus* education—more spent on one boy than on another?]

In 1891 a Bill was brought forward to make the gains of education impartible but it created so much sensation that Government dropped it. The state of the law which that Bill was designed to alter is the state of the law for which I contend.

(5) 7 M. H. C. R. 47.
(6) 4 M. 330; 1 Ind. Dec. (N. S.) 1066.
(7) 6 B. 225 at pp 242, 243; 6 Ind. Jur. 369; 3 Ind. Dec. (N. S.) 608.
(8) 15 B. 32; 8 Ind. Dec. (N. S.) 22.
(9) 20 A 435; A. W. N. (1898) 101; 9 Ind. Dec. (N. S.) 638.

Counsel further submitted on the facts that even if the property in suit were originally separate, there was an agreement by Shewaram to throw all his funds into the joint purse.

Mr. *Raikes* followed.—Under the Mitakshara maintenance plus *any* education would be a detriment to the family purse. The decisions which take the other view have come about partly through the Board's observations in *Pauliem Valoo Chetty* v. *Pauliem Sooryah Chetty* (1) and partly through Mayne's observations based on the Dayabhaga. Till 1877 the decisions were unanimous in my favour: then came this Board's judgment in *Pauliem Valoo Chetty* v. *Pauliem Sooryah Chetty* (1) and in 1878 the first edition of Mayne's Hindu Law appeared. Mayne deals with the matter in paragraph No. 283. The view he there propounds, so far as it deals with the construction of Mitakshara, I, 4, 8, is an innovation introduced from the Dayabhaga: it has no proper place in the Western School of Law. Mayne's observations are cited and misunderstood in *Lakshman Mayaram* v. *Jamnabai* (7).

Secondly, this is not a case where the learner received only the same education as the rest of the family. He had a better education than his elder brother: nor is it material that his younger brothers received the same education as himself.

When the education was given none of these cases except *Bai Manchha* v. *Narotamdas Kashidas* (4) had been decided. Shewaram and Metharam may have been doubtful as to the legal position; the arrangement between them, even if invalid as a contract for want of consideration, may have been good as compromise. Till 1888 Shewaram never asserted self-acquisition.

[The Board intimated that they did not desire to hear arguments for respondents, but would be obliged if respondents' Counsel could refer them to any other authorities.]

Mr. *DeGruyther*, *K.C.*, for the Respondents, referred to Sir Thomas Strange's Hindu Law. Although the Mitakshara is in terms a commentary, yet as regards the people to whom it applies it is the law and you start from it. The texts on which the question depends are cited in Mr. Collett's judgment in *Chalakonda Alasani* v. *Chalakonda Ratnachalam* (2). In Manu IX, Slokas 206, 208, there quoted, "without using the patrimony" means without using the family property in the actual exercise of your profession. So in Mitakshara, Chapter I, section 4, paragraphs Nos. 10, 11, "to the detriment of the family estate" is equivalent to the "without using the patrimony." This is made very clear in Strange's Hindu Law, at page 213: "the essence of the exclusion consists in its having been made by the sole agency of the individual, without employing for the purpose what belongs in common to the family."

[SIR W. PHILLIMORE.—Your argument would go to destroy all those cases about special education.]

That is not necessary for the decision of this case.

Strange goes on to lay down (at page 215) that the acquisition vests in the family only if the common fund has been *directly* instrumental: the emphasis is on the *direct*. He has given as his authority certain passages in the Dayabhaga, but on the general question whether property is joint or self-acquired there is no distinction between the two.

[SIR W. PHILLIMORE.—But you say the Mitakshara is the law and we have to construe that.]

You have to decide what is meant by "science" and "to the detriment of the family," and in construing those words it is legitimate to refer to another work of great authority. Those passages of the Mitakshara have also been translated by Sir W. Jones: he translates as "learning" what Colebrooke renders as "science".

Mr. *P. O. Lawrence* referred to *Durga Dutt Joshi* v. *Ganesh Dutt Joshi* (10).

JUDGMENT.

SIR JOHN EDGE.—This is an appeal from a decree, dated the 24th June 1910*, of the Court of the Judicial Commissioner of Sind, which confirmed a decree, dated the 3rd April 1908, of a single Judge of that Court exercising jurisdiction as the District Court of Karachi.

The suit in which this appeal has arisen was brought in the Court of the District of Karachi on the 26th May 1905 by the appellants here to obtain a declaration that the property which one Shewaram purported to devise by his Will and a codicil was the joint family property of Shewaram, the

(10) 5 Ind. Cas. 400; 32 A. 305; 7 A. L. J. 216.

*See 8 Ind. Cas. 930.—*Ed.*

plaintiffs and some of the defendants, and that the Will and codicil were inoperative to pass any title to the property. Other reliefs were claimed, to which it is not necessary to refer. The executors of the Will were amongst the defendants to the suit.

Shewaram died on the 27th May 1899. He had been and was at the time of his death a member of a joint Hindu family, which was governed by the law of the Mitakshara. The plaintiffs were members of the same joint family. The question in the suit was whether the property of which Shewaram purported by his Will and codicil to dispose was property of the joint family or was property self-acquired by Shewaram which had not been thrown by him into the joint stock of the family property.

The plaintiffs, Metharam, Shewaram, and the defendants, Rewachand and Hermandas, were sons of one Seth Ramrakhiomal Jethanand, and they and others, parties to this suit, constituted a joint Hindu family. The family business was that of money lending, and was carried on at Karachi, Seth Ramrakhiomal being, until his death in 1884, the manager. On his death the money-lending business of the family was continued, and was carried on under the management of the plaintiff Metharam, who was the eldest son. Shewaram, who was the second son, was born in or about 1847. He was educated at the expense of the joint family at the Government School at Karachi, which in the evidence is referred to as a High School. At that school Shewaram learned to speak and to write English. When he was 22 years old he became a Pleader's clerk. He continued to be a Pleader's clerk until 1878, when he entered the employment of Messrs. Volkart Brothers. He was subsequently in the employment of Messrs. Rose and Co., and in October 1881 he entered the employment of the firm of Charles Forbes and Co., as their head broker. With the latter firm he continued until he died in 1899. It may be assumed that the knowledge of English which Shewaram acquired at the Government School was of use to him as a Pleader's clerk and in the other employments in which he was subsequently engaged. From the savings out of his salaries and brokerage, and from the profits which he derived from a money-lending business which he personally carried on, he acquired a fortune of about 2 lakhs and 50,000 rupees, which is represented by the property of which he purported to dispose by his Will and codicil. The money-lending business which Shewaram personally carried on was started by him with capital derived from the savings out of his salary as a Pleader's clerk, and without the aid of the joint fund.

In the plaint it was in effect alleged that the property of which Shewaram purported by his Will and codicil to dispose had been acquired by him as a member of the joint family, and was joint family property of which he could not dispose by Will, and alternatively that Shewaram had thrown his self-acquired property into the common stock with the intention that it should be treated as joint and not self-acquired property. In the written statements of the executors it was alleged that the property of which Shewaram had by his Will and codicil disposed was his self-acquired property, and it was denied that Shewaram had thrown his self-acquired property into the common stock of the family. The learned Trial Judge fixed the following amongst other issues which are now immaterial:—

"2. Did Shewaram acquire the property in suit with the assistance of joint family funds?

"3. If not, did Shewaram join the property to the common ancestral property?"

Those issues were agreed to by the parties. No issue was suggested or fixed as to the education which Shewaram had obtained, nor was it contended before the Trial Judge that the property in question had been acquired by Shewaram by means of any special or other education. The Trial Judge, having stated in his judgment that the evidence in the case "covers nearly every year of Shewaram's active life, and details every incident from which an inference can be extorted that Shewaram's property was the property of the family," considered the evidence fully and in detail, and found the second and third issues in the negative, and dismissed the suit. The plaintiffs appealed to the Court of the Commissioner, and in their grounds of appeal did not suggest that the education which

Shewaram had received at the expense of the joint family had been such as to entitle the joint family to the gains made by him as a Pleader's clerk or in his subsequent employments, or as a money-lender. When, however, the appeal came on for hearing in the Court of the Commissioner the learned Counsel who appeared for the plaintiff-appellant contended, amongst other things, that it had been proved that Shewaram had obtained the posts from which he had derived his salary and brokerage through the general education which he had received from the joint family funds.

There is no evidence on the record to show what was the nature of the education which Shewaram received at the school at Karachi. Had the plaintiffs been in a position to prove that his education had been of an exceptionally high standard and more expensive than the education which ordinarily would be provided for a member of such a family as he belonged to, they could have raised an issue on that subject and have called evidence in support of it. The learned Judges who heard the appeal considered that the English education received at the Government School at Karachi could not be regarded, for a well-to do family, as more than a general education, and certainly was not a special education comparable with special training for the Bar or the Civil Service, and they concurred with all the material findings of fact of the Trial Judge, and by their decree dismissed the appeal. From that decree this appeal has been brought.

In this appeal it has been contended on behalf of the plaintiffs that in arriving at their findings on the second and third issues the Courts below have misconstrued a document in writing. The document referred to was a letter which was written by Shewaram to his brother Metharam, and was as follows:—

"My Dear Brother,

"I am ready to join my property with the family property, and take my share from it.

"SHEWARAM.

"Dated 1st October, 1888."

The Trial Judge construed that letter as a conditional offer. "If you will come to partition I shall join my fund to yours;" implying: "If you don't come to partition, I shall not join them."

The plaintiffs endeavoured to prove by oral evidence that Metharam had asked Shewaram for a chit showing that the joint family fund and Shewaram's self-acquired fund were liable to be partitioned as a joint family fund, and that thereupon Shewaram wrote the letter of the 1st October 1888. That story rested solely on the evidence of Metharam and Rewachand, and the Trial Judge entirely disbelieved it. The Judges who heard the appeal construed the letter as an offer made by Shewaram during negotiations for partition, and found that the offer was never accepted. The Courts below rightly construed the letter. In their Lordships' opinion, Shewaram's letter affords strong evidence that on the 1st October 1888 his contention was that the property which he had acquired was his self-acquired property, and was not the property of the joint family. If Shewaram had, before the 1st October 1888 thrown his self-acquired property into the joint family fund there was no object in his writing the letter to Metharam, who was the manager for the joint family. In neither of the Courts below did the Judges misconstrue the letter of the 1st October 1888; and the plaintiffs are concluded, so far as conclusions of fact to be drawn from the evidence are concerned, by the concurrent findings of fact of those Courts that the property in suit was the self-acquired property of Shewaram, and that Shewaram did not join his self-acquired property to the joint family property.

It has, however, been contended on behalf of the plaintiffs that as Shewaram had received an education in English at the school at Karachi at the expense of the joint family, the property which he acquired must be attributed to that education, and must in law be held to be the joint property of the joint family. That contention depends upon the interpretation of texts of the Mitakshara, which are to be found in section 4, Chapter I. Section 4 deals with effects which are not liable to partition. Those texts of the Mitakshara translated by Mr. Colebrooke are as follows:—

"1. The author explains what may not be divided, whatever else is acquired by

the co-parcener himself, without detriment to the father's estate, as a present from a friend, or a gift at nuptials, does not appertain to the co heirs. Nor shall he who recovers hereditary property, which had been taken away, give it up to the parceners; nor what has been gained by science.'"

"5. He need not give up to the co-heirs what has been gained by him through science, by reading the scriptures, or by expounding their meaning; the acquirer shall retain such gains.

"6. Here the phrase 'anything acquired by himself without detriment to the father's estate,' must be everywhere understood; and it is thus connected with each member of the sentence; what is obtained from a friend without detriment to the paternal estate; what is received in marriage, without waste of the patrimony; what is redeemed of the hereditary estate, without expenditure of ancestral property; what is gained by science, without use of the father's goods. Consequently, what is obtained from a friend, as the return of an obligation conferred at the charge of the patrimony; what is received at a marriage concluded in the form termed *Asura* or the like; what is recoverd of the hereditary estate by the expenditure of the father's goods; what is earned by science acquired at the expense of ancestral wealth; all that must be shared with the whole of the brethren and with the father."

The Sanscrit word which Mr. Colebrooke translated as "science" was translated by Sir William Jones as "learning."

The earliest case, to which their Lordships have been referred, decided in India on the meaning of those texts of the Mitakshara was *Chalakonda Alasani* v. *Chalakonda Ratnachalam* (2). That was decided by the High Court of Madras in 1864. It was a very peculiar case. The plaintiff and the two defendants were dancing girls and constituted a Hindu joint family. The first defendant was the plaintiff's adopted daughter, the second defendant was the plaintiff's natural daughter. The plaintiff brought the suit to obtain possession, as the manager of the joint family, of gold and silver jewels and other personal property which represented gains of the first defendant in her calling of a dancing girl, she also claimed certain household utensils and some other minor articles. The plaintiff had spent a considerable amount of money in educating the first defendant in singing and dancing.

Mr. Collett, who, as the Civil Judge of Vizagapatam, tried the suit, having in a learned judgment considered several Sanscrit texts as translated, including the texts of the Mitakshara, Manu, Yajnavalkya, Narada, and the Dayabhaga and the works of some modern writers on Hindu Law, said:—

"I am sure I am laying down an equitable rule, and I believe also the rule most consistent with the weight of authority. There is no doubt some conflict of opinion; but I think that the true position is that the mere fact of a Hindu having received a professional education at the expense of his family, as for instance from his father, does not render all his subsequent professional earnings liable to be divided with his brothers. I believe that on a due consideration of the authorities the rule of law is not really different in respect to property acquired by learning to what it is in respect to property acquired by agriculture or by trade. The test is the substantial use of joint property during and for the purpose of the acquisition, if there is none such, then the acquisition does not become joint property."

Mr. Collett made a decree in favour of the defendants with the exception of the house-utensils and some other minor articles. From that decree the plaintiff appealed to the High Court of Madras. Phillips and Holloway, JJ., in their judgment in the appeal, said:—

"We are constrained to say that we feel bound by authority to hold that the gains, at all events the ordinary gains, of learning and science which have been taught at the expense of the family funds, are not impartible. To render them so the science or learning must have been imparted by persons not members of the learner's family,"

and they allowed the appeal.

In *Dhunookdharee Lall* v. *Gunput Lall* (3) which was decided by the High Court of Bengal in 1868, the defendant proved that in acquiring the property, which was alleged to be joint property, he did not use any of the property which belonged

to the joint family, and L. S. Jackson and Dwarkanath Mitter, JJ., in appeal dismissed the suit. Dwarkanath Mitter, J., added:—"His (the plaintiff's) case in the Court below was that the defendant received his education from the joint estate, and that he is consequently entitled to participate in every property that has been acquired by the defendant by the aid of such education. But this contention is nowhere sanctioned by the Hindu Law, and I see nothing in justice to recommend it."

In *Bai Manchha* v. *Narotamdas Kashidas* (4), which was decided by the High Court of Bombay in 1869, one Jamnadas, a deceased member of a joint Hindu family, had made money as a Vakil and as a money-lender, and it was held by Couch, C. J., and Newton, J., that the onus of proving that the property so acquired by Jamnadas was his self-acquired property was upon the party alleging that it had been self-acquired. These learned Judges approved of the judgment of the High Court of Madras in *Chalakonda Alasani* v. *Chalakonda Ratnachalam* (2).

In *Durvasula Gangadharuda* v. *Durvasula Narasammah* (5), which was decided by the High Court of Madras in 1872, it was proved that a Vakil had received from his father nothing more than a general education, and it does not appear that the Vakil was distinguished by his professional learning. Kindersley, J., considered that the fair presumption was that such attainments as the Vakil possessed had been acquired with the assistance of the family means, and that presumption not having been rebutted by evidence of the acquisition of such attainments without such assistance, he held that the professional earnings of the Vakil were subject to partition. The judgment of Kindersley, J., suggests that he considered that if the professional gains of the Vakil had not been merely the result of the general education which he had received at the expense of the joint family to which he belonged, but had been the result of much legal learning or skill, his professional gains would have been his self-acquired property. Holloway, J., entertained no doubt that the fund representing the professional earnings of the Vakil was partible, and expressed his full adherence to the judgment of the High Court of Madras in *Chalakonda Alasani* v. *Chalakonda Ratnachalam* (2), and especially to the statement in that case, that the ordinary gains of science by one who has received a family maintenance are certainly partible, and concluded his judgment by observing, "I do not believe, moreover, that within the meaning of the authorities the Vakil's business is matter of science at all." Apparently Holloway, J., regarded the learning in the law required by a Vakil of his day as inferior to the science necessary to her success in her line of life of an Indian dancing girl.

In *Pauliem Valoo Chetty* v. *Pauliem Sooryah Chetty* (1), which came before this Board in 1877, the Board on the evidence found that the son had not been educated by means of any joint fund of the family, but out of the separate estate of his father, over which the father had an absolute power of disposition. In that case the Mitakshara, Chapter, 1, sections 4, 6, 7 and 8, and the decisions in *Chalakonda Alasani* v. *Chalakonda Ratnachalam* (2), *Dhunookdharee Lall* v. *Gunput Lall* (3), *Bai Manchha* v. *Narotam Das Kashidas* (4) and *Durvasula Gangadharudu* v. *Durvasula Narasammah* (5) were referred to in argument before the Board, and their Lordships with reference to them observed—"It does not become necessary to consider whether the somewhat startling proposition of law put forward by the appellant, which, stated in plain terms, amounts to this: that if a member of a joint Hindu family receives any education whatever from the joint funds he becomes for ever after incapable of acquiring by his own skill and industry any separate property, is or is not maintainable. Very strong and clear authority would be required to support such a proposition. For the reasons that they have given, it does not appear to them necessary to review the text-books or the authorities which have been cited on this subject. It may be enough to say that according to their Lordships' view, no texts which have been cited go to the full extent of the proposition which has been contended for. It appears to them, further, that the case reported in the tenth volume of Sutherlands's 'Weekly Reporter,' in which a judgment was given by Mr. Justice Jackson and Mr. Justice Mitter, both very high authorities, lays down the law

bearing upon this subject by no means so broadly as it is laid down in two cases which have been quoted as decided in Madras, the first being to the effect that a woman adopting a dancing girl and supplying her with some means of carrying on her profession was entitled to share in her gains; and the second, to the effect that the gains of a Vakil who has received no special education for his profession are to be shared in by the joint family of which he was a member; decisions which have been to a certain extent also acted upon in Bombay. It may hereafter possibly become necessary for this Board to consider whether or not the more limited and guarded expression of the law upon this subject of the Courts of Bengal is not more correct than what appears to be the doctrine of the Courts of Madras."

That intimation appears to have had its effect upon Courts in India.

In *Boologam* v. *Swornam* (6), which was decided in 1881, Innes and Kernan, JJ., on the evidence having found that the earnings of the dancing girls, who had received an ordinary education sufficient to fit them to earn a living as dancing girls, were acquired by them without detriment to the family estate and without any scientific acquirements which had been imparted by the aid of the family fund held that the earnings of the girls were their self-acquired property.

In *Lakshman Mayaram* v. *Jamnabai* (7), which was decided in 1882, Melvill and Kemball, JJ., who considered that the dictum of Mitter, J., in *Dhunookdharee Lall* v. *Gunput Lall* (3), that the Hindu Law nowhere sanctions the contention that acquisition of a member of a Hindu family who has received education is liable to partition, is not strictly accurate, held that when the Hindu texts "speak of the gains of science which has been imparted at the family expense, they intend the special branch of science which is the immediate source of the gains, and not the elementary education which is the stepping stone of all science," and consequently that the property which was acquired by a Subordinate Judge who had received a mere elementary education at the family expense, but had obtained in a lawyer's office and in the Sadar Adalat that knowledge of law and judicial practice which had qualified him for the post of a Judge, was his self-acquired property and was impartible.

In *Krishnaji Mahadev* v. *Moro Mahadev* (8), which was decided in 1890, Birdwood and Candy, JJ., held that the gains made as *karkuns* by two members of a joint Hindu family who had received only a rudimentary education at the expense of the joint family were their self acquired property.

In *Lachmin Kuar* v. *Debi Prasad* (9) Burkitt and Dillon, JJ., in 1897, approved of the decision in *Krishnaji Mahadev* v. *Moro Mahadev* (8) and following it held that the gains from employment in the Commissariat Department of a member of a joint Hindu family, who was not shown to have had any assistance from the joint family funds except his support in early years and the usual rudimentary education, were his self-acquired property.

With the exception of the cases to which they have referred, no case decided in India, or in which this Board has expressed an opinion on the question as to whether the gains of a member of a joint Hindu family, who had been educated at the expense of the joint family, are in law to be considered as his or her self-acquired property or as belonging to the joint family, has been brought to the attention of their Lordships.

Their Lordships will assume that the Sanscrit word used in the Mitakshara which Mr. Colebrooke translated as "science" means "learning." The latter apparently is the meaning of the word which has been generally accepted by the Courts in India. It gives the Sanscrit word a wider meaning than it would otherwise have. It would be difficult, if not impossible, to ascertain what could have been the science or sciences which the author of the Mitakshara, Vijnanesvara, who wrote his commentary in the latter part of the eleventh century, had in contemplation if he used a word which meant "science" strictly so called and is not susceptible of the wider and more comprehensive meaning "learning."

In construing the texts of the Mitakshara which their Lordships have quoted, it is necessary to bear in mind that education beyond that of a very elementary kind must have been limited to very few of the people for whose guidance the Mitakshara was written, and that for that limited few there could have been then no education attain-

able in the arts, sciences, and professions of that time comparable with the education now obtainable and necessary for a successful career in the arts, sciences, and professions of the present day. It may be assumed that the author of the Mitakshara, who was construing and explaining the more ancient texts of the Hindu Law for the benefit and guidance of the Hindu community, could not have intended to penalise an education which was not in his contemplation and of which necessarily he knew nothing. Nor can it be assumed that his intention was to penalise and discourage self-acquired skill, or the exercise of high mental abilities or great individual effort in winning success in an art, or science, or a profession. He must have been writing of education—learning—such as he knew it to be, and when he laid down that the gains obtained from an education received at the expense of a joint family should be partible, he could not have intended that such gains should include the gains which were the result, not of the education received at the expense of the joint family, but of the peculiar skill, mental abilities and individual effort in applying and improving such education exercised by the person who had been educated at the expense of the joint family. Their Lordships cannot find in the texts of the Mitakshara any authority for contention in this case that the gains made as a clerk, as a broker or as a money-lender personally and without the aid of the joint funds by a member of a joint family who received an ordinary education suitable to his position as a member of the family to which he belonged, should in law be regarded as partible and not as his self-acquired property. The question of whether a man who happening to be a member of a joint family carried on his business, whatever it was, personally for his own personal benefit without detriment to the joint family fund, or carried on such business as a member of the joint family, for the benefit of the point family, is a question of fact to be determined on the evidence. No inferences can be drawn from the fact that until Shewaram became a Pleader's clerk he was maintained by the joint family funds. As a member of the joint family he was entitled to be maintained at the expense of the joint family, and to receive an ordinary education suitable to a person of his position, as was any other member of the family.

Their Lordships are of opinion that this appeal fails and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitors for the Appellants: Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondents: Messrs. *Drake, Son and Parton.*

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1066 OF 1914.

November 1, 1917.

Present:—Mr. Rattigan, Chief Judge, and Mr. Justice Chevis.

WADHAWA SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

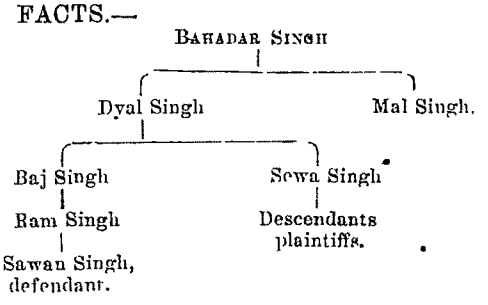
BALWANT SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Land Revenue Act (XVII of 1887), s. 44—Mutation entries, effect of—Presumption—Burden of proof.

Where the parties were present at the time when certain mutation entries were made with their consent, and the Revenue Officers made every effort to ascertain what the parties wished to be done, the entries themselves being quite clear, the onus of proving that a mistake was made lies heavily upon the party who asserts that his intention was not correctly expressed by the entries, and this onus is not discharged by showing merely that there is a certain amount of confusion in the report of the *patwari* and that the area given by that party is considerably in excess of the area received by him. [p. 279, col. 1.]

Second appeal from the decree of the Divisional Judge, Lahore, dated the 14th and 16th February 1914, affirming that of the Subordinate Judge, 1st Class, Lahore, dated the 28th October 1911, dismissing the suit that defendant is not proprietor of 494 *kanals*, 13 *marlas* of land at Dhagana.

FACTS.—



WADHAWA SINGH *v.* BALWANT SINGH.

The parties owned land in two villages, Dhagana and Bhanu Chak.

In 1866 Mal Singh's issue (absentees from Dhagana) brought a suit against issue of Sewa Singh for possession of their share in the land at Dhagana. In 1868 the case was decided and some of the then plaintiffs got decree of their share on the condition of their making over to Sewa Singh's issue the latter's share of the land in Bhanu Chak. No reciprocity was effected and the decree remained a dead letter.

In the 1868 Settlement the Revenue Authorities recorded Mal Singh's issue as absentees and so issue of Baj Singh. Mal Singh's issue was shown as proprietor of ½ of Bahadar's land and Baj Singh proprietor of ¼th and Sewa Singh's issue was recorded as in its possession.

In the Settlement of 1892, the above state of affairs was repeated.

In 1905 according to the well-known Circular No. 2 of 1903, dated 3rd June 1903, (printed in Revenue Executive Part of Punjab Record, 1903, at page 8) names of issue of Mal Singh were removed from Dhagana Revenue papers. Sawan Singh, however, in the same year got a settlement with descendants of Sewa Singh. He gave ½ of the land in his possession at Bhanu Chak and received in return ½ of Bahadar's land at Dhagana and mutations in both the villages were accordingly effected.

In April 1909, some of the parties' land at Dhagana was acquired by the Government and Sawan Singh was allowed to receive ½ of its compensation according to the mutation entry.

On 7th October 1909, descendants of Sewa Singh sued Sawan Singh for declaring that the latter was not owner of 494 *kanals* and 13 *marlas* of land in Dhagana inasmuch as by mistake of the Revenue Authorities Sawan Singh was recorded as owner of ½ of Mal Singh's land at Dhagana of which they are the sole owners and are in its exclusive possession, and that Sawan Singh was really entitled to 1/8th of the whole holding and even that had been abandoned by Sawan Singh and his ancestors and, therefore, he is not entitled to any share in the land at Dhagana. The first Court held that Sawan Singh was entitled to ½ of Bahadar's land and that mutation was effected with the free consent of the plaintiffs who were also estopped from disputing the mutual settlement.

This decision of the first Court was confirmed by the lower Appellate Court.

The plaintiffs preferred a second appeal to the Chief Court on the following

GROUNDS.—1. That the agreement, dated 1st May 1905, required compulsory registration and not being registered ought not to have been received in evidence, and that in the event of its rejection no other evidence was receivable in evidence.

2. That the mutation entries in themselves cannot create any rights and if based on an agreement which is not receivable in evidence, they can be of no avail to the defendant.

3. That the plaintiffs were not debarred in law from impugning the mutation entries:

(*a*) because the agreement was not clear as to whether the land in Daghana, of Mal Singh, absentee's branch in plaintiffs' possession, was to be put in hotchpot;

(*b*) because the plaintiff-appellant laboured under the impression that the land of Mal Singh, absentee, in Dhagana, was excluded from the agreement, but owing to misconception and mistake the matter was not cleared up at mutation.

Mr. *Sewaram Singh* for the Hon'ble Pandit *Sheo Narain*, for the Appellants.

Mr. *Nihal Chand Mehra* and Lala *Hukam Chand*, for the Respondents.

JUDGMENT.—The plaintiffs' suit was dismissed by both the Subordinate Judge and the Divisional Judge of Lahore, and this second appeal by them was admitted with reference to the question whether the agreement of 1905, referred to in detail in the judgment of the lower Courts, was admissible in evidence despite the fact that it was not registered.

After hearing the case very thoroughly and exhaustively argued, we are of opinion that the question at issue between the parties can be decided without reference to the said agreement, and that the determination of the case really depends on the proceedings before the Revenue Officers in 1905 and the mutation entries that were then made. It is obvious, and indeed not now disputed, that the claim of the plaint-

iffs as laid in their plaint was exaggerated and that the defendant is unquestionably entitled to at least one-fourth of the land in dispute. The sole question is whether he is not entitled to a half of that land. When mutation took place in 1905, plaintiffs' party were fully represented before the Revenue Officers, and both Courts are agreed that the entries that were then made, were made at the request and with the full knowledge of Rattan Singh, *lambardar*, and the other plaintiffs who were present. We see no reason ourselves to differ from this finding. According to these entries, the defendant Sawan Singh is entitled to a half of all the lands in Mauza Dhagana. The appellants' contention now is that the Revenue Officers made a mistake, and that the real intention of the parties at that time was that Sawan Singh should receive merely a half of the land originally belonging to Dyal Singh and that Sewa Singh should retain all the land belonging to Mal Singh and his descendants. In support of this argument we were referred to the history of the case, to the various proceedings at mutation, and also to the fact that if Sawan Singh received in Mauza Dhagana a half not only of Dyal Singh's land but also of Mal Singh's land, the bargain would have been a one-sided one, inasmuch as Sewa Singh was given merely a half of Dyal Singh's land in Chak Bhanu where Mal Singh and his descendants continued to own and possess their ancestral share.

Admitting for the sake of argument that there is a certain amount of confusion in the reports made by the *patwari* at the time of mutation and that the area given by the plaintiffs is considerably in excess of the area received by them, we are still of opinion that the appellants have failed to make out a case for our interference. The parties admittedly were present at the time when the entries were made, and so far as we can see, the Revenue Officers made every effort to ascertain what they wished to be done. Again the entries themselves are quite clear, and the onus of proving that a mistake was made lies very heavily upon the plaintiffs who assert that their intention was not correctly expressed by those entries. In our opinion they have entirely failed to discharge this onus and we see no reason to differ from the conclusions at which the lower Courts arrived.

A strong point against the plaintiffs' present claim is that they made no objection whatever when in 1909 the defendant received compensation under the Land Acquisition Act for a half share of the land then taken up by Government. It is true that they brought the present suit within a few months of that award but the fact remains that at the time when it was made, they accepted the apportionment of the compensation without demur and that even in the present suit they did not claim to recover any part of the compensation paid to the defendant. We hold, therefore, that the appeal fails and it must accordingly be dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEALS FROM ORIGINAL DECREES NOS. 216 AND 330 OF 1914.

January 8, 1918.

Present:—Mr. Justice Fletcher and Justice Sir Shamsul Huda, KT.

IN No. 216 OF 1914

DURGA PRASAD JANA—PLAINTIFF—APPELLANT

versus.

DINABANDHU JANA AND OTHERS—DEFENDANTS—RESPONDENTS.

IN No. 330 OF 1914

DINABANDHU JANA—DEFENDANT No. 1—APPELLANT

versus

DURGA PRASAD JANA AND OTHERS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 21—Contract to refer to arbitration, when bars suit—Institution of suit, whether refusal to perform contract.

Per *Fletcher, J.* (*Shamsul Huda, J.*, dissenting).—The mere filing of a suit by a plaintiff who has entered into an agreement with the defendant to refer the matter in dispute to arbitration is not a refusal on his part to perform his contract within the meaning of section 21 of the Specific Relief Act [p. 280, col. 2]

The plaintiff and the defendants who were brothers entered into a registered agreement whereby, to avoid litigation, they agreed to refer their dispute to arbitration. The plaintiff, however, shortly afterwards instituted a suit in respect of the matter covered by the agreement:

DURGA PRASAD JANA v. DINABANDHU JANA.

Held, per *Fletcher, J.*—That the suit was not barred by the proviso to section 21 of the Specific Relief Act, inasmuch as its mere institution did not amount to a refusal within the meaning of that section. [p. 280, col. 1.]

Per *Shamsul Huda, J.*—That the institution of the suit amounted to a refusal on the part of the plaintiff to perform the contract he had entered into to have the dispute settled by arbitration instead of by suit, so that the suit was barred by the proviso to section 21 of the Specific Relief Act. [p. 281, col. 2.]

Appeals against the decrees of the Subordinate Judge, 1st Court, Midnapur, dated the 30th of January 1914.

Babus *Bepin Behari Ghosh, II*, and *Sajani Kanta Sinha*, for the Appellant in No. 330.

Babus *Manmatha Nath Roy, Jyotish Chandra Hazra* and *Gopendra Nath Das*, for the Respondents in No. 330.

Babu *Manmatha Nath Roy*, for the Appellant in No. 216.

Babus *Bepin Behari Ghosh, II, Sajani Kanta Sinha* and *Gopendra Nath Das*, for the Respondents in No 216.

JUDGMENT

IN NO 330 OF 1914.

FLETCHER, J.—This is an appeal by the defendant No. 1 against the judgment of the learned Subordinate Judge of the 1st Court at Midnapur. The plaintiff brought the suit for partition of properties alleged to be joint family properties.

Eight issues were framed in the lower Court, all of which except as to a property in the Sunderbans to which appeal No. 216 of 1914 relates the learned Judge decided in favour of the plaintiffs.

On the hearing of the present appeal the first point argued was that raised by issue No. 7 in the Court below.

It appears that two days before the institution of the suit the parties entered into an agreement to refer the matter to arbitration. The appellant, therefore, alleges that the suit is barred under the provisions of section 21 of the Specific Relief Act. There is no allegation in the written statement that the plaintiff refused to perform the contract to refer to arbitration, nor was any evidence given to prove such a refusal.

The question is, therefore, whether the filing of the suit amounts to a refusal within the meaning of section 21 of the Specific Relief Act. The authorities in this Court appear to me to be quite clear that the filing of a suit is not a refusal within the meaning of section 21. The first decision I would refer to is the case of *Koomud Chunder Dass* v. *Chunder Kant Mookerjee* (1), which is exactly in point. No doubt that case was a decision of a single Judge sitting on the original side but the decision which was given in the year 1879 has never been questioned.

The next decision I would refer to is that of *Crisp* v. *Adlard* (2), which was an appeal from the Recorder of Rangoon. Against these decisions of the Court which have stood for many years the appellant relies on the decision in *Ram Chandra Pal* v. *Krishna Lal Pal* (3).

That decision can be supported on the ground that the learned Judges held that the suit was not cognisable by a Court of Small Causes.

But in so far as it held that the mere filing of a suit was a refusal within section 21 of the Specific Relief Act, I must respectfully dissent from that decision. Such a view, having regard to the fact that the learned Judges held that the suit was not cognisable by a Court of Small Causes, was unnecessary for their decision. Moreover, the learned Judges do not consider the terms of section 21 or the earlier decisions of this Court which apparently were not cited to them. I agree with the learned Subordinate Judge that it is not shown that the plaintiff has refused to perform the agreement to refer to arbitration and that section 21 of the Specific Relief Act is not a bar to the present suit.

I regret that my learned brother is of a different opinion on this issue.

The only other point argued in this appeal is the question raised by issue No. 4. This matter can be dealt with shortly.

The defendants set up a false case of an earlier separation between the parties, which the learned Judge found against them in the Court below and which they have not attempted to support in this Court. The appellant has also in this Court not challenged the finding of the learned Judge that the *pucca* house is joint family property.

(1) 5 C. 498; 5 C. L. R. 284; 2 Ind. Dec. (N. S.) 925.

(2) 23 C. 956; 12 Ind. Dec. (N. S.) 635.

(3) 17 Ind. Cas. 600; 17 C. W. N. 351.

Nor is it challenged in this appeal that on the death of Narahari, the grandfather of the parties, certain properties passed to them as joint. There is also the admitted fact that after the death of Narahari certain lands were purchased on behalf of the family although the defendants have tried to explain away this purchase. I agree with the learned Judge that there was a nucleus of joint family property out of which other properties could be acquired.

Moreover the *karbars* appear to have been carried on in the joint house of the parties and no reliable books of account have been produced to show that they were the property of the defendants.

The evidence establishes that either the properties in question were acquired out of the joint family properties or were brought into the common stock by the parties. It is much too late now for any of the parties to attempt to get back portions of the property as his self-acquired property. I agree with the conclusion of the learned Subordinate Judge.

But as I have already stated my learned brother and I are not agreed as to whether section 21 of the Specific Relief Act is a bar to the suit.

Accordingly under the provisions of section 98 of the Code of Civil Procedure the present appeal is dismissed with costs, three hundred rupees.

IN No. 216 of 1914.

This is an appeal by the plaintiff against the finding of the learned Judge that a property in the Sunderbans did not form a portion of the joint family property. Part of the property was transferred by deed of gift by Prasanna Kumar Jana to the son of the defendant No. 2.

The plaintiff's case was that the transfer was really one in favour of the family in consideration of debts due by Prasanna to the family. But there is no reliable evidence that such debts were in fact due. There is no reason to dissent from the finding of the learned Judge in this respect. As regards the Sunderbans Lot No. 153, which was acquired in the name of the defendant No. 2, there is nothing to support the plaintiff's case with regard to this. On the other hand the mortgage to Ram Prasad Bera on the 28th of February 1911 appears to support the case of the defendant No. 2.

I am not disposed to differ from the learned Judge on his findings as to the Sunderbans properties.

The appeal of the plaintiff must accordingly be dismissed with costs, three hundred rupees.

IN NOS. 330 AND 216 OF 1914.

SHAMSUL HUDA, J.—I regret I am unable to agree with my learned brother in the construction he has placed on section 21 of the Specific Relief Act. It may be convenient before going further shortly to state the facts so far as they bear on this question.

Plaintiff and the defendants are brothers. A dispute seems to have arisen between them regarding the partition of their ancestral properties and properties subsequently acquired Matters seem to have reached a climax seven or eight days before the 5th of August 1911, when plaintiff sent his son to Midnapur to institute a suit against the defendants. However, on the 3rd of August they entered into an agreement called the *Salisnamah*, whereby to avoid litigation they agreed to refer their dispute to the arbitration of Babu Shib Prasad Jana and two others and to be bound by the decision of the arbitrators. The document was registered on the same day and remained in the Sub Registry Office at least until the 9th of August. It appears that the plaintiff changed his mind almost immediately after the execution of the document and we have it on the record that the very next day, *i.e.*, on Friday at 11 o'clock he sent a telegram to his son to file the suit and the suit was accordingly filed on Saturday the 5th of August. There is no doubt that the suit and the agreement cover the same ground.

Upon these facts the question arises whether the institution of the suit amounted to a refusal on the part of the plaintiff to perform the contract he had entered into to have the dispute settled by arbitration instead of by suit. I think it did.

It is, however, urged that a refusal presupposes a demand and as in the present case defendants did not call upon the plaintiff to go to arbitration, the institution

of the suit cannot amount to a refusal. I cannot accede to this contention. In the first place, neither the demand nor the refusal need be express and they may both be implied. It is true the defendants did not expressly call upon the plaintiff to perform his part of the contract but it may safely be inferred, and there are no circumstances leading to a contrary conclusion, that the defendants were insisting on the plaintiff to go to arbitration and would have made an express demand upon him if only they had the opportunity of making one. The time for submitting the case to the arbitrators had not come, for it would have been necessary for the arbitrators to refer to the terms of the agreement and as I have said the document was still in the Sub-Registry Office. In the second place, it seems to me that there may be a refusal in anticipation of a demand. If, for instance, a contractor builds a house for me and before he has made the necessary measurements to prepare his bill and submit it for payment I write to him saying that he has done the work so badly that I refuse to pay him anything, I do not think I would be using inaccurate or inappropriate language. The institution of the suit in the present case conclusively showed that plaintiff was determined not to go to arbitration. This is also apparent from his subsequent conduct. When the defendant No. 1 pleaded in the written statement that section 21 of the Specific Relief Act was a bar to the suit, plaintiff tried to meet the objection by stating that he had executed the agreement on blank paper, had registered it without understanding its contents and that he had agreed to the arbitration of seven persons and not of three. He also pleaded that one of the arbitrators had refused to arbitrate. The learned Subordinate Judge, whilst holding that the institution of the suit did not amount to a refusal, has not accepted this story of the plaintiff and I agree in thinking that it is untrue. Its inherent improbability makes it unnecessary for me to enter into a detailed examination of the evidence bearing on the point and I hold that plaintiff's conduct in asking his son to institute the suit and its subsequent institution and plaintiff's attempt to repudiate the agreement are susceptible of one explanation only, namely, that plaintiff had made up his mind not to abide by his agreement and such determination on his part coupled with the institution of the suit, in my opinion, amounted to a refusal to perform the contract embodied in the *salisnamah*.

I am fortified in this view by the decision of two learned Judges of this Court in the case of *Ram Chandra Pal* v. *Krishna Lal Pal* (3). In that case Brett and Richardson, JJ., held that where a person has agreed with another that all matters in controversy between them should be referred to arbitration, it is not open to that person to resile from the agreement unless for good and sufficient cause. It has been urged, however, that this decision is an *obiter dictum*. What happened was this. The defendant in a suit instituted in the Court of Small Causes pleaded that the suit could not proceed, as there was a subsisting agreement to refer the dispute to arbitration. The plea was overruled and a decree passed in favour of the plaintiff. Defendant then moved the High Court under section 25 of the Mofussil Small Causes Courts Act and obtained a Rule upon the plaintiff to show cause why the decree should not be set aside on the ground that it was barred by section 21 of the Specific Relief Act. The learned Judges made the Rule absolute and they expressly stated to have done so on the ground on which it was issued. Then they apparently proceeded to strengthen their position by an expression of opinion that the suit was not cognisable by the Court of Small Causes at all. But the principal basis of the decision was the construction which the learned Judges placed on section 21 of the Specific Relief Act. It cannot, therefore, be said that the decision is an *obiter dictum* so far as it concerns the present question. In support of the opposite view reliance has been placed on the decision of Wilson, J., in the case of *Koomud Chunder Dass* v. *Chunder Kant Mookerjee* (1). In my opinion the law laid down in that case has reference to its particular facts. In that case defendant not only had opportunities for calling upon the plaintiff to submit to arbitration but as observed by the learned Judge in the course of argument, an occasion arose before the institution of the suit when, if the defendant wanted to insist on arbitration, he ought to have made a demand

but he omitted to do so. That is a fact which seems to distinguish that case from the present. I do not think that the decision was intended to lay down an abstract proposition of law without reference to the facts. In view, however, of the seeming conflict between this decision and the decision of Brett and Richardson, JJ., referred to above I would have been glad if my learned brother had agreed to refer the case to a Full Bench, but if I have to follow one or other of these two decisions I prefer to follow the decision of the two learned Judges of this Court. Any other view of law will have the effect of unduly narrowing the scope of section 21 of the Specific Relief Act and making the provisions of that section practically nugatory.

On behalf of the plaintiff reliance has also been placed on the case of *Tahal* v. *Bisheshar* (4). In this case plaintiff's suit was instituted more than a year after the agreement to refer to arbitration. The learned Judges found that the arbitrators did not decide the case because the parties "were contentious among themselves", and they expressed the opinion that the contract the existence of which would bar a suit under the circumstances contemplated by section 21 *must be an operative contract and not a contract broken up by the conduct of all the parties to it.* I think the words underlined (italicised) by me lay down the true test to be applied to all such cases. It has also been urged that the refusal must be antecedent to the suit and reliance has been placed on the case of *Crisp* v. *Adlard* (2). In that case after the institution of the suit the defendant had called upon the plaintiff to go to arbitration in accordance with a previous agreement and this the plaintiff refused to do, and the learned Judges held that this refusal could not bar a suit previously instituted. In that case the question was not raised and perhaps having regard to the facts of the case it could not be said that the institution of the suit itself amounted to a refusal, and the learned Judges were not called upon to express an opinion on that point nor did they express any.

It has also been urged that it is inexpedient to refer the parties to arbitration after the case has been fully gone into and a decision obtained on the merits. The words of the section are, however, peremptory and leave no room for exercise of any discretion.

In the view that I take Appeal No. 330 of 1914 should be decreed with costs and the decree of the Subordinate Judge reversed.

I agree with my learned brother on the other points discussed by him in his judgment and also in dismissing Appeal No. 216 of 1914 with costs.

Appeals dismissed.

(4) 8 A. 57; A. W. N. (1885) 331; 4 Ind. Dec. (N. S.) 1063.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 2163 OF 1915.

December 6, 1917.

Present:—Mr. Justice Chevis and Mr. Justice Shadi Lal.

FIRM OF CHELA RAM SANT RAM—PLAINTIFF—APPELLANT

versus

KISHAN CHAND AND SONS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXX, r. 1—Suit by firm—Name of firm—Misdescription—Contract Act (IX of 1872), ss. 239, 242—Partnership—Agent sharing profits and losses, whether partner.

In India it is a common practice for a firm to be known by the name of father and son, even after both are dead and the business is carried on by the son's son. [p. 284, col. 1.]

Where a firm continues to be known by its old name, but the name of the actual head of the firm is sometimes added to the old name, the omission of such addition from the name of the firm in a suit by the firm does not amount to a misdescription. [p. 284, col. 1.]

A *gomashta* sharing in the profits as well as in the losses of a business is a partner in the business. [p. 284, col. 2.]

First appeal from the decree of the Senior Subordinate Judge, 1st Class, Rawalpindi, dated the 17th June 1915, dismissing plaintiff's claim.

Messrs. *Tek Chand* and *Jagan Nath*, for the Appellant.

Mr. *Gobind Das*, for the Respondents.

JUDGMENT.—This is a suit for Rs. 5,655-15-3, brought by a money lending firm. The name of the firm is shown in

the plaint as Chela Ram-Sant Ram, and the plaint is signed by Jetha Nand, who describes himself as agent and co-sharer in the firm. The suit has been dismissed on the grounds (1) that the proper name of the firm is Chela Ram-Sant Ram-Tirath Ram and (2) that Tirath Ram is the only member and sole proprietor of the firm, Jetha Nand and Jamna Das being merely *gomashtas* and not partners. As to (1), Tirath Ram is a son of Sant Ram. It is a common practice for a firm to be known by the name of father and son, even after both are dead and the business is carried on by the son's son. So in this case it appears that the shop is still known by the name of Chela Ram and Sant Ram though occasionally the name of Tirath Ram is also added. For all practical, everyday purposes the firm seems to be still known by the old name and we are unable to see that there has been any misdescription. We note that in the deed of hypothecation on which this suit is based (see page 6 of the paper-book) the firm is described as the "firm known as Lala Chela Ram-Sant Ram."

As to (2) there are the statements of Tirath Ram (page 43) and of Jetha Nand (page 47) and the agreement between Tirath Ram, Jetha Nand and Jamna Das (pages 3-5). Tirath Ram no doubt speaks of himself as the sole owner (*malik*) of the firm and so does Jetha Nand. And in the agreement also Tirath Ram is spoken of as the owner, but it seems obvious to us, reading the whole of the evidence and of the agreement, that this only means that Tirath Ram is the sole capitalist. The agreement shows clearly that Jetha Nand and Jamna Das were to have a share in both profit and loss, *labh sukh*, which is equivalent to *nafa nuqsan*. The lower Court says they were to be responsible for losses only if they acted against the orders or without the permission of the owner or traded on their own account. We do not find this in the agreement, which merely says that if they carry on other business they must do so with the permission of Tirath Ram, who will take the profit but not be liable for losses.

For defendants it is pointed out that according to the agreement Jetha Nand and Jamna Das are not only to receive a monthly allowance, but are also liable to dismissal, and that the shop can be closed at the will of the proprietor. No doubt considerable powers were reserved to himself by the owner when admitting Jetha Nand and Jamna Das into partnership, but the fact remains that the two latter were clearly made partners in both profits and losses. There is a note under section 242, Cunningham and Shepherd's Contract Act, 11th Edition, that if a man is a clerk or servant of a firm under an agreement entitling each party to a certain notice, the circumstance that he is in part remunerated by a share of the profits *and has to bear a certain share of the losses* does not make him a partner so as to enable him to bring a suit to have the business wound up and a Receiver appointed. But we know of no case in which it has been held in India that a *gomashta* sharing in losses as well as in profits is not a partner.

We hold that Jamna Das and Jetha Nand are partners.

Accepting the appeal we set aside the order of the Senior Subordinate Judge dismissing the suit and return the case to him for decision on the merits. Stamp on appeal to be refunded, other costs of this appeal to be costs in the cause.

Appeal accepted; Case remanded.

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

November 26, 1917.

Present:—Lord Buckmaster, Sir John Edge, Sir Walter Phillimore, Bart., and Sir Lawrence Jenkins.

BHAGWANDAS PARASRAM (A FIRM)—PLAINTIFF—APPELLANT

versus

BURJORJI RUTTONJI BOMANJI, SINCE DECEASED NOW REPRESENTED BY DULICHAND SHIVLAL—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), s. 30—Wagering contract, what is—Common intention to wager, necessity of—Specu-

BHAGWANDAS PARASRAM v. BURJORJI RUTTONJI BOMANJI.

lation, whether amounts to wagering—Pakka Adatias, *position of.*

Speculation does not necessarily involve a contract by way of wager: to constitute such a contract a common intention to wager is essential. The mere fact that one party to a contract for sale of goods does not intend to deliver, even if known to the other party, does not vitiate the contract, unless there is a bargain or understanding between the parties that delivery is not to be called for. [p. 286, col. 2.]

Pakki adat dealings are well established as a legitimate mode of conducting commercial business in the Bombay market, and the acts of a *pakka adatia* as such are not unlawful. [p. 286, col. 2.]

Defendant instructed plaintiffs, a firm of *pakka adatias*, to sell for him three several lots of linseed amounting in all to 4,000 tons for September delivery. The market went against the defendant, and the plaintiffs discharged their obligations to their buyers by delivering 300 tons of linseed, and by making cross-contracts and paying differences as to the balance. They then sued the defendant for indemnity:

Held, that the fact that the defendant was a speculator who never intended to give delivery and that the plaintiffs did not expect him to deliver did not convert the contract into a wager. [p. 286, col. 2.]

Appeal from a decree of the Bombay High Court, dated the March 28, 1913, reported as 20 Ind. Cas. 834, reversing a decree of Beaman, J., reported as 19 Ind. Cas. 29.

FACTS appear from their Lordships' judgment and from the reports in 19 Ind. Cas. 29; 37 B. 347 and 20 Ind. Cas. 834; 38 B. 204.

Sir *W. Garth*, for the Appellant.—The Appellate Court have erred in holding that the contracts sued on are wagering contracts. This Board have held that the law as to wagers formerly in force in India has been superseded by section 30 of the Indian Contract Act, which in Bombay is supplemented by Bombay Act III of 1865, sections 1, 2. The appellant firm were *pukka adatias*. A *pakka adatia* can accept the contract himself, or he can pass it on: in either case he guarantees the price and gets a commission. What the *pakka adatia* does with the contract does not concern the principal at all. As to the custom of *pakki adat*, I would refer to *Bhagvandas* v. *Kanji* (1), the authority of which has been accepted by both the lower Courts.

The Appellate Court, though not suggesting that we ourselves could win or lose by the rise or fall of the market, have held that we were gambling ourselves with reference to the sub-contracts into which we entered. The only points they rely on are (1) a conversation with our *gomasta* who is reported to have said that 300 tons of linseed were bought by us "for Court purposes." Our representative was not even cross-examined as to this; (2) the fact that in all the sub-contracts delivery to a particular Marwari firm was barred. This, the High Court say, was because that firm might require delivery, but of this there is no proof. These points were not raised in the pleadings. The onus of proof on these two matters is on defendant-respondent, and he has altogether failed to discharge it.

[LORD BUCKMASTER.—The central point in the case is, was there or was there not a stipulation, a term in the contract, express or implied, by which you were never to ask for delivery.]

Appellants here were mere commission agents, entitled to remuneration and re-imbursement of expenses, but they took no risks. It is the essence of a wager that each side should stand to win or lose according to the result of the event as to which a risk is taken. *Sassoon* v. *Tokersey* (2).

JUDGMENT.

SIR LAWRENCE JENKINS.—This appeal arises out of a suit for the recovery of money. Many defences have been pleaded, but only one need now be noticed; it is that the transactions on which the claim rests were agreements by way of wager. At the trial several issues were framed and the third was in these terms:—

"Whether the transactions mentioned in the plaint are not wagering transactions and whether the plaintiffs were not aware of the defendant's intention to deal in differences only?"

The Trial Judge, sitting on the Original Side of the High Court at Bombay, found all the issues in the plaintiffs' favour, and passed a decree for the amount claimed.

On appeal the Appellate Bench of the High Court agreed with the findings of the Trial Judge on all the issues but the third. On that it held in favour of the defendant, and dismissed the suit.

(1) 30 B. 205 at pp. 210, 215; 7 Bom. L. R. 611.

(2) 28 B. 616 at pp. 624, 625; 6 Bom. L. R. 521.

It is from that decree that this appeal has been preferred by the plaintiffs, and the only question is whether the plea that the transactions were by way of wager has been established.

At the date of these transactions the plaintiffs were a firm carrying on a large mercantile business at Bombay, and, as a branch of it, they were in the habit of acting as *pakka adatias*. The defendant, on the other hand, was a young man without any regular business; who, with the aid of winnings in a lottey, engaged in speculative transactions on the Bombay market.

In June and July 1910, he instructed the plaintiffs to sell for him three several lots of linseed amounting in all to 4,000 tons for September delivery.

On the strength of this order the plaintiffs sold linseed to this amount by separate contracts to thirty-nine buyers. Though the transactions took the form of sales by the defendant to the plaintiffs, followed by re-sales by the plaintiffs to thirty-nine buyers, the plaintiffs acted throughout as *pakka adatias*, and, to secure them against loss, sums amounting in the aggregate to Rs. 61,000 were deposited with them by the defendant as margin money.

The market went against the defendant, and at the end of August the plaintiffs asked him either to give delivery of the linseed, or to authorise them to purchase linseed on his behalf. The defendant, however, did neither the one nor the other, and so the plaintiffs, acting within their rights, discharged their obligation to the thirty-nine buyers by delivering 300 tons, and by making cross-contracts, and paying differences as to the balance of the linseed. The result was, that after giving the defendant credit for the Rs. 61,000 deposited as margin money, and a sum of Rs. 5,804-2 3 due to him on another account, there was due to the plaintiffs Rs. 90,763-14-6, unless the plea of wagering is an answer to their claim. To determine whether this plea is applicable, it is necessary to consider the real nature of the relations between the parties to the transactions. The case has proceeded in both the Courts on the footing that the plaintiffs were employed by the defendant, and acted as *pakka adatias*, and the description in *Bhagwandas* v. *Kanji* (1) of the customary incidents of such an employment was applicable to the circumstances of this case, though it is to be noted that the defendant was not an upcountry constituent.

The plaintiffs, therefore, acted in conformity with the terms of their employment when they made the contracts with the thirty-nine buyers.

And as they made these contracts in exercise of the authority conferred upon them and became liable for their performance, they also became entitled to be indemnified by their employer, the defendant, against the consequences of the acts done by them unless those acts were unlawful. There is no suggestion that the acts of a *pakka adatia* as such are unlawful; on the contrary, *pakki adat* dealings are well established as a legitimate mode of conducting commercial business in the Bombay market.

No doubt the contract of a *pakka adatia*, as that of anyone else, may be by way of wager; but can it be said that the employment of the plaintiffs by the defendant was of this description?

It has not been shown that there was any bargain or understanding between the parties, either express or implied, that linseed was not to be delivered, nor was it a term of the employment that the plaintiffs should protect the defendant from liability to make delivery.

It may well be, as suggested in the evidence of Hargopal, that the defendant was a speculator, who never intended to give delivery, and even that the plaintiffs did not expect him to deliver; but that would not convert a contract, otherwise innocent, into a wager. Speculation does not necessarily involve a contract by way of wager, and to constitute such a contract a common intention to wager is essential.

No such intention has been proved.

Under the sales to the thirty-nine buyers it was the right of each buyer to call for delivery, but as the plaintiffs had carried through the transaction as *pakka adatias* of the defendant the rise or fall of the market was a matter of no concern to them, except so far as it might enhance the risk of recovering complete indemnity from their

employer. Their right was to their commission and to an indemnity against loss as incidents of their employment.

The mere fact that as to the greater part of the linseed there was no delivery, but an adjustment of claims cannot alone vitiate the transactions.

The learned Judges in appeal were evidently impressed by the statement ascribed to the plaintiffs' *munim* that the delivery of 300 tons was made for the purpose of Court proceedings and by the clause in the contracts forbidding delivery to Messrs. Narandas Rajaram and Co. Their Lordships, however, attribute no importance to either of these matters. Even if the *munim's* statement be regarded as proved—a point on which their Lordships are, in the circumstances, far from satisfied—it would mean no more than that the plaintiffs fancied an actual delivery would tend to allay such doubts as the Court might otherwise have as to the reality of the transactions. But this was in no sense inconsistent with this reality. At the same time the clauses forbidding delivery to Messrs. Narandas Rajaram clearly cannot be regarded as throwing any doubt on the transactions. No such suggestion seems to have been made at the trial in the Court of first instance, and it does not appear to their Lordships to be reasonably susceptible of the significance ascribed to it.

Their Lordships, therefore, hold there was no ground for setting aside the decree of the Court of first instance, and they will, therefore, humbly advise His Majesty to restore it and to reverse the decree of the High Court on appeal, ordering instead of it that the appeal to it be dismissed with costs. As the defendant Burjorji has died during the pendency of the appeal, and the present respondent has been appointed at the instance of the appellants to represent him for the purpose of this appeal alone, there will be no order as to the costs of this appeal.

Appeal dismissed.

Solicitors for the Appellant: Messrs. *Ashurst Morris Crisp & Co.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 317 OF 1916.

February 24, 1917.

Present:—Mr. Stanyon, A. J. C.

DINDAYAL—DEFENDANT—APPLICANT

versus

DEONATH—PLAINTIFF RESPONDENT.

C. P. Courts Act (II of 1904), s. 15, scope of—'Value of suit," meaning of—Amendment of plaint, effect of—Appeal, forum *of.*

Plaintiff sued for the recovery of Rs. 1,651-15-0, but subsequently, on different dates, he gave up his claim to the extent of Rs. 651-12-5 leaving a balance of Rs. 1,000-3-0 Through mistake, however, he prayed only for a decree for Rs. 988-3-7. The first Court dismissed the claim but on appeal to the District Judge the decree was set aside and the suit was remanded for a decision on merits, with the result that a decree was passed in favour of the plaintiff for Rs. 988-3-7 claimed by him:

Held, that the value of the suit was Rs. 988-3-7 and that an appeal lay to the District Judge and not to the Court of the Divisional Judge. [p. 290, col. 1.]

Jurisdiction in the matter of appeals in the Central Provinces is governed by section 15 of the Central Provinces Courts Act, 1904. The words "value of the suit" as used in that section invariably mean value of the relief originally claimed by the plaintiff in the plaint or increased or reduced by voluntary amendment, that is to say, value of such relief as is made the subject-matter of the Court's decision. [p. 288, col. 2.]

Motabhai Motilal v. *Surat City Municipality*, 20 B. 675; 10 Ind. Dec. (N. S.) 1019, *Kalooram Kurmi* v. *Ram Kishen Kurmi*, 8 C. P. L. R. 86, *Olpherts* v. *Arjundas*, 20 Ind. Cas. 928; 9 N. L. R. 112; *Shriram* v. *Chunni Lal*, 27 Ind. Cas. 988; 11 N. L. R. 13, distinguished.

Where a plaintiff voluntarily reduces an original claim, it is the reduced claim which represents the value of the suit for the purposes of appeal. [p. 289, col. 1.]

A Court cannot adjudicate itself out of the jurisdiction given to it by law over the suit as instituted. [p. 289, col 1.]

Application for revision of the order of the Divisional Judge, Chhattisgarh Division, dated the 9th September 1916.

Messrs. *J. C. Ghosh* and *N. G. Sarkar*, for the Applicant.

Mr. *M. R. Bobde*, for the Respondent.

JUDGMENT.—It is necessary to make a short statement of the material facts. On the 14th April 1914 the plaintiffs instituted a suit in the Court of the Sub-Judge of Bilaspur claiming a sum of Rs. 1,651-15 10 as due to them from the defendant on account of their share of village profits for the six years 1907-08 to 1912-13 inclusive and interest thereon.

On the 8th September 1914, the plaintiff gave up Rs. 100 out of Rs. 200 on account

of the value of timber allegedly cut from the village forest by the defendant, and amended their plaint in some places. Again on the 5th May 1915, shortly before the trial came to an end, the plaintiffs gave up Rs. 172 4 5 claimed for tenancy and *sir* profits for the year 1907-08, Rs. 10 on account of "Najars" for that year, all the interest amounting to Rs. 269-8 0 for the six years and the remaining Rs. 100 on account of timber. These reductions of the claim produce the following mathematical result:—

Original claim			Rs. 1,651-15-10
Given up on 8-9-1914	Rs.	100-0-0	
„ „ 5-5-1915	Rs.	172-4-5	
„ „		10-0-0	
„ „		269-8-0	
„ „		100-0-0	
		651-12-5	651-12-5
Balance in suit			1,000-3-5

No contemporaneous amendment of the plaint was made, for which and for the absence of all reference to the matter in the order sheet the Sub-Judge concerned is mainly responsible. But on the 1st November 1915, after the case had been closed for judgment, a partial amendment of the plaint was made, stating that the abandonment of the above items had reduced the claim to Rs. 988-3-7 and in the prayer to the plaint the plaintiffs now asked for a decree of Rs. 988-3-7.

The Sub-Judge dismissed the suit upon a preliminary point. The plaintiffs appealed to the Divisional Judge, who set aside the decree of the First Court and remanded the suit for a decision on the merits. This time the result was a decree in favour of the plaintiffs for Rs. 988-3-7 claim.

From this decree the defendant presented an appeal to the Divisional Judge, urging that the value of the suit being over Rs. 1,000 the District Judge had no jurisdiction to entertain the plaintiffs' appeal, and, therefore, the order of remand and all proceedings consequent thereupon were *ultra vires*, and the original decree dismissing the suit was in force and had been final. The learned Divisional Judge held that the appellate jurisdiction over the suit lay with the District Judge, and made an order returning the appeal for presentation to the proper Court. From this order the present application has been made by the defendant, and the short question for decision is whether the value of the suit for the purposes of appeal is Rs. 1,651-15-10 originally claimed or Rs. 988-3-7 eventually claimed.

I am of opinion that the order made by the learned Divisional Judge is correct. Jurisdiction is governed in the matter of appeal by section 15 of the Central Provinces Courts Act, 1904. We are now concerned with clause (*b*) of that section, which enacts "an appeal from the decree or order of the Court of a Subordinate Judge, shall, where the value of the suit in such Court exceeds Rs 1,000, lie to the Divisional Court, and in any other case to the District Court".

The words requiring interpretation are "value of suit". After a careful consideration of the subject I have come to the conclusion that for the purposes of appellate jurisdiction the words invariably mean value of the relief claimed by the plaintiff in his plaint. By the word "claimed" I mean such relief as is made the subject-matter of the Court's decision. It may be the value originally claimed or an original claim increased or reduced by voluntary amendment. It is the claim upon which the plaintiff asks the Court to adjudicate. Such value may be actual or it may be artificial, according to the rule by which valuation is governed. It may be estimated by the plaintiff, or for him by Statute. That depends upon the nature of the relief. It may be a value ascertained and specified at the time of instituting the suit, or it may be a value which has yet to be ascertained by trial, as in account suits. But in every case the value of the relief on which the plaintiff has sought adjudication in the first Court represents the value of the suit for the purposes of appeal.

It was urged that the amount claimed in this suit was Rs. 1,651-15 0 and that a subsequent reduction of the claim did not affect the value of the suit for the purposes of jurisdiction. In connection with this argument reference was made to *Kalooram Kurmi* v. *Ramkishen Kurmi* (1),

(1) 8 C. P. L. R. 86.

Olpherts v. *Arjundas* (2), *Shriram* v. *Chunni Lal* (3) and *Motabhai Motilal* v. *Surat City Municipality* (4). The argument is unsound and the rulings cited are inapposite. The plaintiffs cannot be said to have claimed that which they voluntarily withdrew from their claim. The amount for which they eventually asked the Court for a decree was Rs. 988-3-7 and no Court could legally have given them a decree for a pie above that sum, because no Court can give a plaintiff more than he claims. The items specifically given up still left a balance of over Rs. 1,000, but whether from error or other cause the claim made was for Rs. 988 3-7. This was entirely different from a reduction made by a Court. If the plaintiff had continued to claim Rs. 1,651-15- 0 and the Court had held only Rs. 988-3-7 to be claimable and compelled amendment of the plaint accordingly, the value of the suit would have remained Rs. 1,651-15-10. But where a plaintiff voluntarily reduces an original claim, it is the reduced claim which will represent the value of the suit for the purposes of appeal.

In the Bombay case above cited the claim was reduced by the Court, and it was rightly held that such adjudication did not affect the natural value of the suit for jurisdictional purposes. A Court cannot ordinarily adjudicate itself out of jurisdiction given to it by law over a suit as instituted. The cases from this Court above cited were all account cases and offer no analogy to the present case In an account case the value of the suit has to be ascertained. The value of the relief claimed by the plaintiff is whatever may be found due to him on taking accounts and therefore whatever is found discloses the proper appellate *forum*. There is, however, one point on which I am conscious of difference of opinion, *viz.*, as to the power of a Court having a pecuniary limit of jurisdiction to give a decree in an account suit for a sum in excess of that limit. This power has been considered to exsit chiefly to serve convenience but I am very doubtful, with due respect, whether the conclusion is sound. The provisions of the law are imperative as to pecuniary jurisdiction, and no exception seems permissible. This is, to my mind, a much simpler solution of the problems as to what a Court is to do which finds after taking accounts that a sum is due to the plaintiff in excess of the pecuniary limits of its jurisdiction. It is to pass a decree for the maximum which the law allows it to give, and no more. A plaintiff is permitted by Order II, rule 2, of the Civil Procedure Code to relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. Where a plaintiff institutes a suit in a Court of limited pecuniary jurisdiction he must be taken to be aware of that limit. Therefore where he claims a sum due on an account to be taken and files his suit in a Court having jurisdiction upto Rs. 5,000, he should be deemed to ask for whatever may be due to him up to Rs. 5,000 and to relinquish whatever may be due to him above that sum; and if the debt works out to, say, Rs. 5,750 the Court would accurately comply with law by giving him a decree for Rs. 5,000. He cannot in common sense ask for more than he knows to be in the "Bank" to which he goes for his money. The value of his suit when filed was an unknown sum not exceeding Rs. 5,000. However, this particular question is not before me, and, therefore, it is not necessary to express any further dissent from the view that in an account suit a Court may grant relief in excess of its pecuniary jurisdiction. There is no doubt, however, that if a plaintiff by voluntary amendment increased his claim beyond the pecuniary limit, he would have to carry his plaint to another Court. That is not the case when he voluntarily reduces the claim because reduction does not disable the Court in the same way as increase beyond its pecuniary jurisdiction. Section 13 of the Central Provinces Courts Act only applies to an original institution. Whether a plaint is to be returned in a case of reduction of claim is a matter of procedure to be regulated by the circumstances of each case. If a Sub-Judge's case is reduced into a Munsif's case before any trial has been entered upon the plaint may be returned, though the law does not require it. But

(2) 20 Ind. Cas. 928; 9 N. L R. 112.
(3) 27 Ind. Cas. 988; 11 N. L R. 13.
(4) 20 B. 675; 10 Ind. Dec. (N. S.) 1019.

where the trial has made substantial progress it should be concluded by the Sub-Judge.

For the reasons given I hold that the value of the suit in this case was Rs. 989-3-7 and that the plaintiff's appeal lay and the defendant's appeal lies to the District Judge. Whether it can and should now be admitted by that Court is a matter for decision by the District Judge. This application is dismissed with costs. I allow Rs. 2[illegible] as Pleader's fees in this Court.

Application dismissed.

PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.

October 29, 1917.

Present:—Lord Buckmaster, Sir John Edge, Sir Walter Phillimore, Bart., and Sir Lawrence Jenkins.

ANANT RAM, SINCE DECEASED NOW REPRESENTED BY LACHMI NARAIN AND OTHERS—APPELLANTS

versus

THE COLLECTOR OF ETAH AND OTHERS—RESPONDENTS.

Hindu Law—Joint family—Mortgage of joint property by manager who is not father—Necessity—Burden of proof—Mortgage without necessity, whether binds mortgagor's own share.

A mortgage of joint family property made by the manager of the family, who is not the father of the other members of the family, can only be justified so far as it is necessary for joint family purposes. If the necessity cannot be established by direct evidence, it may be assumed if it can be shown that reasonable care was taken to ascertain if such circumstances existed and the transferee acted in good faith. In either case the burden of proof lies on the person who claims the benefit of the mortgage. [p. 291, cols. 1 & 2.]

If the mortgage debt was not incurred for necessity, not even the mortgagor's own interest can be sold in enforcement of the mortgage [p. 291, col. 2.]

Narain Prasad (Lachhman Prasad) v. *Sarnam Singh*, 40 Ind. Cas. 284; 44 I. A. 163; 15 A. L. J. 584; 2 P. L. W. 29; 21 C. W. N. 99; 33 M. L. J. 39; 19 Bom. L. R. 646; 26 C. L. J. 79; (1917) M. W. N. 516; 6 L. W. 334; 39 A. 500 (P. C.), followed.

When the mortgage is for a larger amount than the necessity warrants, it will only be upheld to the extent to which necessity is proved. [p. 292, col. 1.]

A *zemindar*, manager of a joint family, mortgaged three joint villages for Rs. 3,000 to pay the Government revenue. The lender sued on the mortgage and the other members of the joint family contested the validity of the mortgage. It was proved that Rs. 1,698 odd were actually paid as revenue of two of the villages out of the money lent, but no evidence was given as to the disposal of the balance:

Held, that the mortgage was enforceable to the extent of Rs. 1,698 only against the joint villages and that as regards the balance, not even the mortgagor's own share in those villages was bound. [p. 292, col. 1.]

Appeal from a decree of the Allahabad High Court, dated May 11, 1911, varying that of the Subordinate Judge of Aligarh.

FACTS of the case are sufficiently set out in their Lordships' judgment.

Mr. *Dube*, for the Appellants, submitted that the lender in these cases is not bound to see to the application of the money. Here proper enquiry was made by the lender as to the existence of legal necessity. The recital of such necessity in the mortgage deed is sufficient. *Nanda Lal Dhur Biswas* v. *Jagat Kishore Acharjya Chowdhuri* (1).

[SIR W. PHILLIMORE.—All that that case decided was what was evidence of necessity, not that enquiry would supply the absence of necessity.]

My case is that the whole of the Rs. 3,000 was wanted for revenue.

[Sir W. PHILLIMORE.—You have not shown that the balance over and above Rs. 1,698 was even due.]

My case is that a representation was made that the money was due for Government revenue, and on that representation we acted.

The respondents did not appear.

JUDGMENT.

LORD BUCKMASTER.—The question raised in this appeal is as to the rights of certain mortgagees under and in respect of a mortgage which was dated the 4th September 1894. That mortgage was executed by one Raja Sheoraj Singh, the manager of certain joint property held by himself and his brother, Maharaj Singh, and governed by the Mitakshara Law. The mortgage was for the sum of Rs. 3,000 with interest at the rate of 1 rupee 2 annas per cent. per month, with compound interest and half-yearly

(1) 36 Ind. Cas. 420; 43 I. A. 249; 20 M. L. T. 335; 31 M. L. J. 563; (1916) 2 M. W. N. 336; 4 L. W. 458; 44 C. 186; 18 Bom. L. R. 868; 14 A. L. J. 1103; 24 C. L. J. 487; 1 P. L. W. 1; 20 C. W. N. 225 (P. C.)

rests. The mortgage affects three villages, and on the face of it there is a recital that the money was lent in order that the mortgagor might pay the Government revenue. The original mortgagee is dead, and his representatives instituted the proceedings out of which this appeal has arisen for the purpose of enforcing their rights under the mortgage-deed. A considerable number of defences were raised by the different parties who were made defendants to those proceedings, but for the purpose of the present appeal only one of those defences needs consideration. That defence is this: that the property that was mortgaged being joint property, a mortgage could only be operative to the extent to which the mortgage-money was needed for the necessities of the joint estate. The learned Judge before whom the case was heard allowed the whole of the original mortgage debt to stand, but reduced the rate of interest. The High Court, to whom an appeal was brought, has allowed the mortgage for part only of the original sum, namely, for the sum of Rs. 1,698-5-0 and has restored the full rights of interest which the mortgagee possessed under the deed on that sum.

The appeal from that judgment has been brought under an order made by the High Court, who thought that the appeal gave rise to two questions of importance, the first being: "Whether the burden lies upon a mortgagee who takes a mortgage from the manager of a joint Hindu family governed by the Mitakshara Law to prove that the debt was incurred for family necessity"; and the second: "Whether, if the debt was not so incurred, the interest of the manager of the family, that is, of the mortgagor, in the mortgaged property could be sold in enforcement of the mortgage." It is to be observed that the grounds upon which the appeal was permitted do not include the question of considering whether, in point of fact, more than the amount allowed by the High Court had in fact been raised by way of necessity; but this point has been argued and considered by their Lordships.

As to the first of these two questions their Lordships entertain no doubt. The mortgage of joint estate made by the manager of the property, who is not the father of the other members of the joint family, can only be justified so far as it is wanted for the joint family purposes. If the necessity cannot be established by direct evidence, it may be assumed if it can be shown that reasonable care was taken to ascertain if such circumstances existed and the transferee acted in good faith (section 38, Transfer of Property Act). In either case the burden of proof lies on the person who claims the benefit of the mortgage. There is no difference between the burden of proof when it is desired to support a mortgage made by a manager of a joint estate and that which is required to support the mortgage made, for example, by a widow who has only a similar limited power of disposition. In the case of *Nanda Lal Dhur Biswas* v. *Jagat Kishore Acharjya Chowdhuri* (1), following previous decisions to the same effect, it was stated in perfectly clear and unambiguous terms that the burden of proving that such dispositions were lawful rests upon the persons who seek to claim benefits under them. The question, therefore, which the High Court thought needed consideration, so far as the burden of proof is concerned, must be decided against the appellants.

As to the second point, that question so far as it covers mortgages in the same Province as the Province from which this appeal has been brought, has also been decided, since the judgment of the High Court, adversely to the appellants' contention in a case to which their Lordships' attention was called, *Narain Prasad (Lachhman Prasad)* v. *Sarnam Singh* (2).

There remains only the point as to whether in this case the High Court were right in thinking that the mortgagee had only discharged the burden thrown upon him of proving necessity for the deed to the limited extent of the Rs. 1,698. Now the facts with regard to that matter are these: There were three villages that were the subject of the mortgage. The statement in the deed was that the money was needed to pay the Government revenue.

(2) 40 Ind. Cas. 284; 44 I. A. 163; 15 A. L. J. 584; 2 P. L. W. 29; 21 C. W. N. 99; 33 M. L. J. 39; 19 Bom. L. R. 646; 26 C. L. J. 97; (1917) M. W. N. 516; 6 L. W. 334; 39 A. 500 (P. C.).

What payments were made in respect of that revenue could easily be established by calling the proper witnesses, and, indeed, one such witness was called for the purpose of proving payments in respect of two of the villages, and he showed payments to the amount for which the High Court has allowed the mortgage to stand. The mortgagee cannot allege that the witnesses who could prove the necessity, on the existence of which his security depends, are inaccessible, or cannot now be obtained through lapse of time or for other good reason. The proof could have been and ought to have been laid before the Court by the appellants, on whom the burden rests. That burden they have failed to discharge, and in their Lordships' opinion the High Court was perfectly right in deciding that the security stood to the limited extent only of the necessity proved. They will, therefore, humbly advise His Majesty that this appeal should be dismissed.

Appeal dismissed.

Solicitors for the Appellant: Messrs. *Barrow, Rogers & Nevill.*

PATNA HIGH COURT.

APPEALS FROM APPELLATE ORDERS NOS. 61 TO 88 OF 1917.

February 1, 1918.

Present:—Mr. Justice Chapman and Mr. Justice Atkinson.

BUDHAN MAHTON AND OTHERS—DEFENDANTS-APPELLANTS

versus

Musammat WAZI HUNNISSA BEGUM AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII B C. of 1885), s. 37—Enhancement of rent—Illegal contract for enhancement, whether bars subsequent suit for enhancement.

Section 37 of the Bengal Tenancy Act contemplates a prohibition against enhancement of rent in respect of a contract validly made and binding between the parties; an illegal or invalid contract made within fifteen years of the last enhancement does not come within the provisions of the section so as to operate as a bar to the institution of a suit for enhancement of rent. [p. 293, col. 1.]

Appeals from a decision of the District Judge, Patna.

Messrs. *Kulwant Sahai* and *Sant Prasad*, for the Appellants.

Messrs. *Fakhruddin* and *Khurshed Husnain*, for the Respondents.

JUDGMENT.

ATKINSON, J.—These appeals have come before us from a decision of Mr. Ross, the District Judge of Patna. The plaintiffs sued to enhance the rent payable by certain tenants on their property. Thirty-four appeals were taken before the learned District Judge and out of 34 only 28 cases are now pending in second appeal before us. The plaintiffs, who are the *zemindars*, let the lands in suit to the defendants as tenants. Sometime about the year 1882 they leased the property to a *ticcadar*, who was entitled to collect from the tenants the rents payable by them.

In the year 1882 the *ticcadar* sued the tenants for an enhancement of rent. The suit was dismissed; and after the dismissal of the suit while an appeal was pending the parties came to an agreement, the *ticcadar* on the one side and the tenants on the other. By that agreement, the tenants agreed to pay an enhanced rent for the years 1291 to 1293. In 1294 the agreement was revived and again the tenants entered into an agreement with the *ticcadar* to pay an enhanced rent from the years 1294 to 1301. In 1301 the *ticcadar* again came to an agreement to enhance the rent for the years 1302 to 1310. The tenants agreed to pay a further enhanced rent to the *ticcadar* by an agreement which continued in operation till 1310. In 1311 a further arrangement was come to between the *ticcadar* and the tenants by which the tenants agreed to pay a further enhanced rent for the years 1311 to 1319. Subsequently when the matter came before the Settlement Officer it was pointed out that the contract that was made between the parties in 1311 was illegal. The grounds on which it was declared to be illegal do not appear. But there are obvious reasons for holding that the agreement was illegal; firstly, because it was an agreement which was made within 15 years of the date of the last enhancement. Such an agreement is prohibited by section 37 of the Bengal Tenancy Act. Therefore, the agreement that

was arrived at in the year 1311 between the parties was illegal. No doubt after that agreement was entered into, the tenants did pay the rent provided thereby to be paid, but clearly the rent was in excess of the amount provided in the agreement in 1302.

It is urged now in second appeal that the learned Judge was wrong in holding in point of law that this suit was not barred by the provisions of section 37 of the Bengal Tenancy Act. It was contended before the learned Judge that inasmuch as there was a contract providing for enhancement of rent in the year 1311 that no suit could be instituted by the plaintiffs now to enhance the rent, an enhancement of rent having already taken place within 15 years prior to the institution of this suit. It is right to observe that the *ticcadar* made the contract in 1311 and not the plaintiffs as *zemindars*. The learned District Judge, Mr. Ross, has held that the provisions of section 37 do not apply to this case. That section, we think, clearly contemplates a prohibition against enhancement of rent in respect of a contract validly made and binding between the parties; but that if an illegal or invalid contract and one not legally binding is made within the period of 15 years that such a contract does not come within the provisions of section 37 of the Bengal Tenancy Act so as to operate as a bar to the institution of a suit for enhancement of rent. We think the view taken by the learned Judge as to the proper construction to be put upon section 37 was right. The wording of the section runs as follows: "A suit for enhancement of rent of a holding shall not be entertained if within 15 years next preceding its institution the rent of the holding has been enhanced by a contract made between the landlord and the tenants." Giving a legal interpretation and construction to these words, it appears to us that they must mean that the contract then made between the parties to operate as a bar to a subsequent suit for enhancement must be a contract legally binding and operative as between the parties to it; but that these words cannot apply to a contract which is void and illegal. This appears to us to be the correct interpretation of section 37. Therefore, the enhanced rent arrived at by the agreement of 1311 would not operate as a bar to the present suit for enhancement of rent. Accordingly we think the learned District Judge was right in his view of the construction of section 37 and we dismiss these appeals with costs.

It is right to say that the plaintiffs must suffer for the illegal action of the *ticcadar* in so far as the receipt of rent over and above the rate stipulated by the agreement of 1302 is concerned. After the enhancement is made by the learned Judge on remand, which we confirm, we direct that in the future payment of rent the tenants will be entitled as against future rent to deduct in respect thereof the sums paid by them between the years 1311 to 1316 in excess of the rent provided by the agreement of 1302. The deductions will be without interest. We dismiss the appeals.

CHAPMAN, J.—I agree.

Appeals dismissed.

MADRAS HIGH COURT.

SECOND APPEAL No. 1277 OF 1916.

December 6, 1917.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

ABI DHUNIMSA BIBI AMMAL—PLAINTIFF—APPELLANT

versus

MUHAMMAD FATHI UDINI SAHIB AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Dower, incidents of—Minor, renunciation of dower by, validity of—Majority Act (IX of 1875), s. 2—'Capacity to act,' meaning of.

The relinquishment of dower by a Muhammadan minor does not bind her when she attains age according to the Indian Majority Act. [p. 296, col. 1.]

The injunction of Muhammadan Law which prohibits acts being done by a minor to his prejudice must be taken to operate till the age at which the minor attains majority under the ordinary law of the land. [p. 295, col. 2.]

The Majority Act should not be construed so as to deprive a person of rights which he would otherwise be entitled to. [p. 295, cols. 1 & 2.]

A Muhammadan female cannot be said 'to act' in the matter of dower within the meaning of section 2 of the Majority Act when she gives up her rights to it. [p. 296, col. 1.]

Bai Shirinbai v. *Kharshedji*, 22 B. 430; 11 Ind. Dec. (N. S.) 869, distinguished.

Dower, under Muhammadan Law, is in the nature of a debt, being a recompense for the matrimonial restraint. The wife has a lien over the property of her husband in her possession for unpaid dower and she ranks *pari passu* with other creditors in the distribution of her husband's estate. [p 294, cols. 1 & 2.]

When the Legislature by section 2 of the Majority Act permitted a person to act in the matter of dower

it only intended to allow that person who was not otherwise competent under the ordinary law to act in that matter to initiate the religious acts or ceremony which under the personal law he or she was capable of initiating. The legal consequences flowing from this primary act were not intended to be controlled by the section. [p. 295, col. 1.]

Second appeal against the decree of the District Court of South Arcot, in Appeal Suit No. 211 of 1915, preferred against that of the Court of the District Munsif, Chidambaram, in Originial Suit No. 629 of 1914.

Mr. *T. R. Venkatarama Sastriar*, for the Appellant.

Mr. *N. Rajagopalachariar*, for the Respondents.

JUDGMENT.—This is a suit by a Mahomadan lady for dower. The defence is that when her husband was on his death bed and she was only 15 years of age she relinquished her right in the dower. The question for consideration is whether this relinquishment debars the plaintiff from suing to recover it. The District Munsif found that the dower was released but the release was brought about by undue influence and fraud and that, consequently, plaintiff was entitled to recover it. The learned District Judge has written an interesting judgment in which, while accepting the conclusion of the District Munsif that there was a release of the dower, he differs from the lower Court on the question of fraud and finds that the release is binding upon the plaintiff.

The question is not covered by any authority and is one of some importance. It has to be decided on first principles. Under the Muhammadan Law, a dower, as pointed out by Mr. Justice Abdur Rahim in his book on Muhammadan Jurisprudence, "is a sum of money or other form of property to which the wife becomes entitled by marriage; it is not a consideration proceeding from the husband for the contract of marriage, but is an obligation imposed by the law as a mark of respect for the wife". In Hamilton's Hedaya, Chapter 15, section 1, the right to dower is said to have been founded upon the text "Let him support her according to his abilities". It is pointed out in this treatise "that when a woman surrenders herself to the custody of her husband it is incumbent upon the latter thenceforth to provide her with food, clothing and lodging because such is the precept both in the Koran and in the traditions and also because maintenance is a recompense for the matrimonial restraint." The author is apparently of opinion that the fixing of dower is a recompense for the surrender. It is stated in Muhammadan Law books that even though no dower may have been fixed on the date of the marriage, the wife is entitled to some dower from the estate of the husband. That is the nature and origin of the dower or *mahar* in Muhammadan Law.

The character of the obligation to pay the dower is as a debt. The moment that dower is settled, it passes from the domain of a moral precept into an enforceable debt. It has been held that the wife has a lien over the property of her husband in her possession for unpaid dower. It has also been held that she would rank *pari pasu* with other creditors in the distribution of the estate of her husband. See *Meer Meher Ally* v. *Musammat Amanee* (1) and *Syud Imdad Hossein* v. *Musammat Hosseinee Buksh* (2). Mr. Tyabji in his principles of Muhammadan Law discusses the case and says that the widow's claim for dower due from the estate of her deceased husband ranks equally and rateably with the claims of other creditors.

Having now arrived at a conclusion as regards the nature and character of dower, the next question is whether a minor can give up her rights to it. There cannot be much doubt that where a Muhammadan female attains an age which according to Muhammadan Law is the age of majority, she can release her rights to dower. In the present case the plaintiff was a major according to Muhammadan Law. But as regards general contractual obligations the Indian Contract Act has superseded the Laws of Hindus and of Muhammadans. If this question were not complicated by the exception contained in the Indian Majority Act to which we shall presently refer, there could be no doubt the renunciation of the dower by plaintiff could not bind her.

Now the question is whether section 2 of Act IX of 1875 has made any difference in this respect. That section lays down that nothing in the Indian Majority Act shall affect the capacity of any person "to act in the matter of dower". It was contended

(1) 11 W. R. 212; 2 B. L. R. A. C. J. 306.
(2) 2 N. W. P. H. C. R. 327.

by Mr. Rajagopalachariar for the respondent that in releasing the right to dower the plaintiff was acting in the matter of the dower. There is some justification for this contention in the language employed by the learned Judge of the Bombay High Court in *Bai Shirinbai* v. *Kharshedji* (3). That was a case relating to Parsees and the question there was whether a Parsee minor suing to have a marriage declared void was acting in the matter of marriage. The learned Judges seemed inclined to hold that the plaintiff brought herself within the meaning of section 2 of the Indian Majority Act. In our opinion the construction placed upon the word 'act' seems far-fetched. As Mr. Venkatarama Sastriar for the appellant contended, the word 'act' has been used as a comprehensive verb to control the steps to be taken in four specified classes of cases:—marriage, dower, divorce and adoption. It is not very apt as applied to dower, although it is full of meaning as applied to the other three classes. It must be remembered that the primary object of the Indian Majority Act was to reserve liberty to the Indian subjects of the sovereign to exercise their rights in matters specially pertaining to religion or religious usages. No attempt was made in the Majority Act to indicate the legal rights which might flow upon the exercise of these rights. The object was to confer a privilege and not endanger ordinary civil rights. Civil and contractual rights might flow upon the exercise of such rights. The ordinary law was intended to take its course in respect of these correlative rights. Therefore, in our opinion, when the Legislature permitted a person to act in the matter of dower it only intended to allow that person, who was not otherwise competent under the ordinary law, to act in that matter to initiate the religious acts or ceremony which under the personal law of the subject he or she was capable of initiating. In our opinion the legal consequences flowing from this primary act were not intended to be controlled by section 2 of the Indian Majority Act.

One other consideration to be borne in mind is this. The Indian Majority Act should not be so construed as to deprive a person of rights which he is otherwise entitled to. What was intended to be a beneficent legislation should not be construed as operating to deprive the ordinary rights of a person. Under the Muhamamdan Law as pointed out by Mr. Justice Abdur Rahim in his book, "generally speaking only such acts and transactions of a minor will be upheld as are of benefit to him and whatever is injurious to his interests will be disallowed". He says again, "but an infant with or without permission of his guardian cannot do any act which is absolutly injurious to his interests, such as divorcing his wife or making a gift or *wakf* of his property or lending his money. Similarly, a bequest of an infant is void because it is laid down that it is better for a man that he should leave his heirs rich rather than they should beg of people". No doubt, this prohibition against the act of an infant is removed when he or she attains majority as understood by Muhammadan lawyers. But the question still remains whether when the British Government enacted a uniform rule as to the age of majority, it was intended to deprive minors belonging to the Hindu or Muhammadan communities from enjoying the privilege of that legislation by operation of section 2 of the Indian Majority Act. In our opinion the injunction of Muhammadan Law which prohibits injurious acts being done by a minor to his prejudice must be taken to have been preserved till the age at which he or she attains majority under the ordinary law of the land.

There is one other passage in Mr. Justice Rahim's book which is rather significant. He says, "an infant, even if possessed of understanding, is, however, under no obligation with respect to what is regarded in law as a benevolent act, having a semblance of penalty; he is also not liable to penalties which are in the nature of private rights like retaliation." This passage has some bearing upon the finding of the learned District Judge. The act of renunciation by the plaintiff is said to have occurred under the following circumstances. Her deceased husband was suffering from cholera. He was a pious man and was anxious that he should be relieved of all obligations contracted by him prior to his death, as he believed

(3) 22 B. 430; 11 Ind. Dec. (N S.) 869.

that if he died an undischarged debtor he would not be able to attain salvation. It was apparently to ease the mind of her husband in this behalf, that the plaintiff is said to have cried out that she released her rights of dower. That is undoubtedly a benevolent act intended to secure religious benefit to her husband. In the passage which we have cited from Mr. Rahim's book such a benevolent renunciation would be regarded as not binding upon a person even though he or she be good of understanding. We are not sure whether the learned author intended to lay down that, where the age of majority according to the Muhammadan Law had been attained, such a renunciation would still be not binding. But apart from that question, in our opinion, such a purely gratuitous act on the part of the minor should not bind her when she attains the age of majority. As we pointed out at the beginning, the moment that the marriage is contracted the dower due to her becomes a debt and before a debt can be relinquished the person must be of age according to the law of the land. In our opinion the plaintiff was not acting in the matter of dower when she said that she gave up her rights to it. We are, therefore, of opinion that the decision of the District Judge should be reversed and that of the District Munsif restored with costs in this and in the lower Appellate Court.

Appeal allowed.

PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 105 OF 1917.

July 26, 1917.

Present:—Sir Edward Chamier, KT., Chief Justice, and Mr. Justice Sharfuddin.

KRISHNA PRASAD—DECREE-HOLDER—APPELLANT

versus

BIDYA NANDA—JUDGMENT-DEBTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 38—Execution—Warrant of arrest, whether can be executed outside jurisdiction of execution Court—Jurisdiction.

The jurisdiction to issue a warrant for the arrest of a judgment-debtor in execution of a decree is territorial, that is to say, a warrant of arrest issued by an executing Court must be executed, if at all, within the limits of the jurisdiction of that Court, but the fact that the judgment-debtor, at the time of the application, does not reside within the jurisdiction is not necessarily a sufficient reason for refusing to issue a warrant. In such a case, however, a time must be fixed for the return of the warrant. [p. 296, col. 2]

Appeal from an order of the District Judge, Patna, dated the 17th February 1917, confirming that of the Subordinate Judge, Patna, dated the 12th December 1916.

Messrs. *Rai Tribhuan Nath Sahai*, *Nirsu Narain Singh* and *Lachmi Narain Singh*, for the Appellant.

Mr. *Ram Prasad*, for the Respondent.

JUDGMENT

CHAMIER, C. J.—This is an appeal against an order of the District Judge of Patna, affirming an order of the Subordinate Judge, 2nd Court, Patna, dismissing an application for the issue of a warrant for the arrest of the judgment-debtor. The Subordinate Judge says that the decree-holder is not entitled to the issue of a warrant because the judgment-debtor does not reside within the jurisdiction of the Court. This is not a sufficient reason for refusing to issue a warrant. The District Judge says that the jurisdiction of the Court to arrest in execution is territorial only and he, therefore, dismissed the appeal. I agree with the District Judge that the jurisdiction is territorial, that is to say, that a warrant of arrest issued by the Subordinate Judge of Patna must be executed, if at all, within the limits of the jurisdiction of the Subordinate Judge of Patna, but the fact that the judgment-debtor, at the time of the application, did not reside within the jurisdiction is not necessarily a sufficient reason for refusing to issue a warrant. The decree-holder may have information that the judgment-debtor is about to come within the jurisdiction and he may apply for a warrant in order that he may arrest the judgment-debtor as soon as the latter comes within the jurisdiction. By this I must not be understood to mean that it would be proper for the Court to issue a warrant to lie in the office for an indefinite time. A time must be fixed for the return of the warrant. The decree-holder in this Court suggests that it would

be possible to execute the Subordinate Judge's warrant outside the territorial jurisdiction of the Subordinate Judge. I cannot accept the suggestion. I would set aside the orders of the Courts below and direct them to dispose of the application according to law. As, however, the intention of the decree-holder seems to have been to execute the warrant outside the jurisdiction I would make no order as to costs.

SHARFUDDIN, J.—I agree.

Order set aside.

CALCUTTA HIGH COURT.

APPEALS FROM ORIGINAL DECREES NOS. 26 AND 31 OF 1915.

December 8, 1917.

Present:—Mr. Justice Fletcher and Justice Sir Shamsul Huda, KT.

IN No. 26 OF 1915

THE BENGAL COAL COMPANY, LIMITED—*Pro forma* DEFENDANT No. 33—APPELLANT

IN No. 31 OF 1915

ELIAS MEYER—DEFENDANT No. 1—APPELLANT

versus

MONORANJAN BAGCHI AND OTHERS—RESPONDENTS IN BOTH.

Mining lease—Lessee of share working mine, whether can be restrained by lessees of other shares—Accounts of profit, claim for, by other lessees, whether maintainable—Acquiescence—Limitation Act (IX of 1908), Sch. I, Art. 142—Dispossession and discontinuance of possession of mine—Surrender—Relinquishment.

The mere fact that a mine has not been worked does not amount to a dispossession or discontinuance of possession within the meaning of Article 142, Schedule I of the Limitation Act [p. 298, col. 2.]

In this country a surrender or relinquishment does not require to be in writing but can be inferred from the acts of the parties. [p. 298, col. 2.]

Chundermonee Nya Bhooshun v. *Sumbhoo Chunder Chuckerbutty*, W. R. Special No. 270, followed.

Where a lessee, having been defeated in a suit by a rival lessee for restraining him from exercising his leasehold rights, ceased to pay rent to his landlords and some of the co-sharer landlords then granted a fresh lease to another person:

Held, that the lessee abandoned the lease and that the abandonment was accepted and acted upon by the co-sharer landlords. [p. 299, col. 1.]

Where a lessee of a share in a mine works the mine, the lessees of other shares are not entitled to an account of profits unless it is shown that the defendant has worked more than his fair share or that there has been an actual ouster or destruction of common property by his working the mine, nor can the plaintiffs get a decree for ejectment of the defendant from the mine. The proper remedy of the other lessees is a suit for partition and when such a suit is brought, the Commissioner for partition should be directed to award, if possible, to the lessee who has been working the mine the portion of the property of which he is in possession and on which he has spent money. [p. 299, cols. 1 & 2.]

The claim of a lessee of a share in a mine for accounts of profits from the lessee of other shares who has been working the mine would be barred by acquiescence, if the plaintiff knowing that the other lessee was spending large sums of money to develop the mine did not promptly come in with his claim for an account of the profits. [p. 299, col. 1.]

Appeals against the decrees of the Subordinate Judge, 2nd Court, Burdwan, dated the 18th September 1914.

Sir *Rash Behari Ghose*, Babus *Provash Chandra Mitter* and *Satindra Nath Mookerjee*, for the Appellant in No. 31.

Babus *Mohendra Nath Roy*, *Hara Prosad Chatterjee*, *Jatindra Nath Lahiri*, *Dwarka Nath Chackerbutty*, *Hemendra Nath Sen*, *Bankim Chandra Mookerjee*, *Satish Chandra Mookerjee*, and *Sib Chandra Palit*, for the Respondents in No. 31.

Babus *Dwarka Nath Chackerbutty* and *Hemendra Nath Sen*, for the Appellant in No. 26.

Babus *Mohendra Nath Roy*, *Hara Prosad Chatterjee*, *Jatindra Nath Lahiri*, *Provash Chandra Mitter*, *Satindra Nath Mookerjee*, and Babu *Bankim Chandra Mookerjee* for Babu *Hem Chandra Mookerjee*, for the Respondent in No. 26.

JUDGMENT.

IN R. A. No. 31 OF 1915.

FLETCHER, J.—This is an appeal by the defendant No. 1 from the judgment of the learned Second Subordinate Judge of Burdwan, dated the 18th of September 1914.

The plaintiff brought the suit as assignee of a mining lease for recovery of possession and mesne profits. The leases which have been granted of the property appear to be as follows:—

The first lease (the date of which does not appear) was of 66 *bighas* granted to one Mr. D. Smith. This interest is now vested in the Bengal Coal Company.

The next lease is dated the 25th of April

1856 and was granted to Messrs. Gordon Stuart and Co. on behalf of the Bengal Coal Co. The lease was by the 16-annas *maliks* of "approximately 800 *bighas* of *patit danga* land" at a rent of 8 annas a *bigha*. The lease granted both the surface and mineral rights. On the 13th of May 1901 the Bengal Coal Co. underleased their rights to the Barabani Coal Co.

By a lease, dated the 20th of August 1874, the 12-annas co-sharers granted a lease of 300 *bighas* within the boundaries mentioned in the lease described as "Paddy Shuna and waste land" to Bejoy Nath Chatterjee. On the 1st December 1900, this lease was purported to be assigned to the plaintiff. On the 6th of November 1894 a lease was granted by the 12-annas co-sharers to Hari Charan Singh of 1199 *bighas*. This on the 17th of October 1901 was assigned to the defendant No. 1. The owners of the remaining 4 annas on the 29th of January 1907 granted a lease to the defendant No. 1. The Bengal Coal Co. had on the 2nd of September 1875 instituted a suit in the Court of the District Judge of Burdwan against Bejoy Nath Chatterjee for the purpose of obtaining an injunction restraining Bejoy from continuing two shafts on about half a *cotta* of land and from "doing acts of digging coal in the other lands."

By his judgment, dated the 4th of July 1877, the learned District Judge held that the lease to the Bengal Coal Co. included all the "Danga" land and was not limited to the 800 *bighas* and further that the two shafts that were being sunk by Bejoy were on land included in the lease to the Bengal Coal Co. He accordingly granted an injunction restraining the defendant from taking coal or minerals from any portion of the land comprised in the lease to the Bengal Coal Co. and from working the two shafts.

Bejoy then appealed to the High Court but his appeal was dismissed for default in the year 1878.

Bejoy from that time disappeared from the scene and was not heard of again until the present plaintiff found him out and took an assignment of his lease for the sum of Rs. 250.

It is said that Bejoy continued to pay the rent reserved by his lease. I have no doubt that the evidence purporting to prove payment of rent is false and was put forward with a view to proving that the lease to Bejoy was subsisting.

The defendant No. 1, having acquired the lease to Hari Charan Singh and having taken a lease of the other 4 annas on the 29th of January 1907, began to work the coal. The present plaintiff instituted this suit on the 29th of November 1912.

The learned Subordinate Judge by his judgment, dated the 18th of September 1914, decreed the same.

The present appeal (No. 31 of 1915) has been preferred by the defendant No. 1 against that judgment.

The first argument that was raised on the hearing of this appeal was that the suit was barred by limitation.

The property in dispute being mining rights the mere fact that the minerals had not been worked is not a dispossession or discontinuance of possession within the meaning of the Limitation Act. But it was argued that as the Bengal Coal Co. had brought a suit to prevent Bejoy working the minerals and when that suit was successful Bejoy abandoned the property with the intention of exercising no further dominion over the same and so there was a discontinuance of possession within the meaning of the Limitation Act.

This argument is closely allied to another argument that Bejoy abandoned the holding and, therefore, his lease has long since terminated.

In the view that I take on the second argument it is unnecessary for me to express an opinion on the question of limitation.

In this country a surrender or relinquishment does not require to be in writing but can be inferred from the acts of the parties. This is well illustrated by the case of *Chundermoonee Nya Bhooshun* v. *Sumbhoo Chunder Chuckerbutty* (1), a decision which has never been questioned in this Court.

Do the facts then in this case show that Bejoy intended to relinquish the holding?

After the termination of the litigation with the Bengal Coal Co., nothing was heard of Bejoy till he purported to assign his lease to the plaintiff for Rs. 250. During that period I find on the evidence Bejoy paid no rent. Moreover, there is the important fact that in 1894 the 12-annas co-sharers who

(1) W. R. Special No. 270.

were Bejoy's landlords granted to Hari Charan Singh a fresh lease; thus recognising that Bejoy had abandoned and relinquished his tenure. It seems fairly obvious that the plaintiff, who was manager and a great friend of Hari Charan Singh's, came somehow to hear of Bejoy's lease which he acquired for a trifling sum and the defendant No. 1 having purchased the lease of Hari Charan the present suit was brought against him as an attempt to compel him to part with a large sum to the plaintiff.

In my opinion Bejoy had abandoned the lease long before the sale to the plaintiff and that abandonment had been accepted and acted upon by the 12-annas co-sharers as the landlords.

But even if the lease was in existence I could not agree to the form of relief granted to the plaintiff. The defendant No. 1 is admittedly the lessee of the 4-annas share in the property. There being no actual ouster or destruction of the common property by the defendant No. 1 working his pits, the plaintiff is not entitled to an account in the absence of proof that the defendant No. 1 has worked more than his fair share. This proposition is in accordance with the decision of this Court in the case of *Mahesh Narain* v. *Nowbat Pathak* (2).

The evidence shows that the defendant No. 1 is working the coal under a few *bighas*. There is nothing to prevent the plaintiff from working his own share if his lease had been found to be subsisting.

Further the evidence shows that the plaintiff knew or must have known that the defendant No. 1 was spending large sums of money to develop the mines and having acquiesced in the defendant's so doing it would in any case be much too late for him to come in and claim an account of the profits. [see *Parrott* v. *Palmer* (3)]. The plaintiff himself says he saw the defendant No. 1 in possession from the year 1907 and yet he does not bring his suit till 1912. Nor can the form of the decree ordering ejectment of the defendant No. 1 be supported. If the plaintiff has a subsisting lease his proper remedy is partition and if a partition were to be awarded there should, I think, have been a direction to the Commissioner to award to the defendant No. 1, if possible, the portion of the property he was in possession and on which he has spent so much money.

I think the judgment appealed against cannot be supported. I would, therefore, allow this appeal and dismiss the plaintiff's suit with costs both in this Court and in the Court below.

IN R. A. No. 26 OF 1915.

This is an appeal by the defendants the Bengal Coal Co. against the same judgment as that appealed against in Appeal No. 31 of 1915. The learned Subordinate Judge found that the plaintiff had no cause of action against the Bengal Coal Co. They say, however, that they apprehend that the obervations made by the learned Subordinate Judge may prejudice their position on some future occasion and, therefore, they have filed this appeal. These apprehensions are unfounded as the observations they refer to cannot prejudice their position when the Judge held that there was no cause of action against them. The appeal is dismissed. We make no order as to costs.

SHAMSUL HUDA, J.—I agree with my leaned brother.

Appeal No. 31 *allowed*;
Appeal No. 26 *dismissed.*

(2) 32 C. 837; 1 C. L. J. 437.
(3) (1834) 3 My. & K. 632 at p. 643; 40 E. R. 241; 41 R. R. 149.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1510 OF 1916.
November 15, 1917.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

KARNAM CHOWDAPPA AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
KARNAM NARASAMMA AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Succession—Apostacy by Hindu widow and subsequent re-marriage, effect of—Caste Disabilities Removal Act (XXI of 1850)—Hindu Widows' Re-marriage Act (XV of 1856), s. 2.

Section 2 of Act XV of 1856 does not apply to the case of a widow who has been converted to another religion and while in the second religion marries a husband. [p. 300, col. 1.]

The word 'widow' in the section applies only to such widows who continue to be Hindus at the time of re-marriage. [p. 300, col. 2.]

Therefore, where the property of her deceased husband has once vested in a Hindu widow, her subsequent conversion to another religion and re-marriage thereafter will not divest it. [p. 301, col. 1.]

Abdul Aziz Khan v. *Nirma*, 20 Ind. Cas. 335; 35 A. 466; 11 A. L. J. 678, followed.

Matungini Gupta v. *Ram Rutton Roy*, 19 C. 289 (F. B.); 9 Ind. Dec. (N. S.) 638, applied.

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Bellary, in Appeal Suit No. 41 of 1916, preferred against that of the Court of the District Munsif, Bellary, in Original Suit No. 124 of 1912.

Mr. *B. Somayya*, for the Appellants.

Mr. *Sultan Mohideen*, for the Respondents.

JUDGMENT.—The suit is by a reversioner for a declaration that the alienation made by the 1st defendant is invalid beyond her lifetime. The 1st defendant's husband, Ramachandrappa, died 30 years ago. His widow, the 1st defendant, married a Muhammadan in 1894. There is evidence to support the conclusion of the lower Courts that she was a convert to Muhammadanism before she married her present husband and we must accept that finding. On this finding the question is whether the 1st defendant has been in possession of the property for 30 years since her husband's death, and whether the plaintiff's suit is barred by limitation. The Courts below have come to the conclusion that it is so barred because, from the moment of her marriage, her possession was adverse to the plaintiff, but we are unable to agree with them.

There are two Acts to be considered in this connection. The first is Act XXI of 1850, known as the Caste Disabilities Removal Act. By that Act a person who is a convert to another religion does not lose his rights in the estate which he or she inherited while that person belonged to some other religion. The effect of that Act is to remove a disability which conversion was supposed to have imposed under the common law of the country. That is the Act which really governs this case. The second Act to which our attention was drawn is Act XV of 1856. By its preamble and by the tenor of its provisions it is clear that that Act applies only to cases where a Hindu widow re marries as such, because the preamble distinctly says: "Whereas many Hindus believe that this imputed legal incapacity (referring to the re marriage of widows) although it is in accordance with established custom, is not in accordance with a true interpretation of the precepts of their religion, and desire that the civil law administered by the Courts of justice shall no longer prevent the Hindus who may be so minded from adopting a different custom in accordance with the dictates of their own conscience; and whereas it is just to relieve all such Hindus from this legal incapacity of which they complain, and the removal of all legal obstacles to the marriage of Hindu widows will tend to the promotion of good morals and to the public welfare; it is enacted etc." It is clear from this that the Act was intended solely to apply to cases where a Hindu widow had re-married while she still remained a Hindu. Therefore, section 2 of the Act, which speaks of her being regarded as dead on her re-marriage, can have no application to the case of a person who has been converted to another religion and while in the second religion marries a husband. Section 2 was introduced to placate those who pleaded that it was a sacrilege to the memory of the deceased husband that his widow who has sullied his bed by remarrying should be allowed to enjoy his property.

Our attention has been drawn to the decision of the Full Bench in *Matungini Gupta* v. *Ram Rutton Roy* (1). In that case four Judges of the High Court including the Chief Justice took the view that section 2 of Act XV of 1856 prevented a Hindu widow, who had become a *Brahmo*, from inheriting her husband's estate. The learned Chief Justice who delivered the judgment of the Court says: "Section 2 includes all widows who are within the scope of the Act, that is to say, all persons who, being Hindus, become widows, and it must follow from this that if any such widow marries she is deprived by section 2 of the estate which she inherited from her Hindu husband." Justice Princep dissented, and in our opinion the word 'widow' in section 2 applies only to those who continue to be Hindus at the time of re-marriage. We may point out that in the order of reference

(1) 19 C. 289 (F. B.); 9 Ind. Dec. (N. S.) 638.

pronounced by three Judges—Justice Wilson, Justice Banerjee and Justice Princep—Mr. Justice Banerjee took the view that section 2 would not apply to all widows. The learned Judge was further of opinion that a Hindu widow who re-married would be disentitled to inherit the property of her husband not because of Act XV of 1856 but by the precepts of Hindu Law. He says that Hindu text-writers allowed a Hindu widow to inherit her husband's property on the principle that she was the surviving half of her deceased husband and that inheritance should cease when she has become the better half of some other person. It may be anomalous that while a Hindu widow who re-marries is not entitled to the entire estate of her husband, if she is converted and then married she should be allowed to continue in possession of the property. But the Legislature has not intervened in this matter and we are not at liberty to import considerations of this nature in construing the Act.

The view which we take is in accordance with the decision in *Abdul Aziz Khan* v. *Nirma* (2). As pointed out in that case, Act XV of 1856 has no bearing upon a case where the widow who marries is not a Hindu at the time of marriage. We entirely agree with this proposition.

As regards the view taken by Mr. Justice Banerjee in *Matungini Gupta* v. *Ram Rutton Roy* (1), if the matter were not concluded by the authority of the Privy Council we would hold with him that, under Hindu Law, a woman who has been false to her husband's bed by conversion and by re-marriage should not be allowed to inherit the property of her husband But the decision of the Privy Council in *Mouiram Kolita* v. *Keri Kolitani* (3) concludes this matter. There it was held that where property is once vested in a woman her subsequent unchastity would not divest her of the estate. The principle of that decision applies to the present case. At the highest this woman, who was originally a Brahmin widow and has since married a Muhammadan, can only be said to have been false to the bed of her husband. If the property had vested in her before she became a convert to Muhammadanism, the subsequent marriage cannot deprive her of the estate which she had inherited from her Hindu husband.

We, therefore, hold that the decision of the Courts below is wrong, and we reverse their decision. On the other questions the case will be remanded to the Court below for disposal on the merits. Costs will abide the result.

Appeal allowed;
Case remanded.

M. C. P.

(2) 20 Ind. Cas. 335; 35 A. 466; 11 A. L. J. 678.
(3) 5 C. 776; 6 C. L. R. 322; 7 I. A. 115; 4 Sar. P. C. J. 103; 3 Suth. P. C. J. 765; 4 Ind. Jur. 363; 3 Shome L. R. 198; 2 Ind. Dec. (N. S.) 1102 (P. C.).

PUNJAB CHIEF COURT.

MISCELLANEOUS FIRST CIVIL APPEAL NO. 401 OF 1914.

February 4, 1918.

Present:—Sir Henry Rattigan, KT., Chief Judge, and Mr. Justice LeRossignol.

RAM SINGH AND ANOTHER —APPELLANTS

versus

SHAM PARSHAD—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 144—Application for restitution, nature of—Limitation Act (IX of 1908), Sch. I, Art. 182.

An application for restitution under section 144 of the Civil Procedure Code, is an application for execution of a decree within the meaning of Article 182, Schedule I of the Limitation Act [p 303, col. 2.]

Harish Chandra Shaha v *Chandra Mohan Das*, 28 C. 113, *Municipal Council, Kumbakonam* v. *Sadagopa-chariar*, 29 Ind. Cas 380, *Girdhari* v. *Sital Prasad*, 11 A. 372; A. W. N. (1889) 113; 6 Ind Dec. (N. S) 665; *Asha Bibi* v. *Nuruddin*, 30 Ind. Cas. 680; 8 Bur. L. T. 165; 8 L. B R 262, distinguished.

Miscellaneous first appeal from the order of the District Judge, Delhi, dated the 26th January 1914, granting the application of the respondent.

Mr. *D. C. Ralli* and Lala *Moti Sagar*, R. S., for the Appellants.

Mr. *Jai Gopal Sethi*, for the Respondent.

JUDGMENT.—The main issue in this appeal is whether an application under section 144 of the Code is an application for execution of a decree within the meaning of Article 182 of the Limitation Act; the Court below has held that it is such and the contention for the appellants has been that

it is not such an application but an application falling under Article 181 of the Limitation Act, further that if it be deemed to be an application for execution of a decree, the application in question is time-barred.

If the application under consideration was indeed an application to execute a decree, then it is clearly within time and appellants' Counsel admitted after a short argument that he could not really substantiate the plea of time bar under Article 182.

The following are the relevant facts and dates in the case :—

On 20th June 1904 the present appellants Ram Singh and Ram Chand secured an *ex parte* decree for Rs. 5,627 against Sham Parshad and his two brothers.

On 29th June 1904 application was made for execution and on 15th July 1904 houses in two localities in Delhi were sold and the sales were confirmed on 12th October 1904.

On 9th July 1904 Sham Parshad alone applied for the setting aside of the *ex parte* decree against him, but the matter was not concluded till 16th May 1906 when this Court on appeal set aside the *ex parte* decree against Sham Parshad and remanded the case for a decision on his pleas.

On 8th December 1906 the Court of first instance dismissed on the merits the suit against Sham Parshad. In the meantime, however, some property in Gurgaon had been auctioned, but with that property or its restitution this case has no direct concern. It is, however, necessary to mention that on 7th April 1909 an application for restitution of the Gurgaon property was made, for if an application for restitution be held to be unapplication for execution of a decree, then this application in respect of the Gurgaon property brings the present application within time, for the Gurgaon property was auctioned under the authority of the same decree as the Delhi property and both applications must be held to be applications to execute the same decree. Litigation in respect of the Gurgaon property was concluded by this Court's decision reported as *Sham Parshad* v. *Ram Chand* (1), but on 16th April 1910 the respondent had applied for restitution of the Delhi property, which application was dismissed for default on the 16th July 1910 and was followed by the present application on 17th October 1910.

The Court below has directed the appellants to refund to Sham Parshad Rs. 3,200, being the value of his interest in the Delhi property, and before us, as set forth above, the sole issue has been that of limitation, and the question calling for decision is whether an application for restitution falls under Article 181 or Article 182 of the Limitation Act.

The Court below holds that proceedings under section 144 are execution proceedings and has quoted in support of its view :—

Venkayya v. *Ragavacharlu* (2), *Nand Ram* v. *Sita Ram* (3), *Thakar Mahan Chand* v. *Lala Ganda Mal* (4).

The Madras ruling is a very short one and gives no reasons for the decision, nor is it at all clear whether the appellate decree considered in that case directed restitution in so many words.

The Allahabad ruling appears to be a clear authority in favour of the lower Court's view, although by some strange mistake this ruling is quoted in *Asutosh Goswami* v. *Upendra Prosad Mitra* (5) as authority for the view that Article 181 applies.

The Punjab ruling is no direct guide in the matter and has not been discussed before us.

These rulings were passed under the old Code of 1882 with reference to section 583 of that Code and the wording of section 583 was held to justify the conclusion that an application for restitution was an application for execution of the appellate decree.

That section ran :—When a party entitled to any benefit (by way of restitution or otherwise) under a decree passed in an appeal under this Chapter desires to obtain execution of the same, he shall apply to the Court which passed the decree against which the appeal was preferred.

(1) 20 Ind. Cas. 203; 10 P. R. 1914; 273 P. L. R. 1913; 25 P. W. R. 1914; 217 P. W. R. 1913.

(2) 20 M. 448; 8 M. L. J. 79; 7 Ind. Dec. (N. S.) 317.

(3) 8 A. 545; A. W. N. (1886) 178; 5 Ind. Dec. (N. S.) 272.

(4) 49 P. R. 1896.

(5) 38 Ind. Cas. 17; 21 C. W. N. 564 at p. 569; 24 C. L. J. 467.

Now, if the Legislature intended by the parenthesis to lay down that an application for restitution was to be deemed an application for execution of a decree, even though the decree did not specifically order restitution, it adopted a very unusual method but we do not think that such was necessarily the meaning of the section.

It will be observed that the section is not in the Chapter of execution but in the Chapter dealing with first appeals and the purpose of the section is to declare in which Court the decree-holder shall seek execution of the appellate decree.

In the Code of 1882 there is no substantive provision regarding restitution and the Courts used to direct restitution under their inherent powers to adjust a wrong caused by themselves. It is hard to say what the precise intention of the Legistature was in inserting the parenthesis in section 583, but it was probably anxious to make it clear that the appellate Court in no conceivable circumstance should act as the executing Court.

Against the view that an application for restitution falls under Article 182 of the Limitation Act are:—

Harish Chandra Shaha v. *Chandra Mohan Das* (6), a 1900 case in which it was held that Article 181 probably applied, but the question in that case was of academic interest only as whether Article 181 or Article 182 applied, the application was too late.

Kurupam Zemindar v. *Sadasiva* (7) is a very short judgment of 1886, no reasons are given for the decision and the opposite view was taken in the later XX Madras ruling.

Girdhari v. *Sital Prasad* (8) decided that Article 181 applied, and it does not appear that the applicability of Article 182 was considered or urged in that case.

We have been referred also to *Municipal Council, Kumbakonam* v. *Sadagopachariar* (9), *Asha Bibi* v. *Nuruddin* (10).

Had the decree of this Court of 16th May 1906 been issued under the present Code we should have no hesitation in holding, for the reasons succinctly set forth in *Asha Bibi* v. *Nuruddin* (10), that the law has now been made clear and that an application for restitution, unless such is expressly ordered by the appellate decree, is not an application for execution but a miscellaneous application in the nature of an execution application under section 144 of the present Code.

As, however, the decree in question was passed under the old Code of 1882, we cannot avoid a decision whether the application for restitution was an application to execute the decree, and though the language of section 583 is very unfortunate, yet we must take it that the Legislature had some definite object in view in couching the section in the form adopted.

The argument that the section applied only when the restitution was expressly granted in the decree appears to us on consideration to have little force, for if the decree expressly granted restitution, restitution was an integral portion of the decree and the parenthesis was quite uncalled for and superfluous, so that we are driven to the conclusion that the Legislature did intend to convey by the parenthetical clause that an application for restitution was an application for execution of a decree.

If then restitution was decreed to the respondent in 1906, that decree is still in existence, for the subsequent alteration of the law of procedure cannot annihilate his decree which came into existence in 1906.

On this aspect of the case we must hold that respondent's application of 17th October 1910 is an application to execute the appellate decree and we dismiss the appeal with costs.

Appeal dismissed.

(6) 28 C. 113.
(7) 10 M. 66, 3 Ind. Dec. (N. S.) 797.
(8) 11 A. 372; A. W. N. (1889) 113; 6 Ind. Dec. (N. S.) 665.
(9) 29 Ind. Cas. 380.
(10) 30 Ind. Cas. 680; 8 Bur. L. T. 165; 8 L. B. R. 262.

TARINI CHARAN SARKAR v. BISHUN CHAND.

PRIVY COUNCIL.

APPEALS FROM THE CALCUTTA HIGH COURT.

November 26, 1917.

Present:—Lord Buckmaster, Sir John Edge, Sir Walter Phillimore, Bart., and Sir Lawrence Jenkins.

TARINI CHARAN SARKAR—APPELLANT

versus

BISHUN CHAND AND OTHERS—RESPONDENTS

AND

BISHUN CHAND—APPELLANT

versus

SRI KISHUN LAL AND OTHERS—RESPONDENTS.

Bengal Land Revenue Sales Act (XI of 1859), ss. 31, 53—Revenue sale — Encumbrances—Sale-proceeds, disposal of—Purchase by proprietor—Sale brought about by proprietor from dishonest motives—Civil Procedure Code (Act V of 1908), ss. 107, 151, O. XLI, r. 33—Appellate Court, power of, to vary decree—Estoppel.

Section 31 of the Bengal Land Revenue Sales Act provides that the purchase money, after paying the public claims, shall be held on account of the recorded proprietor or proprietors, provided that if before payment the same be claimed by any creditor in satisfaction of a debt, it shall not be paid over without a decree of the Court, but the section nowhere transfers any charges on the property from the property to the proceeds, and as the revenue sale conveys a title free from encumbrances to the purchaser the mortgagees are clearly entitled to claim the same as creditors under the section and the Court would undoubtedly direct that such claims, in due order of priority, should be satisfied out of the sums in the hands of the Collector. [p. 307, cols. 1 & 2.]

Where the property is bought by the recorded proprietor and the estate is acquired, under section 53 of the Act, subject to all its encumbrances existing at the time of the sale, the transaction of the sale merely provides money for payment of the Government claims, and the encumbrances are left entirely unaffected and can only be enforced against the property and the rights to the sale-proceeds of the recorded proprietor, who has purchased the property, are those under section 31, notwithstanding the fact that the motives which led him to cause the sale or purchase were dishonest. [p. 307, col. 2.]

In a suit to which a puisne mortgagee was a party the prior encumbrancer prayed for and obtained a decree against the sale-proceeds of a revenue sale. The puisne mortgagee brought two suits, one for a declaration that the recorded proprietor was the *benamidar* of the purchaser at the sale and that consequently the latter acquired the property subject to encumbrances, and the second to enforce his mortgage against the property. The Court of first instance held that the purchaser was the real owner of the property and decreed both suits in favour of the puisne mortgagee. Against these two decrees the purchaser appealed and the puisne mortgagee appealed against the decree in favour of the prior mortgagee. The High Court heard all the appeals together, and affirming the finding of the Court below dismissed the purchaser's appeals and gave the prior mortgagee a decree against the property in lieu of that against the sale-proceeds:

Held, (1) that inasmuch as on hearing the puisne mortgagee's appeal the High Court had before it all the facts which showed all the circumstances relating to the sale, the Court had abundant power under sections 107 and 151, and Order XLI, rule 33, of the Code of Civil Procedure to vary, as it did, the decree in the prior mortgagee's suit; [p. 308, col. 1.]

(2) that the fact that the puisne mortgagee did not attack the sale in the prior mortgagee's suit did not operate as an estoppel against the puisne mortgagee so as to prevent him from attacking the sale in his own suits and obtaining consequential relief. [p. 307, col. 1.]

Consolidated Appeals from a judgment of the Calcutta High Court (Chitty and Teunon, JJ.), dated the 25th April 1912, modifying one and affirming two other decrees made by the Subordinate Judge, Arrah.

FACTS of the case sufficiently appear from their Lordships' judgment.

Mr. *De Gruyther, K. C.* (with him Mr. *J. M. Parikh*), for Tarini Charan, opened his three appeals: Bishun Chand was estopped from impeachingthe revenue sale. He was a party to the suit brought by Sri Kishun but did not plead therein that Tarini Charan and not Sangam was the real owner of the property. Instead of insisting that all mortgages should be paid out of the mortgaged property Bishun Chand allowed a decree to be made against the surplus sale-proceeds only. He cannot say in one suit that the sale encumbrances are enforceable against the sale proceeds and in another that they are enforceable against the estate. Reference was made to the Bengal Land Revenue Sales Act, 1859, sections 31, 37 and 53, and the Transfer of Property Act, 1882 (Act IV of 1882) section 73.

Messrs *Dunne, K. C.* and *B. Dube*, for Bishun Chand, were not called upon to argue Tarini's appeal but were asked to open Bishun Chand's appeal: Both Ramratan and Sri Kishun were entitled to be paid out of the sale proceeds only, as they treated the revenue sale as valid in every way. Sri Kishun's decretal money was recoverable under the decree of the Subordinate Judge from sale-proceeds only. The High Court had no jurisdiction to modify the decree and make the mortgaged property liable at the instance of Counsel for Tarini, who had not appealed. Under section 31 of Act XI of 1859 Sri Kishun was entitled to treat the revenue sale as valid and to recover his

mortgage money from the revenue sale-proceeds. Tarini fraudulently brought about the revenue sale and is not entitled to any equity. It is not open to the High Court to vary the decree under the Code of Civil Procedure except on an appeal for the purpose. Although the appeals were heard together, the findings in one appeal could not be used to influence the judgment in another appeal.

Mr. *De Gruyther, K. C.*, submitted that the High Court had ample jurisdiction to make a proper decree upon the facts proved before it. All the parties were before the Court. Reliance was placed on sections 107 and 151 and Order XLI, rule 33, of the Code of Civil Procedure, 1908. Reference was made to *Tricomdas Cooverji Bhoja* v. *Gopinathji Thakur* (1).

JUDGMENT.

LORD BUCKMASTER.—These four appeals have been consolidated by order of the Board, dated the 26th March 1917, and have been brought on and heard together.

In three of them Tarini Charan Sarkar is the appellant and Babu Bishun Chand is one of the respondents, and in the fourth Babu Bishun Chand is the appellant and Tarini Charan Sarkar is a respondent.

All the appeals are against a judgment of the High Court of Calcutta dated the 25th April 1912, and three decrees made by that Court consequent on the judgment

The questions raised arise out of certain mortgage transactions affecting a Tahal *Touzi* No. 7062 and, though the facts and circumstances are complicated and involved, for the purpose of explaining the real issues that have to be decided they can be briefly summarised.

In the early part of 1904 the registered proprietors of the said *touzi* were Ram Rattan Sarkar in respect of a 4-anna share, and Sangam Sarkar in respect of the remaining 12-anna share. The *touzi*, however, was subject to certain mortgages, of which it is only necessary to mention the following: *zirpeshgi thicca* of the 15th July 1889, in favour of Gajadhar Lal and Sri Kishun Lal to secure Rs. 11,506 and interest at 9 per cent. per annum, a further mortgage in favour of the same mortgagees, dated the 16th July 1889, to secure Rs. 11,000 and interest at the rate of 12 annas per cent. per month and a mortgage of the 10th February 1896 in favour of the said Babu Bishun Chand to secure a loan of Rs. 5,999 with compound interest at the rate of 24 per cent. per annum with half-yearly rests. In the year 1900 a 4-anna share of the estate was sold in execution of a mortgage decree and was bought on the 8th August 1900 by Ram Ratan Sarkar, and on the 7th March 1904 the said *touzi* estate was purchased on a sale made in execution of a decree at the suit of another mortgagee by one Chatarbhuj Sahai in the name of one Mahanand Sahai, and he, on the 14th May 1904, purported to sell the property to one Sangam Sarkar. Sangam Sarkar was, however, but a mere name, it has been found, and it cannot now be questioned that the real purchaser was the appellant Tarini Charan Sarkar, who thus became the owner of the property subject to the mortgages.

On the 2nd June 1904, the first of the suits, out of which these appeals proceed, No. 39 of 1904, was instituted by Babu Bishun Chand seeking relief in respect of his mortgage of the 10th February 1896 against the representative of the original mortgagor and other parties. It would seem impossible that any estate could bear for long the burden of a mortgage on which the debt was accumulating by a process of compound interest on the principal sum at the rate of 24 per cent. per annum; and it appears that the appellant Tarini Charan Sarkar, instead of adopting what might have then been the inconvenient process of redeeming the mortgage by payment, resorted to the device of causing the mortgaged property to be sold for arrears of Government revenue and himself becoming the purchaser. To secure this object he wilfully allowed the Government revenue to fall into arrear, and the property was in consequence sold by the Government on the 28th August 1906, nominally as the property of Ram Ratan Sarkar and Sangam

(1) 39 Ind. Cas. 116; 44 I. A. 65; 1 P. L. J. 262; 15 A. L. J. 217; 25 C. L. J. 279; 32 M. L. J. 357; 21 M. L. T. 262; 21 C. W. N. 577; (1917) M. W. N. 363; 5 L. W. 654; 19 Bom. L. R. 450; 44 C. 759 (P. C.)

Sarkar, the registered proprietors, and was purchased for Rs. 29,500 by Tarini Charan Sarkar, the true owner. Had Tarini Sarkar been successful in concealing the fact of his ownership the result of this device would have been that the claim of all the mortgagees would have been thrown on to the balance left of the Rs. 29,500 —after satisfying the Government debt; and he would have held the property free from the inconvenience of the many and heavy charges to which it was subjected. Directly after the sale—on the 22nd October 1906, Sri Kishun Lal and others instituted proceedings (No. 258 of 1906) to obtain payment in respect of the mortgage of the 15th July 1889, seeking to obtain payment out of the surplus proceeds of the money due under the mortgages, the amount of which was stated to be—at the date of the proceedings—Rs. 15,983. To these proceedings Babu Bishun Chand was by an order, dated the 17th January 1907, added as a defendant. On the 2nd December 1907, Bishun Chand instituted his second suit No. 153 of 1907 alleging that the purchase of the estate on the 14th May 1904 was really made by Sangam Sarkar, *benami* for Tarini Charan Sarkar, that the sale for arrears of Government revenue had been fraudulently effected by the said Tarini Charan Sarkar, and asking either that the sale should be set aside or that his mortgage of the 10th February 1896 should still remain valid and operative against the estate. In the first Suit No. 39 of 1904 the usual mortgage decree was made on the 6th January 1905, but it was set aside on the 18th April 1907, and another trial was ordered. This took place on the 30th June 1909, when the usual mortgage relief was granted.

In the second suit by Sri Kishun Lal and others judgment was delivered on the 23rd December 1907, and a decree made in favour of the plaintiffs directing that the money due on the mortgage with interest and costs should be paid out of the surplus proceeds of sale. At the date of this decree the sale itself had become a subject of attack, and consequently the further provision was introduced that, in the event of the sale being set aside, the mortgage monies, interest, and costs should be realised by sale of the mortgaged property if the sum were not paid within six months from the date of decree.

The said Tarini Charan Sarkar did not appeal against this decree, but Babu Bishun Chand did, and the appeal came on for hearing together with the appeal by Tarini Charan Sarkar in the two suits commenced by Bishun Chand and an appeal by Sangam Sarkar in the Suit No. 153 of 1907.

On the 25th April 1912 the High Court delivered judgment, dismissing all the appeals; but at the instance of Counsel who appeared for Tarini Charan Sarkar they varied the decree of the Subordinate Judge, in the suit by Sri Kishun Lal, by setting aside the direction that his mortgage monies should be paid out of surplus monies of the revenue sale, and made in its place the ordinary decree against the property itself. It is this latter part of the decree that is challenged by the present appeal of Bishun Chand.

Before dealing, however, with his contention it is desirable to dispose, in the first instance, of the appeals of Tarini Charan Sarkar. He stands in this position: He is held to have been the real owner of the estate *Touzi* No. 7062 at the date of the sale of the 28th January 1906, and it is further established by the findings, both of the Subordinate Judge and of the High Court, that he deliberately allowed the Government revenue to fall into arrear in order that the property might be sold, and that he succeeded in purchasing it himself at an undervalue under circumstances which concealed his original ownership, and appeared to establish an independent sale to an independent third party, so that all the claims of the mortgagees, beyond the amount that would be satisfied by the surplus proceeds of sale, would be wholly defeated.

These grave and serious charges are, therefore, supported by the concurrent findings of both the Courts, and no grounds whatever can be shown for disturbing these decisions. Counsel for Tarini Charan Sarkar undoubtedly realised this difficulty, and refrained from attacking the substance of the judgment, but said that it was one which Bishun Chand had no right to claim because he was estopped by his own conduct from seeking any such relief.

This estoppel is said to be effected by his action as a defendant in the suit brought by Sri Kishun Lal and his co-mortgagees

This suit—it will be remembered—was brought after the revenue sale and sought relief against the proceeds. In that suit the plaintiffs alleged that there had been intentional default in payment of the Government revenue, but they made no reference to the fact that Tarini Charan Sarkar was the real owner, a fact of which they were probably unaware, and which in any event was wholly immaterial to them, since the money in Court was sufficient to satisfy their claims. Bishun Chand was only made a party to this suit as an encumbrancer upon the property. He had no power of controlling the form in which the suit was brought, nor was there any step which he took in the suit irrevocably asserting his intention to rely upon the sale and not impeach the whole proceedings. In these circumstances, it is obvious that no estoppel arises as against him, and as this is the only ground upon which the appeal of Tarini Charan Sarkar is or can be based, it follows that it must fail.

There remains the question of Bishun Chand's appeal, and the question to which that gives rise is one of more general importance. On his behalf it is alleged that Sri Kishun Lal and his co-mortgagees are entitled to be satisfied out of the proceeds of sale, and that, if these are sufficient for the complete satisfaction of their mortgages, their encumbrances are removed from the property, with the result that there is a more abundant security for Bishun Chand's claim; that, in fact, the proceeds of the first sale to the extent of Sri Kishun Lal's claim, are to be added to the proceeds of the sale made under the decree of the High Court, so as to make one fund out of which the mortgage debts may be satisfied.

In order to examine the value of this contention, it is necessary to look at "The Land Revenue Sales Act," No. XI of 1859, by which the rights of the parties are regulated. Section 31 of that Statute provides that the purchase monies, after paying the public claims, shall be held on account of the recorded proprietor or proprietors, provided that if before payment the same be claimed by any creditor in satisfaction of a debt, it shall not be paid over without the decree of the Court.

It is to be observed that this section nowhere transfers the charges from the property to the proceeds; but, as the sale by the Government conveys a title free from encumbrances to the purchaser, the mortgagees are clearly entitled to claim the same as creditors under the section referred to, and the Court would undoubtedly direct that such claims, in due order of priority, should be satisfied out of the sums in Court.

It was a decree under this section that was obtained by Sri Kishun Lal, and it, of course, proceeded upon the assumption that the sale had been made to a *bona fide* third party. Section 53 regulates what happens when the property is bought by the recorded proprietor, and in that case it is enacted that the estate is acquired subject to all its encumbrances existing at the time of the sale. In such a case, therefore, the encumbrances are left entirely unaffected; the transaction of sale has merely provided money for payment of the Government claims, and the estate remains as it was before. Were such a purchase honestly and openly made, it was not disputed that the claims against the purchase-money could not remain in addition to the claim against the estate. The appellant, however, says that in the present case the owner cannot claim this method of administration. He asserts that as it was by the fraud of Tarini Sarkar that the whole transaction was set on foot, he is in a worse position than if he had become the purchaser on a sale made against his will.

Their Lordships are certainly not prepared to assist in providing any possible benefit for a course of conduct so dishonest as that revealed in this case but, on the other hand, it is not right to punish a man for fraudulent behaviour by making him suffer other penalties than those which are the direct consequence of his fraud. In the present case it is impossible to see how the position has been aggravated by the fact that the sale was effected for the purpose of defeating the mortgagees. The Act distinctly contemplates the purchase of property by a recorded proprietor, and the rights that arise in such a case are those which have been already mentioned. Their Lordships are unable to see why those rights should be increased against the purchaser because of the motives which led him to cause the

sale or the purchase. The only effect of the Statute is that, so far as the encumbrances are concerned, the sale is of no effect.

It is then urged that the Court of appeal had no power to vary the order made in Sri Kishun Lal's suit, since he did not request such variation, nor were the facts relating to the sale proved and established in any suit to which he was a party.

Their Lordships think it would have been a matter for regret if the Court of appeal had been thus hampered in making the order, which their Lordships regard as right in all the circumstances of the case. But they think abundant power is given to the Court by sections 107 and 151 of the Code of Civil Procedure of 1908 and Order XLI, rule 33 of the same Statute. Section 107 gives power, if necessary, to take additional evidence; and rule 33 of Order XLI gives power to pass any decree and give any orders which ought to have been passed or made, and to pass or make such further or other decrees or orders as the case may require.

On hearing the appeal in Sri Kishun Lal's suit, the Court had before it the facts that showed all the circumstances relating to the sale. Sri Kishun Lal seems to have raised no objection to the variation of the order, and does not appear here on appeal against it. It is Bishun Chand, in whose suit all the facts were established, who seeks, on the one hand, to retain a judgment based upon the view that the sale was regular, and, on the other, to get the benefit of the decree which determined that it was not. There is certainly nothing in the Statute which gives him such rights, and there is no equity to which he can appeal which entitles him to their possession. This appeal must, therefore, also fail.

It may be doubted whether in the end any property will be left for the real owner. Bishun Chand's mortgage runs at 24 per cent. compound interest with half-yearly rests. It began at Rs. 5,000 and in the hearing before the Court it amounted to 40,000; and the long dealy, amounting to five years, that has elapsed in prosecuting this appeal has more than doubled the amount. Usury and the abuse of legal procedure are a formidable and dangerous combination to the well-being of any community. The former is one which it is not easy to repress, but the latter ought not to be incapable of remedy. There seems to be no lack of expedition in the Courts in disposing of cases when once entered for hearing. The delay is associated with dilatoriness in procedure and apparent unwillingness on the part of persons who have the control of litigation to bring it to a speedy conclusion.

Eleven years have elapsed since Bishun Chand first instituted the proceedings in respect of his mortgage, and more time must pass by before the accounts are finally worked out and his claim ends; and having regard to the rate at which his debt accumulates in a short time the amount might reach the total wealth of the entire province.

All the appeals, therefore, fail and in all the circumstances their Lordships think there should be no costs on either side. They will humbly advise His Majesty to this effect.

Solicitor for Tarini Charan Sarkar: Mr. *E. Delgado*.

Solicitors for Bishun Chand: Messrs. *Barrow, Rogers* and *Nevill*.

Appeals dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1434 OF 1916.

December 14, 1917.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

THE MUNICIPAL COUNCIL OF VIZAGAPATAM—DEFENDANT—APPELLANT

versus

WILLIAM FOSTER—PLAINTIFF—RESPONDENT.

Madras District Municipalities Act (IV Mad. of 1884), ss 172, 173—Misfeasance, liability of Municipalities for—Gravel thrown on public road, injury caused by—Negligence—Damages—Extent of liability—Negligence of contractor, effect of, on relations between Municipality and public.

MUNICIPAL COUNCIL OF VIZAGAPATAM *v.* WILLIAM FOSTER.

Municipal Corporations in India are liable for acts of misfeasance. [p. 311, col. 2.]

It is the duty of Municipalities to lay and maintain roads so that the public may pass over them safely and they are liable for injuries resulting to the public through the negligent or improper performance of that duty. [p 311 cols. 1 & 2.]

The liability of statutory bodies for negligence is not based on whether a profit is derived by the levy of a cess or toll from the public. The question whether it gives them an income over expenditure is not a criterion for enforcing liability. [p. 311, col. 1.]

(Case-law discussed.)

Municipalities in India do not act in the exercise of sovereign powers or as agents of the State in laying or maintaining roads. [p. 311, col. 2; p. 315, col. 1.]

Secretary of State v. *Cockcraft*, 27 Ind. Cas. 723; 39 M. 351; (1915) M. W. N. 39, distinguished.

In the case of statutory bodies entrusted with the performance of public duties, their liability cannot be shifted to a contractor employed by them for a particular purpose. They may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed. But they are not thereby themselves relieved from liability to those injured by the failure to perform it. [p. 312, col. 2; p. 313, col. 1; p. 316, col. 2]

Plaintiff sued the Municipal Council of Vizagapatam for injuries sustained by him by falling on a heap of gravel thrown on to the side of a road and allowed to project 9 feet into the roadway in the course of some repairs which were entrusted to a contractor:

Held, that the Municipal Council was liable in damages for negligence. [p. 313, col. 2; p. 317, col. 1.]

Per *Seshagiri Aiyar, J.*—Municipal Councils in Madras are statutory bodies with very circumscribed powers and are not self-governing in the sense that Municipal Corporations in England are. Though they are not a department of Government, their powers are derived from the Government and they are controlled by the provisions of the District Municipalities Act. [p. 311, cols. 1 & 2.]

The public have a right to use the full breadth of a public road and any obstruction to such use amounts to misfeasance. [p. 313, col. 2]

Per *Napier, J.*—Section 173 of the Madras District Municipalities Act does not apply to the case of a contractor executing repairs to a road under the orders of a Municipal Council. The section has reference to temporary obstructions to a thoroughfare by the erecting of *pandals* or arches by a private person and has nothing to do with the execution of repairs by the employees of the Municipality. [p. 316, col. 1.]

Quære.—Whether a public body can be liable for mere non-feasance?

Whether the making of roads by the Government is an act of sovereign power?

Second appeal against the decree of the District Court, Vizagapatam, in Appeal Suit No. 256 of 1914, preferred against that of the Court of the Temporary Subordinate Judge, Vizagapatam, in Original Suit No. 2 of 1913.

FACTS of the case appear from the judgment.

The Hon'ble *B. N. Sarma*, for the Appellant.—In the *first* place, no suit lies for damages against the Municipal Council, as it exercised sovereign functions in laying and repairing the road. Its liability cannot be more than that of the Crown. *Secretary of State* v. *Cockcraft* (1). It must be deemed to have acted as an agent of Government and it, therefore, enjoys the same immunity from the consequences of a tortious act that is enjoyed by the Secretary of State and public servants in respect of torts committed by them in the exercise of State functions: 28 American Encyclopædia. *Secondly* the District Municipalities Act does not expressly create any liability for damages in Municipal Corporations and no right of action, therefore, is vested in the public. *Thirdly*, the injury was sustained by plaintiff while he was racing on the road on his bicycle for which he did not obtain a license, and this breach on his part of a statutory provision disentitled him from claiming damages from the Council. He was also guilty of contributory negligence, and the amount of damages claimed was excessive. *Lastly*, the work of executing repairs was entrusted by the Council to a contractor, who alone is liable under the common law. The negligence is directly traceable to the act of the contractor and the Council had nothing to do with the work.

Mr. *P. Narayanamurthy*, for the Respondent, argued *contra* that the position of a Municipal Council under the District Municipalities Act was different from the sovereign acts of State and the former was as liable as a private individual for ordinary torts. Nor could their act in repairing a road be deemed to be that of the servants of the Crown. The fact that the work was done by a contractor did not absolve the Council. The ordinary law governing the relations between employer and employee applied to work executed on contract with Municipal Corporations.

(1) 27 Ind. Cas. 723; 39 M. 351; (1915) M, W, N, 39.

MUNICIPAL COUNCIL OF VIZAGAPATAM *v.* WILLIAM FOSTER.

JUDGMENT.

SESHAGIRI AIYAR, J.—The plaintiff sued the Municipality of Vizagapatam for compensation for injuries sustained by him owing to the negligent stacking of gravel in a Municipal road. The Subordinate Judge awarded damages to the extent of about Rs. 3,200 and odd. The amount was increased on appeal by the District Judge.

In this second appeal, I shall deal with the various questions involved in the case, in the order in which they were argued by Mr. Sarma.

The first contention for the appellant was that Municipalities in India have only delegated powers from the Local Governments and that consequently their liability is subject to the same restrictions as that of the Government. This contention was raised with reference to an observation of mine in *Secretary of State* v. *Cockcraft* (1), where I pointed out that in laying out roads, the Municipal Corporations in America were exercising to some extent sovereign functions. I took care in that judgment to reserve my opinion whether the principle on which American Municipal Corporations are exempted from liability can apply to Indian Municipalities. The various sections to which Mr. Sarma drew our attention point to the conclusion that the Municipal Councils in India are statutory bodies whose powers are very much circumscribed. Section 21 as regards constitution, sections 113, 114 and 115 as regards limitations in the application of funds and section 4 (*b*) which relates to the suspension of Municipalities show that Indian Councils are not self-governing in the sense that Municipal Corporations in England are. As regards the latter, charters have been conferred upon various towns since the days of Henry VI empowering the inhabitants to govern themselves completely. They have power to make laws, they have jurisdiction to administer justice, and they have got their quarter sessions. In most respects the English Corporations are complete governing bodies. Although I do not wish it to be understood that Municipal institutions in this country are a department of Government, there can be no doubt that their powers are derived from the Government and are controlled by the provisions of the District Municipalities Act. I may draw attention in this connection to the Act which created the first Municipality in this country. Act X of 1842 which was passed by the President of the Council of India was an enabling act. The preamble shows that it was intended to enable the inhabitants of any place of public resort or residence under the Presidency of Fort William within the town of Calcutta to make better provision for purposes connected with public health and convenience. This Act was subsequently repealed and Act XXVI of 1850 was passed. In this Act also the powers were very much limited These enactments which have subsequently been repealed and re-enacted in a more comprehensive form show that the powers conferred upon Municipalities are of a very restricted character; they, therefore, do not stand on the same footing as Municipal Corporations in England. To this extent I am in agreement with Mr Sarma

The further question is whether in making roads, the Indian Municipalities are exercising sovereign functions. The extract quoted by the learned Vakil for the appellant from 28 American Encyclopaedia shows that it is only in certain States that the Municipalities in the United States are exempted from liability for injuries caused by the negligence of the Municipal Corporations in maintaining streets. In other States the liability has been enforced, *vide* page 1340 (19d).

The principle of liability in such cases was laid down in *Parnaby* v. *Lancaster Canal Co.* (2). In that case it was laid down that a Canal Company which levied tolls was liable for negligence. Tindal, C. J., said: "We concur with the Court of Queen's Bench in thinking that a duty of this nature is imposed upon the company, and that they are responsible for the breach of it upon a similar principle to that which makes a shopkeeper, who invites the public to his shop, liable for neglect on leaving a trap door open without any protection, by which his customers suffer injury". It was contended before

(2) (1839) 11 Ad. & E. 223 at p. 243: 3 P. & D. 162; 1 Railw. Cas. 696; 9 L. J. Ex. 338; 113 E. R. 400; 52 R. R. 329.

us that it is only where a profit is derived by the levying of tolls that the principle enunciated in this case can be held applicable. I find no justification for this distinction. In most cases where a Corporation is charged with liability for misfeasance in the discharge of its duty, it would be almost impossible to prove that the particular department in administering which the misfeasance was committed was giving a surplus income to the Corporation. It is not denied that a road-cess is included in the general taxes levied by the Municipality. The question as to whether that cess resulted in giving an income over expenditure is not the criterion for enforcing liability. The only question is whether the laying of the road, as in the case in 39 Madras, was a purely Governmental function for which no sort of tax is levied upon persons using that road or whether it is a road for using which some sort of consideration is being paid by persons frequenting it. In *Mersey Docks Trustees* v. *Gibbs* (3) it was definitely laid down that a corporate body authorised to perform a work and receiving tolls in respect of it, though obtaining no profit for itself from such tolls but collecting them for the maintenance of the work and the possible future benefit of the public, is responsible for the injuries arising from the improper performance of that work, and that the funds thus obtained must be applied for the discharge of that liability. Lord Cranworth said that a "body of trustees constituted by Statute having the right to levy tolls for their own profit in consideration of making and maintaining a dock or a canal is no doubt under a liability to make good to the person using the dock or canal any damage occasioned by the neglect in not keeping the works in proper repair." The other learned Lords agreed with this view. Reference may also be made to *Hartley* v. *Rochdale Corporation* (4), *Geddis* v. *Proprietors of Banu Reservoir* (5), *Reg.* v. *Williams* (6), *Gibraltar Sanitary Commissioners* v. *Orfila* (7), *Foreman* v. *Canterbury Corporation* (8), *Gilbert* v. *Trinity House Corporation* (9) and to the latest judgment of Lush, J., in *Mc'Clelland* v. *Manchester Corporation* (10). The observation in *Harris* v. *Baker* (11) that only an indictment lies has no application to this country and I doubt whether it is any longer law in England. In this country the principle of making Corporations liable for neglect of duty has been uniformly enforced. The decision in *Corporation of the Town of Calcutta* v. *Anderson* (12) is a strong authority for that proposition; notwithstanding the criticisms of the learned Vakil for the appellant that that decision turned on the language of the particular section therein commented on, I feel no doubt that it enunciated a general principle of liability for neglect by Corporation. *Rajendralal Maneklal* v. *Surat City Municipality* (13), *Dholka Town Municipality* v. *Desaibhai* (14), *McInerny* v. *Secretary of State* (15) all point to the same conclusion. I am therefore of opinion that in laying and maintaining a road, Municipalities in this country are not exercising purely sovereign functions and that consequently they are liable for misfeasance. In this view the decision in *P. and O. S. N. Co.* v. *Secretary of State for India* (16), which discriminates between the liability of the East India Company for purely sovereign functions and other functions which involve transactions which can be carried on by private individuals, is fully satisfied in this case.

The next point argued by Mr. Sarma was that as there is no provision for damages in the District Municipalities Act,

(3) (1866) 11 H. L. C. 686; 35 L. J. Ex. 225; 1 H. L. 93; 14 L. T. 677; 14 W. R. 872; 12 Jur. (N. S.) 571; 11 E. R. 1500; 145 R. R. 385.

(4) (1908) 2 K. B. 594; 77 L. J. K. B. 884; 99 L. T. 275; 72 J. P. 343; 6 L. G. R. 858; 24 T. L. R. 625.

(5) (1878) 3 A. C. 430 at p. 455.

(6) (1884) 9 A. C. 418; 53 L. J. P. C. 64; 51 L. T. 546.

(7) (1890) 15 A. C. 400; 59 L. J. P. C. 95; 63 L. T. 58.

(8) (1871) 6 Q. B. 214; 40 L. J. Q. B. 138; 24 L. T. 385; 19 W. R. 719.

(9) (1886) 17 Q. B. D. 795 at p. 799; 56 L. J. Q. B. 35; 35 W. R. 30.

(10) (1912) 1 K. B. 118; 81 L. J. K. B. 98; 105 L. T. 707; 76 J. P. 21; 9 L. G. R. 1209; 28 T. L. R. 21.

(11) (1815) 4 M. & S. 27; 105 E. R. 745; 16 R. R. 370.

(12) 10 C. 445; 5 Ind. Dec. (N. S.) 299.

(13) 3 Ind. Cas. 511; 33 B. 393; 10 Bom. L. R. 498.

(14) 21 Ind. Cas. 847; 38 B. 116; 15 Bom. L. R. 1034.

(15) 13 Ind. Cas. 370; 38 C. 797.

(16) 5 B. H. C. R. App. 1.

no claim for damages can lie. I see no force whatsoever in this contention. The Act no doubt directs the application of Municipal funds in a particular manner. That is a direction given by the Government to the statutory body. That direction is not binding upon a person against whom a wrong has been committed by the statutory body. If authorities were necessary for this proposition I may refer to the case in *Attorney-General* v. *Leaes Corporation* (17), where it was held by Swinfen Eady, J., that the fact that the Public Health Act of 1875 provides a statutory remedy by complaint to the Local Government Board in the case of a local authority making default "in the maintenance of existing sewers does not preclude a private individual from obtaining damages and an injunction against that local authority in respect of a common law nuisance arising from that default." *Vide* also *Khagendra Nath* v. *Bhupendra Narayan* (18).

One other minor contention of Mr. Sarma may be disposed of in a few words. He argued that as the plaintiff did not obtain a license under the Madras Act I of 1907, he is not entitled to damages. It would lead to startling results to hold that because a person passes in a vehicle in a public highway without obtaining a license for that vehicle he can recover no damages for injuries caused to him by the negligence of the Municipality. No authorities were quoted for this proposition nor is it possible to find any.

The next point on which a great deal of learned argument was addressed to us by Mr. Sarma and by Mr. Narayanamurti related to the question whether the Municipality can be held liable, inasmuch as it had given a contract for the making of the road to a contractor. I am in agreement with Mr. Sarma that the contractor to whom the work was entrusted must be taken to be an independent contractor, notwithstanding the finding of the learned District Judge that supervision was exercised over his work by Municipal subordinates. In *Thomas Field Evans* v. *Trustees, Port of Bombay* (19) and *Ullman* v. *Justices of the Peace for the Town of Calcutta* (20) it was held that an independent contractor would not be liable for torts. In *Steel* v. *South Eastern Railway Co.* (21) Crowder, J., with the concurrence of the other Judges said: "The circumstance of the work being done by Furness under a contract, negatives his being a servant of the Company". The Full Bench laid down that where work is being done for a Railway Company under a contract (parol or otherwise), the company are not responsible for injury resulting to a third person from the negligent manner of doing the work, though they employ their own surveyor to superintend it, and to direct what shall be done. In *Overton* v. *Freeman* (22) it was held that if one employs another to do an act which may be done in a lawful manner, and the latter in doing it unnecessarily commits a public nuisance whereby injury results to a third person, the employer is not responsible. The principle of these decisions is that an employer is entitled to expect of the contractor that he will perform the duty lawfully and without negligence. Therefore, if there has been illegality or neglect on the part of the contractor the employer is not ordinarily liable. Reference may also be made to 28 American Encyclopædia page 1280. But, there is an exception to this rule even in the case of private employers and that is this. That where the employer is aware that the doing of a contract work involved a public danger he ought to see that the contractor so discharges his duty as to avoid such a danger. That was the principle enunciated in *Corporation of the Town of Calcutta* v. *Anderson* (12). There is another exception which is even more pertinent to the present case, namely, that in the case of statutory bodies entrusted with the performance of a public duty their liability cannot be shifted to a contractor. This principle is pointedly illustrated by the decision of Lindley, L. J., in *Harda Ker* v. *Idle District Council* (23). The distinction between the liability of

(17) (1911) 2 Ch. 495; 55 S. J. 703; 27 T. L. R. 581.

(18) 8 Ind. Cas. 530; 38 C. 296; 15 C. W. N. 316.

(19) 11 B. 329; 6 Ind. Dec. (N. S.) 215.

(20) 8 B. L. R. 265;

(21) (1855) 16 C. B. 550; 139 E. R. 875; 25 L. T. (o. s.) 129; 100 R. R. 836.

(22) (1852) 11 C. B. 867; 21 L. J. C. P. 52; 16 Jur. 65; 138 E. R. 717.

(23) (1896) 1 Q. B. 335; 65 L. J. Q. B. 363; 74 L. T. 69; 44 W. R. 323; 60 J. P. 196.

the contractor to the employer and the liability of the employee to the employer in the construction of public works is thus stated by the Lord Justice· "This principle lies at the root of the modern decisions on the subject, and the distinction between the two classes is well illustrated by comparing *Reedie* v. *London and North Western Railway Company* (24) with *Hole* v. *Sittingbourne and Sheerness Railway Co.* (25). In the first of these cases the defendants employed a contractor to build a bridge. One of his men carelessly let a stone fall on the plaintiff, and the defendants were held not liable. In the second case the defendants' duty was to build a bridge which would open and let vessels pass. They employed a contractor, who built a bridge which would not open. The plaintiff was injured thereby, and the defendants were held liable for the consequences. The principle to which I am referring is further illustrated by *Pickard* v. *Smith* (26) (the coal-cellar case) and *Gray* v. *Pullen* (27), in which the Court of Exchequer Chamber, reversing the judgment of the Court of Queen's Bench, held the employer of a contractor liable for injury caused to the plaintiff by the contractor's failure to make good a pavement under which he had constructed a drain." The learned Lord Justice quotes with approval a passage from Lord Blackburn's judgment in *Dalton* v. *Angus* (28). On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty, and stipulate for an indemnity from him, if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it. The present case comes within the principle above enunciated. Story on Agency, section 454, enunciates the same principle.

The next point urged for the appellant was that the stacking of the gravel on the road was not the proximate cause of the injury done to the plaintiff. The finding of the District Judge in paragraph 7 is against this contention. Mr. Sarma referred to the fact that the road was 27 feet in width and that the projection of the stacked gravel only extended to 9 feet from the base. Even though there was a large margin for travellers to go through, the liability of the Municipality is not lessened by that circumstance. It was pointed out in *Queen-Empress* v. *Bolappa* (29) that the passer-by has a right to use the full breadth of the road. See also *Wednesbury Corporation* v. *Lodge Hole Colliery Co.* (30). The finding of the learned District Judge disposes of any contention regarding contributory negligence. It was not disputed that no red lights warning passers-by were fixed upon the gravel stacked in the road. I find no justification for re-opening the question that the plaintiff was racing along the road when he sustained injury. I must, therefore, disallow this contention also.

The last point related to the amount of damages. A great deal of argument was addressed to us on this subject. There can be no doubt that for two months after the accident the plaintiff was normally discharging his duties. It seems also clear that he neglected a caution conveyed to him by his medical adviser in using his right hand. It was after two months that he was told that he must get his arm set right by a specialist in England. It is open to doubt whether the necessity for going to England would have risen had the plaintiff been more careful or had he been more prompt in getting his injuries redressed. I am, therefore, unable to agree with the District Judge that the cost of going to and returning from England should be charged against the Municipality. On the whole, considering the various items of charges, I have come to the conclusion that the plaintiff's damage should be reduced to Rs. 2,500.

(24) (1849) 6 Railw. Cas. 184, 4 Ex. 244; 20 L. J. Ex. 65; 13 Jur. 659; 80 R. R. 541; 154 E. R. 1201.

(25) (1861) 6 H. & N. 488; 30 L. J. Ex. 81; 3 L. T. 750; 9 W. R. 274; 123 R. R. 636; 158 E. R. 201.

(26) (1861) 10 C. B. (N. S.) 470; 4 L. T. 470; 142 E. R. 535; 128 R. R. 790.

(27) (1864) 5 B. & S. 970; 34 L. J. Q. B. 265; 11 L. T. 569; 13 W. R. 257; 122 E. R. 1091; 136 R. R. 833.

(28) (1881) 6 A. C. 740; 50 L. J. Q. B. 689; 44 L. T. 814; 30 W. R. 191.

(29) 11 M. 343; 1 Weir 732; 4 Ind. Dec. (N. S.) 239.

(30) (1905) 2 K. B. 823; 69 J. P. 323, 93 L. T. 307; 21 T. L. R. 569; 3 L. G. R. 817.

He will be entitled to costs upon the Rs. 2,500 from the appellant. The appellant will bear his own costs. The decree of the District Judge will be modified to this extent. In other respects the second appeal will be dismissed.

NAPIER, J.—This is an appeal from the decision of the District Judge of Vizagapatam, confirming the decision of the Temporary Subordinate Court of Vizagapatam awarding damages to the plaintiff against the Municipal Council of Vizagapatam, in respect of injuries received by the plaintiff through the faulty condition of the road under the defendant's control. The lower Appellate Court has found that the injuries were caused owing to the plaintiff being thrown from his motor-bicycle in consequence of collision with a heap of gravel projecting 9 feet into the roadway which was left unprotected by a light during the night. It has also found that there was no contributory negligence in the plaintiff. The District Judge has awarded him damages to the amount of Rs. 4,180-15 0.

To these findings and to this amount of damages several objections have been raised in this Court. The *first* is, that no suit will lie against a Municipal Council in respect of any such injuries; the *second* is that even if a suit will lie, the liability is confined to a narrow class of public or private bodies to which the defendant Municipality does not belong; the *third* is, that the Council are protected by the fact that they employed a competent contractor and that the most that can be charged against them is a non-feasance; and the *fourth* is, that the greater part of the damages is too remote. The first objection is said to be based on the decision of this Court in *Secretary of State* v. *Cockcraft* (1) which, it is contended, lays down that the making of roads by Government is an act done in exercise of sovereign powers; and it is sought to apply that doctrine to the present case by the argument that Municipal bodies act only as agents of the State in respect of such matters. In my opinion the decision is not an authority for the broad proposition asserted. That case decided that the provisions and maintenance of a military road is a function of Government carried on in exercise of sovereign powers and that accordingly a person who receives injuries owing to the negligence of a servant of Government in stacking gravel on such a road cannot recover in a suit against the Secretary of State. I am not prepared, without further argument, to accept the proposition that the making of all roads and the repairing of all roads by the State is necessarily an act in exercise of sovereign powers. But I reserve my opinion on this subject until the point comes for decision before me. But even if it be so, the proposed extension of the principle to the making and repairing of roads by a statutory body seems to be without foundation.

Mr. Sarma in his able argument before us assumed, I think too lightly, that a statutory body acts as an agent of the State and thus comes within the protection accorded by that decision to the State and its servants. The foundation of this protection is set out in the case under consideration and in the decision in *P. & O. S. N. Co.* v. *Secretary of State for India* (16) which was followed. The proposition shortly stated is that by operation of Statutes the same protection is given to the Secretary of State and his servants in respect of torts committed by them in the exercise of the functions of sovereign powers as is granted to the Crown and its servants in respect of all torts, and that a suit will no more lie against the former than a petition of right will lie against the Crown or a suit against its servants. During the course of the argument, I asked for any authority from England that statutory bodies, in whom roads and the right to repair are vested, came under the potection given to the servants of the Crown, and the learned Vakil was unable to give me any. I am unable to see how a statutory body can be said to be either the servant or the agent of the Crown unless it is so constituted by the provisions in the Act.

It may be that prior to the introduction of legislation in this country, where the East India Company granted a charter to a body to exercise such functions, such body might be an agent or servant of the Company, but bearing in mind the cases in which such bodies holding charters from the Crown have been held responsi-

ble in England, I should be slow to accept even this proposition. I would especially refer to the case of the *Mayor & Burgesses of Lyme Regis* v. *Henley* (31). There the borough of Lyme Regis held by Letters Patent from the King a certain pier on condition, among others, that they should repair and maintain it as necessary. The plaintiff's premises having been injured by the sea in consequence of the disrepair of the pier, he brought a suit against the Mayor and Burgesses. It was held that the obligation to repair being one which concerned the public, an indictment would lie in case of non-repair against the Mayor and Burgesses for their general default, and an action on the case for a direct and particular damage sustained in consequence by an individual. Throughout the argument of Counsel I can find no trace of the theory of agency, nor is it suggested in the judgment of the Court.

With regard to a statutory body it seems to me to be impossible to suggest that they are servants or agents. They are not appointed by Government, but are created by the Legislature. Mr. Sarma argues from the language of the District Municipalities Act that Government has power to suspend. That is undoubtedly so, but that power, like the body itself, is the creation of the Statute and must be exercised within the limits imposed. Without such a statutory power the Government could not dissolve or suspend a statutory body and it seems to me beside the question to examine, as the learned Vakil has asked us to do, the sections of the Act for the purpose of ascertaining the rights that are vested in Government. I, therefore, hold that the doctrine pressed on us has no application to this case.

The next point is that only a narrow class of public or private bodies can be made liable. This argument is founded on observations in two old cases, *Parnaby* v. *Lancaster Canal Company* (2) and *Mersey Docks Trustees* v. *Gibbs* (3). In the first case it was held that a common law liability arose in a Canal Company which took tolls for navigation to use reasonable care in making the navigation secure, and in the second case, that a private person or a company having a right to levy tolls in respect of performance of a particular work would be liable in damages for injuries occasioned by performing it improperly. In neither case, however, is it stated that the absence of profit or tolls would have made a difference in the decision of the case, and even assuming that that view was taken in these earlier cases, and even if that is good law at the present time, it can have no application to public bodies as appears from other decisions by the House of Lords to which I shall now refer. The first is a decision of the Privy Council in the *Bathurst Borough* v. *Macpherson* (32). That was a suit arising out of injuries caused to the plaintiff by a non-repair of a drain. Some doubt has been cast on this case in later decisions, but not on the point now under consideration. The next is another decision of the Privy Council in *Gibraltar Sanitary Commissioners* v. *Orfila* (7). In this case, the Board repudiated the liability of the Commissioners, but in neither case did their Lordships consider the bearing of the question whether these public bodies levied a toll. Later cases are *Cowley* v. *Newmarket Local Board* (33), *Pictou Municipality* v. *Geldert* (34) and *Sydney Municipal Council* v. *Bourke* (35), the last two being decisions of the Privy Council. In none of these was this ground even argued. If, therefore, this principle has any application in these days, it must be confined to private bodies, such as the Canal Company and the Dock Company.

The next point taken was that the Municipality had been at most guilty of a mere non-feasance for which they are not legally responsible, and that any misfeasance found was that of a contractor for which the Municipality was not responsible, Mr. Sarma argued that the only breach of duty which could be laid in this case was under section 172 of the District Municipalities Act, which requires that a Municipal Council shall during the repair of any street take

(31) (1832) 3 B. & Ad. 77; 110 E. R. 29.

(32) (1879) 4 A. C. 256; 48 L. J. P. C. 61.

(33) (1892) A. C. 345; 62 L. J. Q. B. 65; 1 R. 45; 67 L. T. 486; 56 J. P. 805.

(34) (1893) A. C. 524; 63 L. J. P. C. 37; 1 R. 447; 69 L. T. 510; 42 W. R. 114.

(35) (1895) A. C. 433; 64 L. J. P. C. 140; 11 R. 482; 72 L. T. 605; 59 J. P. 659.

proper precautions for guarding against accidents and shall cause every such street during its repair to be sufficiently lighted and guarded during night. He wished us to read that section with section 173 as applying to the facts of this case. Section 173 provides that no person shall cause any obstruction in any street, without the written permission of the Chairman and that when such permission is granted, such person shall take proper steps to prevent accidents. His argument was that a contractor executing repairs to a road under the orders of the Council was a person to whom section 173 applied. I am clearly of opinion that this section has no application. It has reference to temporary obstructions to a thoroughfare by the erecting of *pandals* or arches by a private person, a procedure with which we are familiar. All the sections grouped together under Chapter IV, streets (*a*) refer to projections and obstructions created by private persons, and have nothing whatever to do with execution of repairs by employees of the Municipality itself. This argument therefore fails, and in this view I do not think it necessary to discuss at any length the difficult question whether a public body is liable for mere non-feasance. It was undoubtedly so held in a case above referred to, *Bathurst Borough* v. *Macpherson* (32), where the liability was put on the broad proposition that neglect to repair a drain caused a nuisance in the highway for which the borough was liable, and their Lordships expressly say that there is no principle upon which a distinction in this respect between non-feasance and misfeasance can be supported. There are, however, later cases, such as the *Pictou Municipality case* (34) and the *Sydney Municipality case* (35) above referred to, which directly negative that view, and draw a distinction which, the Board in the earlier case said, should not be drawn. The question will require fuller consideration in the light of the latest decisions of the Board when it arises necessarily for decision before this Court. In my opinion the liability of the Council must rest on the admitted fact that a heap of gravel was thrown on to the side of the road and allowed to project 9 feet into the roadway. This is an undoubted misfeasance. The question is, whether the fact that it was done by an independent contractor will protect the defendant. Mr. Sarma relied strongly on the case of *Daniel* v. *Metropolitan Ry.* (36). The injury caused to the plaintiff in that case was due to the fall of an iron girder on a train, which girder was being erected by a contractor. The decision was that the accident was not one which the company was bound to anticipate and against which it was bound to take precautions. Although there are observations in the judgments of the learned Lords about persons over whom the railway contractors have no control, I have no doubt that the basis of the decision in that case was absence of any negligence, that being at all events the only ground on which Lord Colonsay bases his decision. At all events all the learned Lords agree in holding that there was no misfeasance by the contractor. The true proposition seems to me to be contained in the proposition laid down in *Gibraltar Sanitary Commissioners* v. *Orfila* (7), with the corollary to be found in the language of Lord Blackburn in *Dalton* v. *Angus* (28). The first case decides that the powers conferred on a body created by Statute must be executed with due care. In the absence of contrary intention its duties and liabilities are the same as those imposed by the general law on a private person doing the same thing. And the corollary is as follows:—A person causing something to be done, the doing of which casts on him a duty, cannot escape from responsibility attaching on him of seeing that duty performed by delegating that to a contractor. He may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed. But he cannot thereby relieve himself from liability to those injured by the failure to perform it. This proposition of law was quoted by Lindley, L. J. in *Harda Ker* v *Idle District Council* (23) and treated as an authoritative exposition on the law. In that case the District Council employed a contractor to construct a certain sewer. In consequence of his negligence in carrying out the work a gas main was broken with the result that an explosion took place by which

(36) (1871) 5 H. L. 45; 40 L. J. P. C. 121; 24 L. T. 815; 20 W. R. 37.

injury was caused to the wife of the plaintiff and to his premises. The Court of Appeal presided over by that eminent Judge mentioned held that the District Council were responsible for the contractor's negligence. Lindley (L. J.) in paraphrasing Lord Blackburn's view says, that in *Hughes* v. *Percival* (37), Lord Blackburn points out that the employer's duty was to see that his contractor did his work properly and adds, "Lord Watson, in the same case, said the same thing." The doctrine was applied to a later case which is on all fours with the present case. That is *Penny* v. *Wimbledon Urban District Council* (38), which is also a decision of the Court of Appeal. There their Lordships pointed out the limitation to the doctrine which will also be found in Lord Blackburn's judgment. They say that where the act of negligence is a mere casual or collateral act, such as a workman employed on the work negligently leaving a pick-axe or such like on the road, the Council would not be responsible for that negligence of the contractor's servant. That is the proposition of law stated in *Pickard* v. *Smith* (26). But the Court held it had no application to a case where a statutory authority has power to do something to a road which will make it dangerous while it is being done, for then there is a duty cast upon them to take care that the Queen's subjects are not injured by any carelessness in the doing of that which has to be done, whether that action be the action of their own servants or of an independent contractor. This decision and the principles stated in it cover the present case exactly. I am therefore of opinion that the employment of a contractor did not relieve the Council of their liability.

On the question of remoteness of damage I do not think it necessary to say anything more than that I agree with my learned brother on this point, that the damages should be reduced to the sum of Rs. 2,500. The decree will be in the terms proposed by him.

M.C.P. *Decree varied.*

(37) (1883) 8 A. C. 443 at p. 446; 52 L. J. Q. B. 719; 49 L. T. 189; 31 W. R. 725; 47 J. P. 772.

(38) (1899) 2 Q. B. 72; 68 L J. Q. B. 704; 80 L. T. 615; 47 W. R. 565; 63 J. P. 406; 15 T. L. R. 348.

PATNA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 19 OF 1916.

July 16, 1917.

Present:—Mr. Justice Mullick and Mr. Justice Atkinson.

TRILOCHAN PANDA—DEFENDANT—APPELLANT

versus

DINABANDHU PANDA—PLAINTIFF—RESPONDENT.

C. P. Tenancy Act (XI of 1898), ss. 35, 36, 46, 47, 95—"Transfer," meaning of "Surrender," whether transfer—Surrender of tenancy in favour of co-sharer landlord—Lambardar, *whether can apply for possession—Suit for possession by landlord who obtained surrender, whether barred—Jurisdiction.*

The transfer contemplated by section 46 of the Central Provinces Tenancy Act must be either a sale or a gift or a mortgage or a sub-lease, and the words "otherwise transfer" must be limited to transactions of a similar nature. A surrender is in no sense a transfer, much less a transfer within the meaning of section 46. [p. 318, col. 2.]

The Central Provinces Tenancy Act, while making provision for the recovery of possession of a holding by the heir of a surrendering tenant, makes no provision for such recovery by a co-sharer landlord. [p. 318, col. 2.]

The institution of a suit for ejectment against a purchaser of a holding is not one of the duties which a *lambardar* can be held to have to perform as the representative of the proprietary body. He has no authority to represent the co-sharers for the purpose of ejectment before a Revenue Officer. [p. 319, col. 1.]

Plaintiffs Nos. 1 to 8 were co-sharer landlords with defendant who was also the *lambardar*. Certain tenants surrendered the lands in suit to plaintiffs Nos. 1 to 8, and the latter leased them to plaintiffs Nos. 9 to 12. Defendant then applied to the Revenue Officer under sections 46 and 47 of the Central Provinces Tenancy Act to be put in possession as landlord of the disputed lands, and his application was allowed. Plaintiffs then brought a suit in a Civil Court for declaration and possession.

Held, (1) that the surrender was not a transfer within the meaning of section 46 of the Central Provinces Tenancy Act and that the defendant had, therefore, no right to make an application under sections 46 and 47 of the Act; [p. 318, col. 2; p. 319, col. 1.]

(2) that section 95 of the Central Provinces Tenancy Act was no bar to the suit. [p. 319, col. 1.]

Appeal from an order of the Sub-Judge of Sambalpur, dated the 21st September 1916, reversing that of the Munsif, Sambalpur, dated the 12th June 1916.

Babu *Satish Chondra Bose* and Rai *Janaki Nath Bose* Bahadur for the Appellant.

Mr. *M. S. Das*, for the Respondent.

JUDGMENT.

MULLICK, J.—The plaintiffs Nos. 1 to 8

TRILOCHAN PANDA v. DINABANDHU PANDA.

are co-sharer landlords of a Gaontiahi village with defendant No. 1, who is also the *lambardar* appointed by Government.

It appears that certain tenants surrendered the lands in suit to plaintiffs Nos. 1 to 8, and that these plaintiffs thereupon leased the lands to plaintiffs Nos. 9 to 12. When that was done defendant No. 1, the *lambardar*, applied under sections 46 and 47 of the Central Provinces Tenancy Act to be put in possession as landlord of the disputed lands. The Revenue Officer allowed the prayer, and the present suit has been brought by the plaintiffs in the Civil Court for a declaration that they have a proprietary right in the lands and are entitled to recover them from defendant No. 1; and in the alternative there is a proposal for joint possession with the defendant No. 1 to the extent of the shares of plaintiffs Nos. 1 to 8.

The Munsif found that the Civil Court had no jurisdiction to entertain this suit by reason of section 95 of the Central Provinces Tenancy Act.

The learned Subordinate Judge in appeal was of a contrary opinion and held that the suit was maintainable, and he has remanded it to the Munsif for further hearing.

Now section 35 of the Central Provinces Tenancy Act makes provision for the surrender of a holding by a tenant.

Section 36 provides that in cases of surrender the next heir of the surrendering tenant will, upon application to the Revenue Officer, be entitled under certain circumstances to be put in possession. It is to be noticed that this section makes no provision for surrender by a tenant to a co-sharer landlord and recovery of possession by the remaining landlords.

Then section 46 of the Act provides that when an occupancy tenant sells his holding or makes a gift of it or mortgages it or sub lets it for a period exceeding one year, or otherwise transfers his rights in the holding or in any portion thereof, every such sale, gift, mortgage, sub lease, or transfer shall be voidable in the manner and to the extent provided by the section.

Section 47 provides that when a transfer is made by an occupancy tenant, contrary to the provisions of section 46, the landlord from whom the tenant held the land may, on application to a Revenue Officer made within two years from the date on which the transfer was made, be placed in possession under certain circumstances.

On behalf of the appellant before us it is contended that he was competent as *lambardar* to make an application under section 47, and that the order of the Revenue Officer being final, and no civil suit being allowed by the Act for the purpose of setting aside that order, section 95 is a complete bar to the present suit.

In order to bring himself within the provisions of section 46 it is necessary for the learned Vakil for the appellant to establish that the surrender in this case was a transfer within the meaning of section 46. Now the transfer contemplated by that section must be either a sale or a gift or a mortgage or a sub-lease, and the words "otherwise transfer" must be limited to transactions of a similar nature. A surrender is yielding up by the tenant of his rights to a person who is entitled to the immediate reversion or remainder; in no sense can it be called a transfer, much less a transfer within the meaning of section 46. The Act, while it makes provision for the recovery of possession by the heir of a surrendering tenant, makes no provision for such recovery by a co-sharer landlord, and to read section 43 as creating such a right would, in my opinion, lead to an absurd result. For if this section applies then the co-sharer who accepts a surrender can only be ejected if he joins in his own ejectment, inasmuch as the word "landlord" in the section means the whole body of joint owners.

But then it is contended that the *lambardar*, representing the whole body of landlords, is entitled to eject, upon his own authority, without the consent or leave of the co-sharer who has accepted the surrender.

There is no justification for this contention. So far as the prayer for ejectment

is concerned, be it in a suit before a Civil Court or an application before a Revenue Officer, the entire body of landlords must be represented; and, if the *lambardar* seeks to prosecute such a claim, he can only do so as the agent for the entire body. In the case under consideration he must, therefore, represent the very co-sharer who accepted the surrender in the first instance, and the same absurdity results.

Moreover, the position of the *lambardar* has been the subject of judicial authority and it is only necessary to refer to the case of *Nilmani Guntia* v. *Jogendra Guntia* (1), where their Lordships of the Calcutta High Court have ruled that section 138 of the Central Provinces Land Revenue Act does not give the *lambardar* power to eject trespassers from lands or to eject tenants. Section 11 of the Act defines a *lambardar* as a person appointed in the manner prescribed by the Act to represent the proprietary body of a *mahal* in its relations with Government. The institution of a suit for ejectment against a purchaser is not one of the duties which the *lambardar* can be held to have to perform as the representative of the co-sharers. In my opinion, therefore, it is clear that the *lambardar* has no authority to represent the co-sharers for the purpose of ejectment before the Revenue Officer.

The result is that upon the ground that the surrender by the plaintiffs Nos. 1 to 8 was not a transfer within the purview of sections 46 and 47 of the Central Provinces Tenancy Act, I hold that section 95 has no application. The order putting defendant No. 1 into possession was *ultra vires*, and the plaintiff is entitled to maintain the suit. The appeal is dismissed with costs.

ATKINSON, J.—I concur.

Appeal dismissed.

(1) 6 Ind. Cas. 389; 37 C. 694; 12 C. L. J 104.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 667 OF 1917.

December 5, 1917.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

SRIKAKOLAPUR VENKATARAJU—DEFENDANT—APPELLANT

versus

GUDIVADA RAMANUJAM—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), ss 30, 65—Wagering contract—Suit for recovery of deposit made as security for performance of contract, maintainability of—Void contracts, money paid under, when recoverable.

A suit lies for recovery of money deposited by a party to a wagering contract as security for the performance of his part of the contract. The direct prohibition contained in section 30 of the Contract Act does not cover such a claim. [p. 320, col. 1.]

The words 'entrusted to any person to abide the result of a game etc.,' in section 30 refer only to moneys deposited with stakeholders. [p. 320, col. 1.]

The general principle is that a plaintiff whose hands have not been tainted by corruption and who has not committed any act which fixes him with having been a party to a fraud is entitled to get back the money which he left with another. [p. 320, col. 2.]

Second appeal against the decree of the Court of the Subordinate Judge, Cocanada, in Appeal Suit No. 129 of 1914, preferred against that of the Court of the District Munsif, Cocanada, in Original Suit No. 338 of 1912.

Mr. *T. R. Ramachandra Aiyar*, for the Appellant.

Mr. *B. Narasimha Row*, for the Respondent.

JUDGMENT.—We accept the finding that the contract was a wagering one. The further question is whether the money deposited by the plaintiff with the defendant as the security for the performance of his part of the contract is recoverable. There is no question of limitation.

The lower Courts held that section 65 of the Contract Act was applicable to he transaction. We are unable to agree with them. Section 30 makes a wagering contract void *ab initio* and to such a class of contracts section 65 has no application. In *Ledu* v. *Hira Lal Base* 1) this view was taken. Despite the inclination of the learned Judges of the Bombay High Court in the earlier cases to apply section 65 to such contracts, the later view is in agreement with the Calcutta

(1) 29 Ind. Cas. 625; 43 C. 115; 21 C. L. J. 537; 19 C. W. N. 919.

view. See *Parshottam Veribhai* v. *Chhotrasangji Madhavsangji* (2). In this Court, Oldfield and Bakewell, JJ., held in *Srinivasa Aiyar* v. *Sesha Iyer* (3) that section 65 does not cover monies paid under a marriage brokerage contract. That principle is applicable to the present case. The question still remains whether the plaintiff is entitled to sue for the recovery of the money paid by him in furtherance of the contract of wager. We are clear that the direct prohibition contained in section 30 does not prevent such a claim. This is not a suit to recover any money "won on any wager", nor is the suit to recover money "entrusted to any person to abide the result of any game or other uncertain event on which any wager is made." In our opinion this latter clause applies only to cases of monies left with stakeholders. It may be, as Mr. Ramachandra Iyer suggested, that the money is sometimes left with one of the parties to the contract on account of his solvency or respectability. But the position he would occupy with reference to the money so paid will be that of a stakeholder. The entrustment referred to in the section can have no meaning when the money is left as a security for the due performance of the contract. We, therefore, hold that section 30 does not prohibit the maintainability of such a suit.

This takes us to the general right of parties whose monies are in the hands of another without the latter having any right to retain them. Ordinarily the person who paid the money is entitled to claim it back. But there may be such a conduct on the part of the person paying it as to disentitle him from recovering it; one instance is that of being a party to the perpetrated fraud. Another instance is where moral turpitude is attributable to the person who paid the money. The decision in *Ledu* v. *Hira Lal Bose* (1) is an illustration of the latter class of cases. The observations of the learned Judges in that case show that if there is no moral delinquency, the plaintiff can sue to recover. *Gulabchand Paramchand* v. *Fulbai Harichand* (4) and *Haribhai Hansji* v. *Nathubhai Ratnaji* (5) lay down the same principle.

These decisions derive support from a catena of English decisions which have held that even against a stakeholder a suit for money will lie if he had not parted with the stake money and the claim is founded not on the result of the wager. It is an *a fortiori* conclusion from these authorities that where money is not left with a stakeholder nor entrusted on condition that its disposal is to be determined by the result of the uncertain event, the money deposited as security must be returned. *Hampden* v. *Walsh* (6), *O'Sullivan* v. *Thomas* (7), *Burge* v. *Ashley* (8) enunciates the proposition we have referred to.

In our opinion the general principle that a plaintiff whose hands have not been tainted by corruption and who has not committed any act which fixes him with having been a party to a fraud is entitled to get back the money which he left with another is applicable to the present case. We uphold the judgment of the Courts below on this ground and dismiss the second appeal with costs.

The memorandum of objections is also dismissed with costs.

Appeal and Memo. of objections dismissed.

M. C. P.

(2) 40 Ind. Cas. 1002; 41 B. 546; 19 Bom. L. R. 545.

(3) 41 Ind. Cas. 783; 6 L. W. 42; 34 M. L. J. 282.

(4) 3 Ind. Cas. 748; 33 B. 411; 11 Bom. L. R. 649.

(5) 23 Ind. Cas. 602; 38 B. 249; 16 Bom. L. R. 62.

(6) (1876) 1 Q. B. D. 189 at p. 196; 45 L. J. Q. B. 238; 33 L. T. 852; 24 W. R. 607.

(7) (1895) 1 Q. B. 698; 64 L. J. Q. B. 398; 15 R. 253; 72 L. T. 285; 43 W. R. 269; 59 J. P. 134.

(8) (1900) 1 Q. B. 744; 69 L. J. Q. B. 538; 82 L. T. 518; 48 W. R. 433; 16 T. L. R. 263.

AMIRUDDIN *v.* EMPEROR.

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 377 OF 1917.

July 30, 1917.

Present:—Mr. Justice Teunon and Justice Sir Shamsul Huda, KT.

Sheikh AMIRUDDIN AHMED *alias* TAHUR BAP—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 298, 299, 164—Trial by Jury—Functions of Judge and Jury—Misdirection—Expressions assuming guilt of accused, propriety of—Evidence Act (I of 1872), ss. 24, 25, 26, 27—S. 27, whether controls s. 24—Confession of co-accused, admissibility of—Supplementary statements by accused during verification proceedings, admissibility of.

In a trial by Jury the Sessions Judge admitted as evidence confessional statements of the accused made to the Police which were not strictly within the limits laid down by section 27 of the Evidence Act, and also allowed the Committing Magistrate to depose to statements made by the accused in the course of a proceeding undertaken by him for verifying the confession—statements which were at no time recorded by the Magistrate in accordance with the provisions of section 164, Criminal Procedure Code:

Held, that the trial was vitiated by misdirections so that the conviction of the accused and the sentence passed upon him must be set aside and the case re-tried by the Sessions Court. [p. 324, col. 2; p. 326, col. 2.]

Per *Teunon, J.*—In a trial by Jury the Judge's treatment of a confession, though onesided to some extent, may not by itself be a sufficient misdirection to the Jury to necessitate a re-trial. [p. 322, col. 2.]

The Judge's instruction to the Jury to take into consideration against an accused statements of co-accused as their "confessions or confessional statements or confessions of a sort", when as a matter of fact those statements were not self-incriminating, amounts to a misdirection. [p. 322, col. 2.]

It is a misdirection for a Judge to leave it to the Jury to decide whether certain statements or confessions made by the accused and how much thereof are admissible in evidence. It is for the Judge to admit or exclude evidence in accordance with the law on the subject and for the Jury to weigh and value the evidence admitted. [p. 323, col. 2.]

A Judge in his charge to the Jury should avoid, as far as may be, the use of expressions which assume the guilt of the accused and must not indulge in the use of slang or colloquial phrases [p. 324, cols. 1 & 2.]

Verification proceedings undertaken by a Magistrate in the presence of the accused, with a view to testing the truth of his confession and to obtain evidence either corroborating the confession or indicating its falsity, are not wholly illegal; but the verifying Magistrate cannot be permitted to depose to statements said to have been made to him by the accused in the course of the verification proceedings, where such statements are not recorded by him in the manner provided by section 164, Criminal Procedure Code. [p. 322, col 2; p. 323, col. 1.]

Section 27 of the Evidence Act qualifies not only sections 26 and 25 but also section 24. Therefore, when a confession as a whole is excluded, whether by reason of the provisions of section 26 or of section 25 or of section 24, so much of the information given by the person making the confession when he was an accused and in custody as distinctly relates to a relevant fact thereby discovered becomes admissible. [p. 323, col. 2; p 324, col. 1.]

Under section 27 of the Evidence Act so much of the information as set the Police in motion and led to the "discovery" is admissible. It does not matter whether the accused himself produced the articles said to be discovered by his statement or confession. [p. 324, col. 1.]

Per *Shamsul Huda, J.*—Section 24 of the Evidence Act does not control section 27. If a single statement made by the accused contains more information than what is contemplated in section 24, the statement is not to go in as a whole nor is it to go in as a statement at all, but what is admissible is the particular information given by the statement which has led to the discovery. [p. 325, cols. 1 & 2.]

The verification of a confession by taking the accused to various places referred to in the confession lends itself to great abuses and should be avoided. There is perhaps nothing objectionable if a verification is made independently of the confessing accused and unaided by him. [p. 326, col. 1.]

It would be difficult to hold that the supplemental statements made by the confessing accused in the course of the verification proceedings were voluntary even where they are recorded by the Magistrate in the manner provided in section 164, Criminal Procedure Code. [p. 326, col. 1.]

Appeal against the conviction and sentence passed by the Second Additional Sessions Judge, Mymensingh, dated the 9th May 1917.

Babus *Dasarathi Sanyal* and *Jotindra Mohan Choudhury*, for the Appellant.

Mr. *Orr* (Deputy Legal Remembrancer), for the Crown.

JUDGMENT.

TEUNON, J.—In this case the appellant before us has been convicted of dacoity and sentenced under section 395, Indian Penal Code, to rigorous imprisonment for five years.

The trial was by Jury in the Court of the 2nd Additional Sessions Judge of Mymensing and what has been urged before us is that the trial has been vitiated by the erroneous admission of evidence and by serious misdirections in the learned Judge's charge.

It appears that on the night of the 24th of November 1916, at a village called Rajoi, a serious dacoity took place in the houses of two cousins Rajendra and Debendra Bhoumik. From the house of Debendra cash, currency notes, ornaments and other articles to an aggregate value of over

Rs. 9,000 and from Rajendra's house cash and other property to the value of some Rs. 800, are said to have been removed.

In connection with this dacoity and with a dacoity that took place in village Baliapara about a month before, the appellant, it appears, came into touch with the Police on the 26th of November. On the 28th of that month two persons of the name of Zahir and Piru, and on the 29th a third man named Maniruddin were arrested. Thereafter also on the 29th, the appellant was himself arrested.

It is next said that all the four persons so arrested made confessions to certain Police Officers, and that the confessions so made led to certain discoveries.

On the following day, 30th November, all four were produced before a Deputy Magistrate to whom appellant made a confession and Zahir and Piru made statements. On the 3rd of December, the Deputy Magistrate, who recorded the statements, next proceeded to verify the appellant's confession and in the course of these verifications proceedings, which continued to the 5th December, appellant, it is said, made additional statements.

Ultimately all four accused were placed on their trial, and all four have been convicted. We are, however, not concerned with Piru, Zahir and Maniruddin, whose cases are not before us.

I shall now deal with the objections that have been taken before us to the trial as conducted by the learned Judge.

The 1st objection or series of objections refers to the confession made by the appellant himself on the 30th November. It is urged in the 1st place that the Sessions Judge has not sufficiently placed before the Jury the circumstances which militate against the value of the confession, such as (*a*) the interval between arrest and the making of the confession, in other words, the period spent in Police custody, (*b*) facts indicating that the appellant had been led to believe that he would be made an approver, (*c*) the attempts made in portions of the confession to extenuate the appellant's own share in the crime and (*d*) the discrepancy between the sums or value stolen and the sums recovered. It has also been urged that the Judge should have excluded or directed the Jury to discard from their consideration the first portion of the confession in which the appellant speaks of the earlier dacoity at Balipara. In my judgment the Judge would have grievously erred had he excluded any portion of the confession, and the fact that he put the whole of the confession before the Jury detracts from the argument that he did not invite special attention to passages in which, for instance, he speaks of persuasion or of his rescue of a child from spoliation. Similarly the learned Judge has in fact dealt with the question of inducement. Thus, though it may be said with some reason that the Judge's treatment of the confession is to some extent one-sided, for instance in putting to the Jury such questions as these, "is not the production.....material corroboration" ....."do they not afford sufficient corroboration", and in treating the use in the confession of English expressions (which is merely consistent with evidence previously obtained) as having the value of independent corroboration, yet such misdirections as there are in this connection would not in my opinion have been sufficient by themselves to necessitate a re-trial.

It is next urged that the Judge has erred in instructing the Jury to take into consideration as against the appellant the statements made by Zahir and Piru to the Magistrate on the 30th of November. He has throughout spoken of these statements as "confessions", "confessional statements" or "confessions of a sort," but when we examine them we find that they are not self-incriminating statements. In speaking of them as confessions and in saying that they "should" be taken into consideration as against the appellant, the Judge, it is clear, must have misled the Jury.

In the third place it is contended that the so-called verification proceedings are illegal and that no evidence regarding them should have been admitted. This contention is based largely on the observations to be found in the judgments in the case of *Emperor* v. *Radhe Halwai* (1), but I do not understand that case or any other case to lay down that such proceedings are wholly illegal. They are undertaken, it would seem, with a view to testing the truth of a confession and to obtain evidence either corro-

(1) 7 C. W. N. 220.

borating the confession or indicating its falsity. In so far at least as such evidence may be obtained, for instance, in ascertaining that the prisoner is familiar with, or wholly ignorant of, the localities of which he has spoken, or in furnishing clues to further enquiry, such proceedings may be useful. In connection with such proceedings the main concern of the Courts would seem to be to ensure that evidence not strictly admissible is not admitted. In the present case that precaution has not been taken, for we find that the verifying Magistrate has been permitted to speak to statements said to have been made to him in the course of his proceedings. Such additional statements being statements made in the course of an investigation, when not recorded in the manner provided in section 164 of the Code of Criminal Procedure, are, in my opinion, inadmissible. If further authority for this proposition is required it is to be found in the cases of *Queen Empress* v. *Bhairab Chunder Chuckerbutty* (2) (though I am not to be understood as agreeing in the distinction therein drawn between a statement and a confession); *Emperor* v. *Radhe Halwai* (1) and *King-Emperor* v. *Rajani Kanto Koer* (3).

Lastly very serious objection has been properly taken to the manner in which the Sessions Judge has dealt with the confessions said to have been made by the appellant and the co accused to the Police in the course of the Police investigation. It is unnecessary and it would be all but impossible to enumerate in detail the errors committed by the learned Judge in this connection. He has admitted in evidence and placed before the Jury the whole history so to speak of the investigation. He has permitted the Police Officers and other witnesses, introducing *inter alia* much hearsay matter, to describe the steps and processes by which they obtained and worked up clues and finally succeeded, in the Judge's language, "in tracking and trapping the culprit" and finally in "bagging" the accused on their trial.

The confessions having led, it is said, to discoveries, he has next admitted in evidence not merely so much as led directly to the discovery or related directly to the fact discovered but practically the whole of each such statement, including such matter as this, "Maniruddin named one Amiruddin (*i.e.* the appellant), while Zahir did not... Maniruddin and Zahir were confronted and Zahir when thus confronted had to admit that Amiruddin was also in the gang," and again, "Amiruddin asked to be confronted with Piru, Zahir and Maniruddin, to tell them to their faces what articles they each had got in their shares."

He has next in effect directed the Jury that the statements which he has thus erroneously admitted could and should be used not merely against the maker but against his co-accused. In another respect also the Sessions Judge has dealt erroneously with this part of the case. He has expounded to the Jury the provisions of sections 24 to 30 of the Evidence Act, and has next left it to the Jury to "scrutinize the confessions and the other evidence" in the light of that exposition. If in this portion of the charge he intended, as he apparently did, to leave it to the Jury to decide, whether the statements or confessions made to the Magistrate and how much of the confessions said to have been made to the Police Officers were admissible, he has clearly thrown upon the Jury the duty which the law lays on him. It is for the Judge to admit or exclude evidence in accordance with the law on that subject, and for the Jury to weigh and value the evidence admitted.

I have next to consider two criticisms which have been advanced in connection with this part of the case and do not appear to me to be well founded.

It is said that the Sessions Judge is wrong in his view that section 27 of the Evidence Act applies to and qualifies section 24 and section 25, as well as section 26. Whether as regards section 24 the question strictly arises has not been made clear, inasmuch as it has not been shown to us that discoveries resulted or are said to have resulted from confessions other than confessions made to Police Officers, or when in the custody of Police Officers and not in the immediate presence of a Magistrate. If, however, the question does arise, in that case I am of opinion that section 27 qualifies not only section 26 and section 25, but

(2) 2 C. W. N. 702 at p. 703.
(3) 8 C. W. N. 22; 1 Cr. L. J. 10.

also section 24. All three sections lay down general rules excluding confessions. It is, in my opinion, unnecessary to discuss the policy which has led to the enactment of these rules. It is sufficient to say that the same broad grounds or principles appear to underlie all three. In section 27 follows an exception. The reason for making or providing this exception applies alike to each of the three preceding general rules. If the exception had been intended to apply only to section 26 or only to sections 26 and 25, we should have expected to find this intention expressly stated or to find the exception embodied in those two sections or in section 26 alone. Further the position of section 28, which is also in the nature of an exception to section 24, supports this view. I, therefore, hold that when a confession as a whole is excluded, whether by reason of the provisions of section 26 or of section 25 or of section 24, so much of the information given by the person making the confession, when accused and in custody, as distinctly relates to a relevant fact thereby discovered becomes admissible.

It has next been contended that when an accused himself produces the articles said to be discovered, any anterior statement made by him is inadmissible. I am unable to assent to this contention. On the contrary I agree with the view taken in *Queen-Empress* v. *Nana* (4) and in *Legal Remembrancer* v. *Chema Nashya* (5) that in such cases so much of the information as "set the Police in motion and led to the discovery" is admissible. Even so, that does not in the present case render admissible evidence to the effect that when a certain pot had been fished out, Amiruddin, when pouring out the ornaments, said: "I got these ornaments in my share in the Rajoi dacoity." That statement obviously led to the discovery.

In conclusion I have to point out to the Additional Sessions Judge that in his charge to the Jury he should avoid as far as may be the use of expressions which assume the guilt of the accused. I have already had occasion to deprecate his use of the interrogative method, and more particularly his addressing to the Jury questions couched in the form "is *not* this" or "does *not* that" and the like. Lastly, I cannot condemn too strongly his use of slang or colloquial phrases such as "tracking and trapping" or "bagging" culprits; more especially when applied to the persons then on their trial.

For the reasons given in our several judgments we agree that we have no alternative but to set aside the conviction and sentence in the present case and direct that the appellant be re-tried. The re-trial will be in the Court of the Sessions Judge.

SHAMSUL HUDA, J.—In this case three important questions of law have been argued before us. The first question is whether section 24 of the Evidence Act controls section 27 or is controlled by it or in other words, whether information given to a Police Officer by an accused person which may have led to a discovery within the meaning of section 27 can be used as evidence in case such information is proved to have been obtained by any inducement, threat, or promise, such as under section 24 would make a confession inadmissible. The question is *res integra* so far as this Court is concerned, but there is an important decision of the Full Bench of the Allahabad High Court in *Queen-Empress* v. *Babu Lal* (6), in which the question whether section 27 controls section 25 of the Evidence Act was fully discussed and that decision has an important bearing on the decision of the present question. It was held by the majority of the Full Bench that section 27 controlled section 25, while the opposite view, *viz.*, that it was a proviso to the next preceding section only was maintained in an equally exhaustive judgment by Mahmood, J. The reasons given for and against the view that section 27 controls section 25 also apply with equal force to the question whether that section likewise controls section 24. Although at first sight it may appear somewhat anomalous that an accused person should be prejudiced by a statement made by him even against his own will, for it infringes one of the fundamental principles of law that an act done by a person against his own will is not his act, there is on the other hand the consideration that by whatever means obtained, the statement receives a guarantee

(4) 14 B. 260 (F. B.); 7 Ind. Dec. (N. S.) 632.
(5) 25 C. 418; 2 C. W. N. 257; 13 Ind. Dec. (N. S.) 274.
(6) 6 A. 509; A. W. N. (1884) 229; 4 Ind. Dec. (N. S.) 155.

of its authenticity by the corroboration which the discovery lends to it. The considerations for and against the admissibility of such statement may be said to be equally balanced. If the policy of exclusion embodied in sections 25 and 26 is based on the unreliability of Police Officers deposing to incriminating statements made by accused persons, by reason of their being specially interested in the detection of crime and by reason of the corrupt practices that prevailed in those days, the danger is largely removed by the confirmation afforded by the 'discovery.' If, on the other hand, the exclusion is based on a desire to remove all temptations in the way of Police Officers to obtain confessions by inducement, threat or torture the 'discovery' does not remove the danger. That both these considerations had their share in determining the provisions of sections 25 and 26 cannot be doubted. The fact, however, that sections 25, 26 and 27 existed in the Code of Criminal Procedure uncontrolled by any express provisions such as we now have in section 24 of the Evidence Act, may suggest the inference that by transferring those three sections from the Code of Criminal Procedure to the Evidence Act, no change in the law was intended to be introduced. But this argument is clearly fallacious, as section 24 laid down no new principle but embodied a well established principle regulating the admissibility of confessions, and even before it was formally enacted as a rule of law in this country the principle governed these provisions of the Criminal Procedure Code even before their transfer to the Evidence Act of 1872. It appears, however, that the general principle derived from the English law was even under that law modified, so as to negative its application to confessions leading to 'discovery.'* I think, therefore, we ought to be guided by the decision of the majority of the Full Bench of the Allahabad High Court and hold that section 24 does not control section 27.

The next question for consideration is the extent to which information falling under section 27 can be given in evidence. The section itself is clear on that point and no discussion seems necessary. It lays down that only so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. It is noticeable that the word used is not "*statement*" but "*information*", and this seems to suggest that even if a single statement contains more information than what is contemplated in section 24, the statement is not to go in as a whole nor is it to go in as a statement at all, but what is admissible is the particular information given by the statement which has led to the discovery. If, therefore, an accused person were to state to a Police Officer that he killed *A* with a knife and concealed the dead body at a particular place, all that is admissible is the information that he had concealed the dead body in that place, but the further information that he himself had killed *A* is not admissible under section 27.

It was pointed out by Straight, J., in the case of *Queen-Empress* v. *Babu Lal* (6) that "where a statement is being detailed by a constable as having been made by an accused in consequence of which he discovered a certain fact or certain facts, the strictest precision should be enjoined on the witness, so that there may be no room for mistake or misunderstanding." This question was fully discussed by a Full Bench of the Bombay High Court in *Queen-Empress* v. *Nana* (4). In the present case it is clear that the investigating Police Officer was allowed to disclose in his evidence a great deal more than is contemplated by section 27.

The last question for consideration is the propriety of the procedure adopted by the Deputy Magistrate Maulvi Abu Ali Chowdhury for the purpose of verifying the confession of the accused Amiruddin. It appears that after recording the confession of the accused in the regular manner this officer took the accused with him to various places referred to in the confession for purposes of verification, and in the course of such verification Amiruddin seems to have supplemented his former recorded confession by other statements of an incriminating nature, and the learned Deputy Magistrate was allowed at the trial to depose to these other statements of Amiruddin though they were never recorded at any time under section 164 of the Criminal Procedure Code. I am clearly of opinion that these additional statements could not be used as evidence

*Taylor's Law of Evidence, Section 824.

against the accused. As authorities for this view, I may refer to the decisions of this Court in *Queen-Empress* v. *Bhairab Chunder Chuckerbutty* (2) and *King-Emperor* v. *Rajani Kanto Koer* (3) and of the Madras High Court in *Queen-Empress* v. *Viran* (7). Apart from the question of legality of the procedure I think I would not be going out of my way if I expressed my concurrence with the views expressed by Prinsep and Geidt, JJ., in the case of *Emperor* v. *Radhe Halwai* (1) on the utility and, propriety of such a procedure.

It seems to me that such a procedure for purposes of verification, confined as such verification must be to facts already stated in a confession recorded in accordance with law would seldom require the presence of the accused. At any rate it was not required in the present case. The presence of the accused naturally leads to questioning, and to an effort to get out of him incriminating statements which under pressure of circumstances he finds himself compelled to make and as to which it cannot be said that it is voluntary. Even, therefore, if the Deputy Magistrate had in this case tried to make these statements admissible in evidence by recording them under section 164, Criminal Procedure Code, after the verification had been completed, I would have found it difficult to hold that the confession was voluntary. I think 'verification' under conditions such as these lends itself to very great abuses and should be avoided. There is perhaps nothing objectionable in a verification made independently of the confessing accused and unaided by him. An accused person should not be placed in a position which *necessitates* his making incriminating statements and which leads to the creation of evidence against himself. It is the privilege of an accused to say as little as he likes regarding the offence with which he is charged or to say nothing at all, if he is so minded, but it seems to me that the procedure adopted by the verifying officer is an infringement of the privilege. In this respect the Police are in a position materially different from that of a Magistrate, for whereas a statement made to a Police Officer, unless it falls within the provision of section 27 of the Evidence Act, can never be used against an accused, a Magistrate may, if he chooses, record these statements in the manner required by law after the verification procedure is over, and thereby give such record an air of validity which in reality does not attach to it.

I think, therefore, that there was misdirection to the Jury in so far as the learned Judge admitted as evidence confessional statements made to the Police which were not strictly within the limits laid down by section 27 of the Evidence Act and also in so far as he allowed the Deputy Magistrate Mr. Abu Ali Chowdhury to depose to statements made by the accused in the course of the procedure adopted by him for verifying the confession of the accused—statements which were at no time recorded by him in accordance with the provisions of section 164 of the Criminal Procedure Code, and it is highly likely that the admission of such evidence, not legally admissible, has prejudiced the accused in the trial. For these and for other reasons given in the judgment of my learned brother I agree with him in directing a re-trial.

Re-trial ordered.

(7) 9 M. 244; 2 Weir 125; 3 Ind. Dec. (N. S.) 553.

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 1542 OF 1917.

October 2, 1917.

Present:—Mr. Justice Rattigan, Chief Judge, and Mr. Justice Scott-Smith.

HIRA LAL—ACCUSED—PETITIONER

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 14—"Any local area", meaning of—Special Magistrate powers of—Punjab Government Notification No. 99, dated 23rd February 1883.

The words "any local area" in section 14 of the Code of Criminal Procedure can be extended to cover, if necessary, all the territories administered by the Local Government issuing the notification, and are not restricted in their meaning to a local area within a specified District or Sessions Division. [p. 327, cols 1 & 2.]

The Punjab Government Notification No. 99, dated 23rd February 1883, applies equally to a Special Magistrate of the first class appointed under section 14 of the Criminal Procedure Code. [p. 327, col. 2.]

HIRA LAL *v.* EMPEROR.

Petition for revision of the orders of the Special Magistrate, 1st Class, at Ludhiana, dated the 24th September and the 4th October 1917, framing charges against the petitioner and rejecting his objection that the Court was without jurisdiction.

Mr. *Beechey*, for the Petitioner.

Lala *Mul Chand*, R. S., for the Government Advocate, for the Respondent.

JUDGMENT.—The petitioner Hira Lal Kapur is being tried by Mr. D. J. Boyd, Magistrate, 1st Class, Ludhiana, upon charges under (1) sections 162 and 163, Indian Penal Code, and (2) sections 162/109 and 168/109, Indian Penal Code, for offences alleged to have been committed by him at Simla. He has applied to this Court through his Counsel, Mr. Beechey, for revision on the ground that the Magistrate trying the case has jurisdiction merely with regard to offences committed within the District of Ludhiana and is, therefore, incompetent to try petitioner upon the present charges and further that in any event he has no jurisdiction to take cognizance of this case on the information of Sardar Bahadur Sukha Singh, Deputy Superintendent of Police, without the consent of the accused. In our opinion neither of these contentions is tenable. Mr Boyd was appointed by the Local Government a "Special Magistrate" under the provisions of section 14, Criminal Procedure Code, and all the powers of a Magistrate of the 1st Class in regard to cases generally throughout the Punjab were conferred upon him for a period of two months from the date of the Notification No. 3548-S., dated the 25th August 1917. Mr. Beechey contends that this notification of the Local Government was *ultra vires* inasmuch as the words 'any local area' under section 14 of the Code cannot be extended to cover a whole province and ought to be restricted in their meaning to a local area within a specified District or Sessions Division. This argument is, however, no longer open in view of the opinions to the contrary expressed by all six Judges in *Lakhmi Chand* v. *Emperor* (1). In that case the Judges were unanimous in holding that the words "local area" could be extended to cover, if necessary, all the territories administered by the Local Government issuing the notification. It is perhaps true that the actual point now in question was not expressly before the learned Judges for determination, but they all considered it and the opinions expressed by them must necessarily carry the greatest weight. The notification which was before them for consideration in 1901 was far wider in its terms inasmuch as no local area at all was specified, but even so the learned Judges by a majority held that the proceedings of the Special Magistrate, Mr. J. G. M. Rennie, ought not to be set aside. On the other hand, they were (as we have already remarked) quite clear that a notification expressed in terms such as those of the notification now before us would be valid and confer jurisdiction on the Special Magistrate throughout the province. The difficulty suggested by Mr. Beechey as regards appeals from the orders of a Special Magistrate having jurisdiction throughout the Punjab does not at present arise, but we see no reason to doubt the correctness of the Madras High Court decision in a similar case, where it was held that the appeal would lie to the Sessions Judge within the local limits of whose jurisdiction the Magistrate was in any particular case holding his Court: *Valia Ambu Poduval* v. *Emperor* (2). The principle underlying that decision might well be held to apply to a case such as that before us.

As regards the second objection, we need say no more than that it is disposed of by the ruling of this Court in *Piyare Lal* v. *Emperor* (3) and Notification No. 99, dated 23rd February 1883. There is no ground for holding that that notification does not apply equally to Special Magistrates of the First Class appointed under section 14 of the Code.

We accordingly reject this petition.

Petition rejected.

(1) 24 P. R. 1901 Cr.; 96 P. L. R. 1901.

(2) 30 M. 136; 1 M. L. T. 402; 16 M. L. J. 444; 4 Cr. L. J. 443.

(3) 20 P. R. 1901 Cr.; 186 P. L. R. 1901.

CHAND TARAFDAR v. SHAMSHER FAKIR.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 1386 OF 1917.

January 28, 1918.

Present:—Mr. Justice Chitty and Mr. Justice Walmsley.

CHAND TARAFDAR—PETITIONER

versus

SHAMSHER FAKIR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 16, 350—Difference of opinion between even number of Magistrates—Procedure—Rules framed by Bengal Government under s. 16, Criminal Procedure Code, r. 6—Trial, de novo—Jurisdiction.

Rule 6 of the Rules framed by the Bengal Government under section 16, Criminal Procedure Code, provides that in case of a difference of opinion between an even number of Honorary Magistrates the case shall be referred back to the District Magistrate or Sub-Divisional Officer, as the case may be.

Where a case is thus referred back under this rule to the Sub-Divisional Officer, the provisions of sections 350, Criminal Procedure Code, apply to the case, so that the Magistrate does not act without jurisdiction if in the absence of any demand for a *de novo* trial on the part of the accused he hears arguments and passes judgment without holding a *de novo* trial.

Babus *Manmatha Nath Mukerjee*, *Jogendra Narain Majumdar* and *Amulya Kumar Bhattacharjya*, for the Petitioner.

Babus *Dasarathi Sanyal* and *Provat Chandra Dutta*, for the Opposite Party.

JUDGMENT.—In this case the petitioner Chand Tarafdar was charged under sections 147 and 324 of the Indian Penal Code before a Bench of two Honorary Magistrates exercising 3rd Class powers. The two Magistrates differed in opinion and the case was under rule 6 referred back to the Sub-Divisional Magistrate. He did not try the case *de novo* but heard arguments and passed judgment convicting the accused under sections 147 and 324, Indian Penal Code, and sentencing him to six months' rigorous imprisonment. The accused appealed and his appeal was heard by the 2nd Additional Sessions Judge of Mymensingh. He held, on the authority of *Ulfat Sheikh* v. *Emperor* (1), that the Sub-Divisional Magistrate had no jurisdiction, and that the case should have been decided by the casting vote of the Chairman of the Bench of Honorary Magistrates, though at the same time he pointed out that no Chairman ppeared to have been chosen. He accordingly set aside the conviction and sentence and remanded the case for re-trial by a Stipendiary Magistrate. Against that order the accused applied for and obtained this Rule. We must at once point out that the learned Judge was in error in supposing that the old rule 6 of the Rules framed by the Local Government under section 16, Criminal Procedure Code, was still in force in Mymensingh. The new rule 6, which provides that in case of a difference of opinion between an even number of Magistrates the case shall be referred back to the District Magistrate or Sub-Divisional Officer, has been made applicable to the whole of the Presidency of Bengal, as now constituted, by Government Notification 950-A, dated 30th January 1914. The Sub-Divisional Officer had, therefore, jurisdiction to deal with the case. The difficulty, however, does not end there. It is not quite clear what is meant by the concluding words of rule 6, "the case shall be referred back to the District Magistrate or the Sub-Divisional Officer, as the case may be." Does it mean that he is merely to hear arguments and record his opinion, as was done in this case, or is he to try the case again *de novo*? Though the word "back" might be taken to indicate that the case was to be sent back as an untried case, we do not think that this is the only possible interpretation. In any case we see no reason why the provisions of section 350, Criminal Procedure Code, should not apply to this case. Here the accused did not demand a *de novo* trial before the Sub-Divisional Officer: nor does he now express any such desire. On the contrary he begs that he may not be tried all over again, but that his appeal may be heard on the merits. To this the complainant, whose Pleader we permitted to address us on the point, has no objection. We accordingly make the Rule absolute, set aside the order of the 2nd Additional Sessions Judge and direct that the appeal be heard on its merits. The accused may remain on bail pending the hearing of the appeal.

Rule made absolute.

(1) 21 Ind. Cas. 1004; 18 C. W. N. 394; 19 C. L. J. 92; 14 Cr. L. J. 684.

CUFFLY *v.* MUHAMADALI MUHAMMAD IBRAHIM SAHIB.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 705 OF 1917.

CASE REFERRED No. 108 OF 1917.

January 18, 1918.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Napier.

A. F. CUFFLY—ACCUSED—PETITIONER

versus

MUHAMADALI MUHAMMAD IBRAHIM SAHIB—COUNTER-PETITIONER—RESPONDENT.

Railways Act (IX of 1890), s. 120, scope of—Railway officials, applicability of section to—'Person', meaning of—Removing passengers from compartments in which they are entitled to travel—Offence.

The word 'person' in section 120 of the Railways Act includes Railway officials. [p. 329, col. 2.]

The section applies to acts mentioned therein, even if they are committed by Railway servants. [p. 330, col. 1.]

Where a Railway guard removed two *gosha* ladies from a first class compartment in which they were entitled to travel and forced them to occupy another compartment:

Held, that he was guilty of an offence under section 120 of the Railways Act. [p. 330, col. 1.]

Case referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by the Sessions Judge of North Arcot, in his letter No. 4435, dated the 20th October 1917.

FACTS appear from the judgment.

Mr. *Satyamurthi Ayyar*, for the Complainant argued that the language of section 120 of the Railways Act is not restricted to acts done by ordinary passengers on the Railways, but is comprehensive enough to include the acts of Railway servants as well. It is significant that the word 'person' is used in the section as distinguished from the word 'passenger' in other sections which impose liabilities on ordinary passengers.

Mr. *C. Narasimha Chariar*, for the Public Prosecutor, argued *contra*.

ORDER.—The Magistrate in this case found that the accused, who was a Railway Guard, made two Mahomedan *gosha* ladies who were travelling in a first class compartment in which there were two European ladies get out of that compartment and get into a coupe compartment at Arkonam. He also found that the ladies did not consent to changing their compartment. It would appear that the two European passengers or at least one of them objected to the *gosha* ladies travelling in the same compartment and that was the reason why the guard interfered and made the *gosha* ladies go into another compartment against their will. This he had no right to do, as the *gosha* ladies had agreed to pay the excess fare which was chargeable for the difference between the second class ticket which they possessed and the first class fare. The Station Master and the guard himself had given them this accommodation in consideration of the excess fare which they had promised to pay and which was actually paid at Arkonam. The action of the guard was not justified by the law and it necessarily interfered with the comfort of these *gosha* ladies who were entitled, upon the facts found, to travel in the compartment in which they were.

The learned Sessions Judge has gone elaborately into the evidence and has come to the conclusion that the prosecution had exaggerated the facts. But he was not entitled to reconsider the case on the evidence and to come to a different finding from that arrived at by the Magistrate. There was no appeal to him and he was acting in exercise of the powers of revision. He also holds that the action of the accused did not amount to an offence under section 120, Indian Railways Act, on the ground that the section does not apply to a Railway guard or other Railway employees. But the section itself is in general terms. It says: "If a person in any Railway carriage or upon any part of a Railway .....wilfully and without lawful excuse interferes with the comfort of any passenger or extinguishes any lamp, he shall be punished, etc." It also covers the case of any such person being in a state of intoxication or committing any nuisance or act of indecency or using obscene or abusive language. There is no apparent reason why, if a Railway employee or Railway guard commits any of these acts, he should be exempted from the punishment provided by the section.

The word used in section 120 is 'person', and there is nothing in the section to indicate that a Railway guard or other Railway officials are intended to be excluded from the purview of the section. It is perfectly true that there are special classes of offences dealt with in the Act which may be committed by Railway servants,

But that does not at all lead to the inference that the other offences dealt with in the Act may not be committed by Railway servants, where the offence is defined in general terms. It may also be pointed out that there are a number of sections which deal with offences by passengers travelling in a Railway train. But in all these sections, the word 'passenger' is specifically used. Contrary to that, the word used in section 120 is 'person', and not 'passenger'. We think that section 120 applies to an act mentioned in that section, if committed by a Railway servant. The conviction of the accused was, therefore, justified and there is no reason to interfere with the sentence.

This is the answer which will be returned to the Sessions Judge's reference.

Reference answered;
Conviction affirmed.

M. C. P.

PUNJAB CHIEF COURT.
FULL BENCH.

CRIMINAL REVISION No. 1309 OF 1917.
November 26, 1917.

Present:—Mr. Justice Rattigan, Chief Judge, Mr. Justice Chevis and Mr. Justice Leslie Jones.

ALI MUHAMMAD AND OTHERS—CONVICTS—PETITIONERS

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 295—Killing cow with intention of offending religious feelings of Hindus—Offence.

The killing of a cow with the intention or knowledge of offending the religious susceptibilities of Hindus is not an offence under section 295 of the Penal Code [p. 330, col 2; p. 331, col. 1.]

Where in a village the Sikhs killed some fowls by the process known as *jhatka* in the vicinity of a mosque, thereby causing annoyance to the Muhammadans, who in retaliation killed a cow with the knowledge that the Sikhs would be likely to consider such killing as an insult to their religion:

Held, that the Muhammadans were not guilty of an offence under section 295 of the Penal Code. [p. 330, col. 2.]

Hakim v *Empress*, 27 P. R. 1884 Cr, overruled.

Queen-Empress v. *Imam Ali*, 10 A. 150: A. W. N. (1888) 17; 6 Ind. Dec. (N. S.) 10 and *Romesh Chunder Sannyal* v. *Hiru Mondal*, 17 C. 852; 8 Ind. Dec. (N. S.) 112, followed.

Petition under section 439 of the Criminal Procedure Code, for revision of the order of the Sessions Judge, Gujranwala, dated the 14th August 1917, modifying that of the Magistrate, 1st Class, Sheikhupura, District Gujranwala, dated the 15th July 1917, convicting the petitioners.

Mr. *Badr-ud-Din Kureshi*, for the Petitioners.

The Assistant Legal Remembrancer, for the Respondent.

JUDGMENT.—The facts as found by the Magistrate and by the Sessions Judge on appeal are that in Mauza Qila Amir Singh the Sikhs killed some fowls by the process known as *jhatka* in the vicinity of a mosque, thereby causing annoyance to the Muhammadans of the village who in retaliation killed a cow with the knowledge that the Sikhs would be likely to consider such killing an insult to their religion. Several of the Muhammadan party were convicted upon these facts of an offence under section 295, Indian Penal Code, and their convictions were upheld by the learned Sessions Judge upon the authority of *Hakim* v. *Empress* (1). A petition for revision was presented to this Court and the question of the correctness of the Division Bench ruling above quoted was referred to a Full Bench.

The judgment in *Hakim* v. *Empress* (1) is very brief and does not attempt to discuss the question whether upon the strict construction of a Penal Statute the language employed in section 295, Indian Penal Code, can be reasonably held to cover cases such as that with which we are concerned. On the other hand, the question has been elaborately considered by a Full Court in Allahabad [see *Queen-Empress* v. *Imam Ali* (2)] and also by Norris and Macpherson, JJ., in *Romesh Chunder Sannyal* v. *Hiru Mondal* (3). It is unnecessary for us to say more than that we entirely agree with the reasoning of Edge, C. J., and Brodhurst, J., in the Allahabad case and that we must accordingly overrule the previous decision of our Court.

It was urged that if the killing of a cow with the intention of offending the

(1) 27 P. R. 1884 Cr.
(2) 10 A. 150; A. W. N. (1888) 17; 6 Ind. Dec. (N S.) 10.
(3) 17 C. 852; 8 Ind Dec. (N. S.) 1112.

religious susceptibilities of Hindus is held to be no offence under section 295, Indian Penal Code, there is no other provision of law which can be applied to prevent the commission of such an act, while on the other hand grave danger to the public may arise if such acts are to go unpunished. This is an argument which should be addressed rather to the Legislature than to a Court of Justice, but with reference to it we might point out that the decisions of the Allahabad and Calcutta High Courts were published nearly thirty years ago and that the Legislature has taken no steps that we are aware of to amend section 295, Indian Penal Code, so as to cover acts of the kind referred to. With this expression of opinion we direct that the record be laid before the Single Bench for decision of the petition upon the merits.

Reference disposed of.

CALCUTTA HIGH COURT.

CIVIL REVISION No. 2 OF 1918.

January 28, 1918.

Present:—Mr. Justice Chitty and Mr. Justice Smither.

NANDO LAL GANGULI—PETITIONER

versus

KHETRA MOHAN GHOSE—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 195—"Court," meaning of—Tribunal constituted under Calcutta Improvement Act, 1911, whether Court—Sanction to prosecute.

The word "Court" in section 195, Criminal Procedure Code, has a wider meaning than a Court of Justice as defined in the Penal Code. It may include a Tribunal empowered to deal with a particular matter and authorised to receive evidence bearing on that matter in order to enable it to arrive at a determination. [p. 332, col. 1.]

The Tribunal constituted under the Calcutta Improvement Act of 1911 is a "Court" within the meaning of section 195, Criminal Procedure Code. Therefore, a person who has given false evidence before the Tribunal cannot be prosecuted for perjury without its sanction. [p. 332, col. 1.]

Babus *Atulya Charan Bose* and *Manmotha Nath Pal*, for the Petitioner.

Babu *Manmotha Nath Mukerjee*, for the Opposite Party.

JUDGMENT.—An application was made to the President of the Tribunal constituted under the Calcutta Improvement Act, 1911, for sanction to prosecute one Khetra Mohan Ghose for giving false evidence before the President of the Tribunal in two apportionment cases. The President held that he had no jurisdiction to entertain the application, on the ground that the Tribunal was not a Court within the meaning of section 195, Criminal Procedure Code. Against that decision the applicant obtained this Rule, and Khetra Mohan Bose has appeared by Pleader and shown cause against it. The opinion of the President appears to be based upon the decision in *Hari* v. *Secretary of State* (1), where it was held that the Bombay Tribunal was not a Court but merely a body of arbitrators not subject to the supervision of the High Court. It was no doubt on account of this decision that Act XIV of 1914 was passed by the Imperial Legislative Council. In the case of Calcutta the Tribunal is constituted by the Calcutta Improvement Act of 1911, but the finality of its decisions is regulated by that Act as modified by the Calcutta Improvement (Appeals) Act, 1919, passed by the Imperial Legislative Council. It is unnecessary for us to discuss the question whether in view of the subsequent legislation the Bombay decision is still good law, as we have no doubt whatever that the Calcutta Tribunal is a Court within the meaning of section 195 of the Criminal Procedure Code. By section 70 of the Calcutta Improvement Act, the Tribunal is constituted for the purpose of performing the functions of a Court in reference to the acquisition of land for the Board under the Land Acquisition Act, 1894. By section 71 (*a*) the Tribunal shall (except as to appeals which are specially provided for) be deemed to be the Court and the President the Judge under the said Act. Section 71 (*c*) gives the President the powers of a Civil Court with regard to the summoning and attendance of witnesses and production of documents By section 77 (*b*) apportionment cases may be tried by the

(1) 27 B. 424; 5 Bom. L. R. 431.

President sitting alone and his decision is then to be deemed to be the decision of the Tribunal.

It has been held by the Court that the word "Court" in section 195 has a wider meaning than a Court of Justice as defined in the Indian Penal Code. It may include a Tribunal empowered to deal with a particular matter and authorised to receive evidence bearing on that matter in order to enable it to arrive at a determination. See *Raghoobuns Sahoy* v. *Kokil Singh* (2), where the question arose whether a Collector acting under sections 69 and 70 of the Bengal Tenancy Act was a Court. That case was followed in *Chandi Charan Giri* v. *Gadadhar Prodhan* (3), where the question was to what Court the Collector was subordinate. We may also refer to the definition of "Court" in section 3 of the Evidence Act. It includes all Judges and Magistrates and all persons except arbitrators legally authorised to take evidence.

We do not think that the Tribunal as "the Court" under the Land Acquisition Act, 1894, for the purposes of the Improvement Trust can be regarded simply a body of arbitrators. It is *the* Court under that Act, and the President is the Judge. It follows that it must also be regarded as a Court for the purposes of section 195 of the Criminal Procedure Code. We may point out that if the contrary view were to prevail, the deplorable result would follow that any private person who alleged that false evidence had been given before the Tribunal might institute a prosecution without any control on his action by the Tribunal before whom the evidence was given.

The Rule is accordingly made absolute, the order of the President is set aside and the application remanded to him for adjudication upon the merits.

Rule made absolute.

(2) 17 C. 872; 8 Ind. Dec. (N. S.) 1126.
(3) 44 Ind. Cas. 177; 19 Cr. L. J. 273; 22 C.W.N. 165.

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION No. 363-B OF 1916.

March 15, 1917.

Present:—Mr. Justice Maung Kin.

NGA BA MYIT—CONVICT—APPLICANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 421—Appeal, summary dismissal of—Judgment, writing of, necessity of—Revision.

Section 421 of the Criminal Procedure Code empowers an Appellate Court to dismiss an appeal summarily without writing a judgment or giving reasons, but it is within the power of the High Court in revision to say after having regard to the facts of each particular case whether or not the Appellate Court has exercised a proper discretion in acting under that section. If the High Court finds that the case is one which should not have been dealt with summarily, the High Court will send the case back ordering the Appellate Court to hear it on its merits and pass a judgment. [p. 334, col. 2]

Case-law considered.

Review of the order of the Sessions Judge Tenasserim, confirming that of the Sub-Divisional Magistrate, Thaton, dated the 27th September 1916, passed in Criminal Regular Trial No. 16 of 1916.

JUDGMENT.—Four bullocks were stolen from a grazing ground on the 28th February 1916. Subsequently a bullock was found in the possession of one Po Thaung, who had bought it in March 1916 from one Po Tok in the presence of Ba Myit, the applicant. In the same month were also found two other bullocks in the possession of one Tun Lin, who had bought them from the applicant. All these bullocks were proved to be those of the stolen cattle. It was also proved that the purchases by Po Thaung and Tun Lin were *bona fide* and that they were from Po Tok and Ba Myit respectively. The Sub-Divisional Magistrate who tried Po Tok and Ba Myit, discharged the former and convicted the latter of theft of the three bullocks.

Ba Myit's defence was that he was hired by an Indian called Babugale to drive the bullocks and that at his request he drove them to Po Tok's house. He denied having anything to do with the sale of the bullocks.

Ba Myit appealed to the Sessions Judge of Tenasserim who passed the following judgment:—

"Read memorandum of appeal and record of the lower Court.

I see no grounds for interfering and dismiss the appeal summarily."

Ba Myit has now applied for revision to this Court upon the following grounds:—

1. That, considering the nature of the defence set up by him, the Sessions Judge erred in law in summarily dismissing this appeal and not giving any reasons of his own for confirming the conviction and sentence.

2. That the Sessions Judge does not show that he has considered the evidence in the case and that his judgment is consequently bad in law.

I may at once say that the second ground is untenable, as it is clear the learned Sessions Judge must have considered the evidence, for he stated in his judgment that he had read the record.

I shall now deal with the first ground.

I am satisfied that the order of the learned Sessions Judge was passed under section 421 of the Code of Criminal Procedure.

In *Rash Behari Das* v. *Balgopal Singh* (1) a Bench of the Calcutta High Court (Trevelyan and Rampini, JJ.) held that an Appellate Court rejecting an appeal under section 421 of the Code of Criminal Procedure of 1882 need not give its reasons for the decision. The learned Judges observed: "We think that the question really depends upon the meaning of the word 'summarily' in section 421 of the Code. In the absence of that word there would seem from the Code to be no reason why a judgment is more required in a case where an appeal is heard and dismissed than in a case where it is rejected under section 421, but the word 'summarily' differentiates the cases. The word 'summarily' ordinarily means in an informal manner and without the delay of formal proceedings. This we think would seem to show that the Judge was entitled to reject the appeal without any formality at all; therefore without the formality of either a recorded judgment or reasons of any description." This case has been followed in *Queen-Empress* v. *Warubai* (2), a Bombay case, *King-Emperor* v. *Krishnayya* (3), a Madras case, and *Nitya Pal* v. *Beni Madhab Ghose* (4), another Calcutta case. In the last case it was held, following the other Calcutta case cited above, that the language of section 421 is quite clear and that in dismissing an appeal summarily under it, the Appellate Court must be taken to have considered that there were no sufficient grounds for interfering. This and the Madras case were decided after the passing of the present Code and there was nothing said as to whether there is a difference in meaning between the word "reject" in section 421 of the old Code of 1882 and the word "dismiss" in the corresponding section of the present Code, apparently because there is really no difference. In my opinion there is obviously no difference at all.

The learned Counsel for the applicant has cited *Damri Toaraha* v. *Emperor* (5) and *Ekcowri Mukerjee* v. *Emperor* (6), both Calcutta cases. In the former the Appellate Court after hearing the Pleader for the appellant summarily rejected the appeal, and on revision the learned Judges of the High Court observed as follows: "We think from the nature of the defence which was set up in the Court of first instance the appeal was one which the Judge should have heard on the evidence and not have summarily dismissed". In the latter, the Appellate Court had not expressly stated that the appeal was dealt with under section 421 and it could not be certain that it was so dealt with. The record was voluminous and hearing must have taken some considerable time and several points must have been raised. The Appellate Court dealing in a general way had held that the complainant was not worthy of credit. The learned Judges held that it was desirable that the objections should have been noticed showing how they were disposed of without writing an elaborate judgment. The case of *Queen-Empress* v. *Nannhu* (7), a Full

(1) 21 C. 92; 10 Ind. Dec. (N. S.) 694.
(2) 20 B. 540; 10 Ind. Dec. (N. S.) 925.
(3) 25 M. 534; 2 Weir 473.
(4) 9 C. W. N. 623; 2 Cr. L. J. 344.
(5) 10 C. W. N. cxxxv (135).
(6) 32 C. 178; 2 Cr. L. J. 170.
(7) 17 A. 241; A. W. N. (1895) 68; 8 Ind. Dec. (N. S.) 480.

Bench case of the Allahabad High Court, might also have been cited for the applicant together with another case of the same High Court, namely, *Kundan* v. *Emperor* (8). In the first of these two cases the Bench held that, in view of the possibility of the order of the Appellate Court being challenged by an application for revision, it is advisable that such a Court when rejecting an appeal under section 421 should record shortly its reasons for such rejection. But the learned Judges also stated that they came to that view without deciding the question whether in acting under that section it is necessary for the Court to express its views beyond stating that it considers that there is no sufficient ground for interfering. In the second case Piggott, J., said that broadly speaking he was in agreement with the decision of the Bombay High Court above cited that the Appellate Court was not bound, when dismissing an appeal summarily under section 421, to write a judgment as defined in section 367 of the Code but that he had no desire to dissent from the Full Bench case of his own High Court. He went on to say, after considering the nature of the pleas set up by the defence in the case, that the order of the Appellate Court (which stated no reasons) was not a commendable one. He then examined the evidence and came to the conclusion that there was no reason for interfering.

The case of *Ekcowri Mukerji* v. *Emperor* (6) was a case where it was uncertain whether the Appellate Court had acted under section 421 and under the circumstances, having regard to the voluminous nature of the record and the probability of several points having been raised, it appears to have been thought that the Appellate Court had not sufficiently dealt with it. I am not disposed to dissent from these two Calcutta cases, because having regard to their particular circumstances the Appellate Court was held to have been wanting in discretion. The Allahabad cases, however, stand on a different footing. It appears according to those cases that the Appellate Court should in every case state reasons for its decision though it is acting under the provisions of section 421. Now it appears to me that the requirement that reasons should be stated means the same thing as requiring a judgment, for before the reasons are stated, the point must be stated and decided. That being so, the ruling in those cases is contrary to the plain provisions of the law and does away with the effect of the word "summarily" which, the Calcutta High Court has held in the case of *Rash Behari Das* v. *Balgopal Singh* (1), enables the Appellate Court to reject an appeal without any formality at all.

I find, however, that there is an appreciable conflict between the cases which have followed the Calcutta case of *Rash Behari Das* v. *Balgopal Singh* (1) and the two Calcutta cases of *Damri Toaraha* v. *Emperor* (5) and *Ekcowri Mukerji* v. *Emperor* (6) and in my judgment, what I may call an intermediate view will be the most reasonable and just view. Section 421 of the Code of Criminal Procedure empowers an Appellate Court to dismiss an appeal summarily without writing a judgment or giving reasons, but it is within the power of the High Court in revision to say after having regard to the facts of each particular case whether or not the Appellate Court has exercised a proper discretion in acting under that section. If the High Court finds that the case is one which should not have been dealt with summarily, the High Court will send the case back ordering the Appellate Court to hear it on its merits and pass a judgment.

In the case before me I do not find any special features in the case which justify me in thinking that it is one which should not have been dealt with summarily. I think that the case is quite simple and that the learned Sessions Judge was quite right in dismissing the appeal summarily. The application is dismissed.

Application dismissed.

(8) 24 Ind. Cas. 600; 36 A. 496; 12 A. L. J. 850; 15 Cr. L. J. 512.

IMPERATOR *v.* ISMAIL.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REPORT No. 12 OF 1917.

March 1, 1917.

Present:—Mr. Pratt, J. C., and Mr. Hayward, A. J. C.

IMPERATOR—PROSECUTOR

versus

ISMAIL—ACCUSED—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 299, Exp. (1), 300 (2)—Accelerating death of person suffering from disorder—Knowledge of disorder—Offence—Criminal Procedure Code (Act V of 1898), s 207—Commitment to Court of Session—"Ought to be tried by such Court," scope of.

Explanation (1) to section 299 of the Penal Code assumes that the bodily injury was inflicted with the intention of causing death or the knowledge that it would be likely to cause death. It was intended to repeat the English rule that an injury which accelerates the death of a dying man is deemed to be the cause of it, and where death has been caused it is no defence that the deceased was suffering from a complaint which would have caused his death in any event. Section 300 (2) of the Code makes it clear that the offender is not responsible for death in such a case unless he knew that the condition of the deceased was such that his act was likely to cause death. [p. 335, col. 2.]

The Criminal Procedure Code does not require that all cases of assault ending in death should be committed to the Court of Session. The expression "ought to be tried by such Court" in section 207 of the Code is limited to cases which the Magistrate is not competent to try or cases in which he is unable to inflict an adequate punishment. [p. 336, col. 1.]

Reference by the Sessions Judge, Hyderabad, that the commitment made by the 1st Class Magistrate, Chachro, be quashed.

Mr. *E. Raymond*, Public Prosecutor, for the Crown.

JUDGMENT.—This is a reference by the Sessions Judge, Hyderabad, asking us to quash the commitment made to him by the First Class Magistrate, Chachro, of the accused on a charge of culpable homicide not amounting to murder under section 304, Indian Penal Code.

No question of appreciation of evidence s involved, because the facts are simple. The accused was annoyed with the deceased because his cattle trespassed into his land and beat him with a stick and kicked him. The deceased died a few hours later and the medical evidence makes it clear that the injuries inflicted were slight and only amounted to simple hurt, but that death had ensued because the heart of the deceased was weak and dilated and the shock of the assault had stopped its beating. On these facts the Magistrate considered that the accused was guilty of culpable homicide because he had accelerated the death of the accused. The Magistrate apparently had in mind explanation (1) of section 299, Indian Penal Code, that "a person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other shall be deemed to have caused his death." This explanation, however, assumes that the bodily injury was inflicted with the intention of causing death or the knowledge that it would be likely to cause death. It was only intended to repeat the English rule that an injury which accelerates the death of a dying man is deemed to be the cause of it and where death has been caused, it is no defence that the deceased was suffering from a complaint which would have caused his death in any event. Section 300 (2), Indian Penal Code, makes it clear that the offender is not responsible for death in such a case, unless he knows that the condition of the deceased was such that his act was likely to cause death.

Here it is not suggested that the accused knew that the deceased was suffering from heart disease and, therefore, when he assaulted him he had no intention either to cause death or to cause such bodily injury as is likely to cause death. The offence, therefore, does not amount to culpable homicide and does not fall under section 299, Indian Penal Code.

The Public Prosecutor suggests that all cases of assault ending in death should be committed to the Court of Session. But the only case he has been able to cite in support of his proposition is that of *Queen Empress* v. *Rupaya* (1). But that case does not support the inference the Public Prosecutor seeks to draw from it. The accused had violently assaulted his wife and caused her death and there was no evidence in support of the Magistrate's assumption that the death was due to a diseased spleen. The Bombay High Court, therefore, on these facts reversed the conviction under section 323, Indian Penal Code, and directed the accused to be committed to the Court of Session on charges of

(1) Ratanlal's Unrep. Cas. page 382.

culpable homicide and voluntarily causing grievous hurt.

On the other hand, the Criminal Procedure Code makes no such distinction and the expression "ought to be tried by such Court" in section 207, Criminal Procedure Code, is limited to (1) cases which the Magistrate is not competent to try or (2) cases in which he is unable to inflict an adequate punishment. This is the view taken by the Bombay High Court in the case of *Porna Ranchod* (2), where a commitment for an assault which had caused death was quashed.

The present case is one of simple hurt under section 323, Indian Penal Code, and that is an offence which the Magistrate was competent to try and to punish adequately. He has, therefore, erred in law in committing the accused to the Court of Session.

We accordingly quash the commitment under section 215, Criminal Procedure Code, and direct the Magistrate to proceed with the trial himself.

Commitment quashed.

(2) B. H. C. Cr. Rulings Jan. 23, 1902.

PATNA HIGH COURT.
CRIMINAL REVISION No. 30 OF 1918.
February 7, 1918.
Present:—Justice Sir Ali Imam, KT.
SAHDEB SINGH AND OTHERS—2ND PARTY—PETITIONERS
versus
JUMON JOLAHA—1ST PARTY—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 107, 145—Proceeding under s. 107 converted into one under s. 145—Procedure—Evidence, recording of.

Where a proceeding is started under section 107 of the Crininal Procedure Code and evidence is taken under that section, but the Magistrate subsequently converts the proceeding into one under section 145 of the Code, he must call for the written statements of the parties and record evidence under the latter section. If he omits to do so, any order passed by him under section 145 of the Code would be illegal.

Criminal revision from an order of the Deputy Magistrate, Purulia.

Mr. *Abani Bhushan Mukerji*, for the Petitioners.

JUDGMENT.—The petitioners in this case were originally proceeded with under section 107 of the Code of Criminal Procedure and the case continued to be treated as a case under that section till the 6th November 1917, when on the conclusion of the evidence of the second party the learned Deputy Magistrate fixed the 10th of November 1917 for order. He, however, supplemented that by adding the words 'proceeding changed to section 145 of the Code of Criminal Procedure.' On the 10th November 1917, the learned Deputy Magistrate took up this case and simply passed an order declaring the first party to be in possession of the land in dispute.

The learned Vakil appearing on behalf of the petitioners contends that the order of the 10th November 1917 passed by the learned Deputy Magistrate is without jurisdiction. He urges in support of his contention the failure on the part of the learned Deputy Magistrate to draw up proceedings under sub-clause 1 of section 145. He also contends that even if he had done so, the order passed by him would still be without jurisdiction inasmuch as the Magistrate was bound not only to take the written statements of his clients, but also such evidence as they might be disposed to offer after action under sub-clause 1 of section 145 of the Code of Criminal Procedure was taken. The proceedings taken under section 107 of the Code and the evidence recorded thereunder could not be accepted as sufficient ground to dispense with the necessity of taking fresh action under sub-clause 1 of section 145. Sections 107 and 145 are intended by the Legislature to serve two distinct purposes and the learned Vakil appearing on behalf of the petitioners has rightly contended that unless and until the proceedings were duly initiated and his clients were given an opportunity of filing written statements and offering evidence, the order passed by the Magistrate would be *ultra vires*. I agree. The order in question is set aside and the case is sent back to the learned Deputy Magistrate to deal with it in accordance with law.

Rule made absolute.

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION No. 290 B OF 1916.

November 3, 1916.

Present:—Mr. Justice Robinson.

HNIN YIN—APPLICANT

versus

THAN PE—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 350—Transfer of Magistrate—Trial de novo—Procedure.

The right of claiming a trial *de novo* on the transfer of a Magistrate is given to an accused person in order that he may have the very great benefit of the Trying Magistrate having the witnesses examined and cross-examined in his presence, so that he may see and note their demeanour and manner of giving evidence. When the right is claimed the Magistrate must re-commence the trial

In a criminal trial the Magistrate was transferred after the prosecution evidence was heard and a charge framed. The accused claimed a trial *de novo* before the succeeding Magistrate. Thereupon the witnesses were re-summoned, their statements were read over to them and they were further cross-examined. No fresh charge was framed nor was the accused examined by the Magistrate:

Held, that the provisions of section 350 of the Criminal Procedure Code were not complied with and that a new trial must be ordered.

King-Emperor v. *Nga Pe*, 2 L. B R. 17 and *Sobh Nath Singh* v. *Emperor*, 12 C. W. N. 138; 6 Cr. L. J. 431, relied upon.

Mr. *Maung Kin* (Assistant Government Advocate), for the Applicant.

Mr. *J. A. Maung Gyi*, for the Respondent.

JUDGMENT.—This case has been referred by the District Magistrate. The evidence was heard and a charge framed and all but one witness for the defence were examined by Maung Shin. He was then transferred and Mr. . . . . took up the case. The accused exercised his right to have all the witnesses re-summoned and re-heard. They were re-summoned but they were not re-heard. Their statements were merely read over to them and they were then further cross-examined. No fresh charge was framed nor was the accused examined by Mr. . . . .

This is clearly no compliance with the law. The right is given to an accused person in order that he may have the very great benefit of the Magistrate having the witnesses examined and cross examined in his presence, so that he may see and note their demeanour and manner of giving evidence. When the right is so claimed, the Magistrate must re-commence the trial [*King-Emperor* v. *Nga Pe* (1)].

( ) 2 L. B. R. 17.

In *Sobh Nath Singh* v. *Emperor* (2) the facts were the same as in the present case and it was held that the provisions of section 350, Criminal Procedure Code, were not duly complied with and further that it was impossible to say that the accused had not been materially prejudiced. A re trial was ordered.

With this I entirely agree.

It is urged that the accused has been very lightly sentenced to fine only and that if a re-trial is ordered he may be convicted again and sentenced to imprisonment and that if so, he would be materially prejudiced. I cannot assume that he would be convicted nor that if he is he would be imprisoned, and the mere fact that he may be has nothing to do with the matter before me. A direct contravention of an express provision of law has been committed and is an illegality. This being so, section 537 cannot cure the defect [*Gomer Sirda* v. *Queen-Empress* (3)].

The convictions and sentences are set aside and a new trial is ordered.

Convictions set aside;
Retrial ordered.

(2) 12 C. W. N. 138; 6 Cr. L. J. 431.

(3) 25 C. 863; 2 C. W. N. 465; 13 Ind. Dec. (N. S.) 563.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 1293 OF 1917.

December 20, 1917.

Present:—Mr. Justice Chitty and Mr. Justice Smither.

HARAI CHANDRA NAMA—COMPLAINANT—PETITIONER

versus

OSMANALI—ACCUSED—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 435, 439—Revision against acquittal—Appellate Court, duty of—Evidence, discussion of—Criminal trespass—Civil dispute.

It is not a good reason for an Appellate Court to set aside a conviction for criminal trespass and acquit the accused without discussing the evidence or coming to any conclusion thereon, on the mere ground that the case is of a civil nature especially where the first Court has tried out the matter and has come to the conclusion that the accused is guilty of the offence charged. [p. 338, col. 1.]

Babu *Hit Lal Guha*, for the Petitioner.

Babu *Manmotha Nath Mukerjee*, for the Opposite Party.

JUDGMENT.—In this case the learned District Magistrate on appeal acquitted the

MR. M. PLEADER, *Re enquiry against.*

accused but without really going into the case or discussing the evidence or coming to any conclusion thereon. He says that the Trying Magistrate may have been right in believing the prosecution witnesses instead of the defence witnesses, but, as he considered that it was a matter where the complainant ought to have gone to the Civil Court and availed himself of the procedure laid down for Civil Courts, he acquitted the accused. That was obviously not a good reason in a case where the matter had been tried out in the first Court and the Magistrate had come to the conclusion that the accused was guilty of criminal trespass. We accordingly set aside the order of acquittal on appeal and direct that the appeal be re-heard.

Re-trial ordered.

SIND JUDICIAL COMMISSIONER'S COURT.

FULL BENCH.

March 22, 1917.

Present:—Mr. Pratt, J.C., Mr. Crouch, A. J. C., and Mr. Hayward, A. J. C.

Re enquiry against Mr. M., PLEADER,

FOR PROFESSIONAL MISCONDUCT.

Sind Courts Act (*XII Bom. of* 1866), *s.* 16—"*Misbehaviour,*" *scope of—Pleader, duty of—Letter containing personal attack on Judge, whether misbehaviour.*

The jurisdiction of the Judicial Commissioner under section 16 of the Sind Courts Act extends not only to professional misbehaviour but to general misbehaviour; but while this jurisdiction is unlimited, the Court is reluctant to take cognizance of misconduct not connected with the office of Pleader unless it is morally disgraceful or shows that the individual is not a proper person to hold that office. [p. 339, cols. 1 & 2; p. 340, col. 1.]

A Pleader by virtue of his *sanad* has certain rights and privileges, but he is not a chartered libertine and those rights and privileges carry with them corresponding duties and restraints. [p. 341, col. 1.]

A Pleader is an officer of the Court and is bound to assist the Court in the administration of justice. Criticism which is permissible to a private individual is not permissible to a Pleader. The co-operation of Pleader and Judge would be impossible if the Pleader were attacking the Judge in the public press. Nor would it be possible for the business of the Court to be conducted with dignity, decorum and impartiality when the Pleader is posing in public as the chastiser of the Judge. Such conduct is not only a breach of the Pleader's duty to the Court but must also result in an actual obstruction to the administration of justice. [p. 341, col. 2.]

A letter published by a Pleader, alleging that a certain Judge is indolent and takes credit for cases not tried but compromised, even if written in good faith and even if it does not constitute the offence of libel, amounts to misbehaviour under section 16 of the Sind Courts Act. [p. 341, col. 2; p. 342, col. 1.]

Mr. *E. Raymond*, Government Pleader, for the Crown.

Mr. *T. G. Elphinston*, for the Opponent.

JUDGMENT.—This is a Rule to Mr. M., Pleader, to show cause why he should not be dealt with under section 16 of the Sind Courts Act for misbehaviour on the following charge:

"That you wrote and published in the issue of the 'Hindvasi' newspaper of the 21st January last a letter calculated to bring into contempt the administration of justice in the Court of the Sub-Judge, First Class, Hyderabad."

The Rule was granted on a report by the District Judge, Hyderabad, that Mr. M. had published a letter in a newspaper scandalizing the Court of the First Class Sub-Judge. The letter runs thus:

"But it is your duty not only to bring to the notice of the superior officers but also to the notice of the litigants how much and what work is daily done in this Judge's Court. On several occasions daily those who come to Court return disappointed in the evening without any work being done, after sitting in Court the whole day and having wandered and spent money. If all men knew properly, they would not file suits, nor wander, nor incur unnecessary expenses and would privately settle with defendants. I give you the account of one case from which it will be seen that it is useless to file suits in this Court during the time of this Judge. Parties wander and incur expenses and settle between themselves and then the Judge Sahib reports that he has decided those cases."

Then follows the statement of a case in which Mr. M.'s firm represented one of the parties. This statement is admittedly inaccurate and was corrected in a subsequent letter.

From this statement Mr. M. deduced the conclusion stated in the last paragraph of his letter, which is as follows:—

"You will see from the above table what ill-fated man will file a suit in this Court, and which Pleader will get proper remunera-

tion that he will be wasting his time in Court the whole day on so many hearings. It is hoped that superior officers will give full consideration to this subject and make such arrangement that Hyderabad should get proper justice at proper expense."

In this letter Mr. M. puts aside all words of glozing courtsey at once without any equivocation and informs the public that it is useless to file suits in this Court. These words carry their own condemnation, for they are calculated to bring the administration of justice in that Court into contempt.

The letter is signed by Mr. M. and he admits having written it.

Mr. Elphinston who appeared for Mr. M. began by tendering an apology but when asked whether his client pleaded guilty he replied he did not. An apology coupled with words of justification is not only ungracious but insincere. It is not a token of repentance but a subterfuge to escape punishment. We, therefore, declined to accept the apology and called upon Mr. Elphinston to enter upon his defence.

Mr. Elphinston then sought to repel our jurisdiction over Mr. M. and to justify the writing of the letter. We shall now deal with the points raised.

Our jurisdiction is conferred by section 16 of the Sind Courts Act, which is as follows:—

"It shall be competent to the Court of the Judicial Commissioner with the sanction of the Local Government to make rules for the qualification and admission of proper persons to be Pleaders in any Court in the Province of Sind and it shall also be competent to the Court of the Judicial Commissioner to remove or to suspend from practice for misbehaviour any person so admitted to be a Pleader."

We have, therefore, to see that proper persons are admitted to be Pleaders and after they have been so admitted, we have to supervise their conduct and in case of misbehaviour to suspend or remove them from practice. The intention of the Legislature was expressed by Sir Comer Petheram in the case of *Khuda Bux Khan, In re* (1) in words which I quote: "Now it is clear that so far as the Courts are concerned, the Legislature has to a great extent made these persons (Pleaders) officers of the Court, and of course the object of doing that is, that the Courts may have a control over them as their own officers, and may see that in their dealings with the public they were fit to be entrusted with the responsible duties which they had to perform." We cannot, therefore, admit the construction which seeks to limit the word misbehaviour to conduct in the strict course of the Pleader's professional duties. A similar contention was raised *Weare, In re* (2) and was characterised by Lord Esher as a monstrous doctrine, for it would appear to lead to this conclusion that, however disgraceful be the conduct of a Pleader, yet if that conduct were unconnected with his professional duties he might continue to be a member of a profession which, Lord Mansfield, said "should stand free from all suspicion." Lord Esher referred to the case of *Brounsall, In re* (3), where in the case of an attorney who had been convicted of felony it was said that the whole question was whether he was a proper person to be continued on the roll or not. These two cases were cited with approval by the Privy Council in the case of *Rajendro Nath Mukerji, In re* (4). There can be no doubt, therefore, that our jurisdiction extends not only to professional misbehaviour but to general misbehaviour. A similar construction has been put by the Bombay High Court on the almost identical words occurring in section 55 of the Bombay Pleaders' Regulation, II of 1827—*Government Pleader* v. *Annaji Narayan Deshpande* (5) and by a Full Bench of the Calcutta High Court on section 14 of the Legal Practitioners Act, XVII of 1879—*Le Mesurier* v. *Wajid Hossain* (6).

But while our jurisdiction is unlimited it may be conceded that we should be reluctant to take cognizance of misconduct not connected with the office of Pleader, unless it were morally disgraceful or

(1) 15 C. 638; 7 Ind. Dec. (N. S.) 1009.

(2) (1893) 2 Q. B. 439; 62 L. J. Q. B. 596; 69 L. T. 522; 58 J. P. 6.

(3) (1778) 2 Cowp. 829; 98 E. R. 1385.

(4) 22 A. 49; 3 C. W. N. 736; 1 Bom. L. R. 708; 26 I. A. 242; 7 Sar. P. C. J. 556; 9 Ind. Dec. (N. S.) 1064

(5) 19 Ind. Cas. 529; 37 B. 354; 15 Bom. L. R. 231 14 Cr. L. J. 257.

(6) 29 C. 890; 6 C. W. N. 556.

showed that the individual was not a proper person to hold that office. It was on this ground that Lord Westbury based his judgment in the case of *Wallace, In re* (7), where an attorney who was a suitor wrote a letter to the Chief Justice reflecting on the other Judges of the Court. But here Mr. M. was not himself a party to any proceeding in the Court of the Sub-Judge. He did not write as an aggrieved suitor but on knowledge acquired during the course of his practice as a Pleader. His letter was an attack by a Pleader on a Judge. The case of *Wallace, In re* (7) was distinguished on this ground by the Privy Council in a case similar in many respects to the present one. *Sashi Bhushan Sarbadhicary, In re* (8).

In justification of the letter Mr. Elphinston argues that it does not constitute the criminal offence of contempt of Court punishable by summary procedure and that it is not a libel on the Sub-Judge, for the administration of justice is a fit subject for public criticism. Hence he contends that not being an offence if written by a private individual it cannot be an offence if written by a Pleader, for the rights of a Pleader, he says, are at least as high as those of any other citizen.

Now the reference to the jurisdiction to commit for contempt seems quite irrelevant. It is true that this Court has no jurisdiction to commit for contempt except contempts in its immediate presence. The power is sparingly used and only when the contempt is such as to cause an actual obstruction of public justice. But these proceedings have not been taken by way of contempt.

Whether or not it is a libel on the Sub-Judge is not a matter for decision on the hearing of this Rule. The administration of justice is, no doubt, a matter of public interest and criticisms in good faith on a Judge are entitled to the privilege of exceptions 1 and 2 of section 499, Indian Penal Code. The latest pronouncement on this point is that of the Privy Council in *Channing Arnold* v. *Emperor* (9) and is expressed in no ambiguous language. Lord Shaw said: "Upon the other side it would appear from certain observations of the learned Judge that this false and dangerous doctrine may have been hinted at, that some privilege or protection attaches to the public acts of a Judge which exempts him, in regard to these, from free and adverse comment. He is not above criticism, his conduct and utterances may demand it. Freedom would be seriously impaired if the Judicial Tribunals were outside of the range of such comment."

But the vital condition of this privilege is that the criticism should be in "good faith." Considering the letter written by Mr. M. as a statement of fact it is not written with due care and attention, for some of the statements are admittedly inaccurate. And treating it as an expression of opinion, the excess of language gives a severe shock to the plea of "good faith."

But the vice of Mr. Elphinston's argument is the assumption that whatever is not a criminal offence is not misbehaviour. Counsel seeks to draw a line which surely falls far below the extreme low watermark of professional conduct. In the case of *Blake, In re* (10), Mr. Justice Blackburn said: "It is not necessary in order to induce the Court to interfere in a summary manner that the misconduct should amount to an indictable offence." More recently in the case of *Krishna Sawmi Aiyar, In the matter of* (11) a Pleader was suspended for gross negligence in the performance of his duties and in the control of his office. Lord Shaw said: "Their Lordships, while not interfering with his acquittance of direct and personal fraud, did not see their way to acquit him of conduct in the management of the appeal, and of his clients' affairs, which caused the procedure

(7) (1866) L. R. 1 P. C. 283; 4 Moore P. C. (N. S.) 140; 36 L. J. P. C. 9; 15 W. R. 533; 16 E. R. 269.

(8) 29 A. 95; 4 A. L. J. 34; 9 Bom. L. R. 9; 17 M. L. J. 74; 11 C. W. N. 273; 5 C. L. J. 130; 2 M. L. T. 1; 6 Cr. L. J. 57; 34 I. A. 41.

(9) 23 Ind. Cas. 661; 18 C. W. N. 785; 26 M. L. J. 621; 15 Cr. L. J. 309; 41 C. 1023; 1 L. W. 461; 7 Bur. L. T. 167; 12 A. L. J. 1042; (1914) M. W. N. 506; 16 M. L. T. 79; 20 C. L. J. 161; 16 Bom. L. R. 544; 8 L. B. R. 16; 41 I. A. 149.

(10) (1860) 3 E. & E 34 at p. 38; 30 L. J. Q. B. 32; 6 Jur. (N. S. 1242; 2 L. T. 429; 122 R. R. 604; 121 E. R. 357.

(11) 16 Ind. Cas. 328; 35 M. 543; 23 M. L. J. 114; 16 C. W. N. 1081; (1912) M. W. N 963; 13 Cr. L. J. 680; 12 M. L. T. 396; 14 Bom. L. R. 1079; 16 C. L. J. 634; 39 I. A. 191.

of the Court to be the very opposite of what it should be, namely, responsible, orderly and pure;" and they also laid it down that it was the duty of the Bar to co-operate with the Court in the orderly and pure administration of justice.

Again the assumption that a Pleader has all the rights of a private individual is equally fallacious. A Pleader by virtue of his *sanad* has certain rights and privileges but he is not a chartered libertine and those rights and privileges carry with them corresponding duties and restraints. Some restraints are imposed by Statute. Under section 557, Criminal Procedure Code, a Pleader cannot sit as a Magistrate in any district in which he practises. Under section 135 of the Transfer of Property Act, a Pleader may not buy or sell an actionable claim. It was with reference to this latter restriction that the Chief Justice of the Madras High Court in the case of *Munireddi* v. *Venkata Rao* (12) said: "A Pleader holds a privileged position in connection with the administration of justice, and the law imposes on him certain restrictions and disabilities by reason of the position or office which he holds, and in order to safeguard the interests of the litigants and the pure administration of justice." And there is another restraint not imposed by Statute but equally well settled by judicial authority which arises out of his duty to the Court. In the case already cited Sir Comer Petheram said that the Legislature has made Pleaders officers of the Court. In the case of *Government Pleader* v. *Jagannath* (13) the Bombay High Court said: "Pleaders are a privileged class enrolled for the purpose of rendering assistance to the Court in the administration of justice. Their position, training and practice gives them influence with the public and it is directly contrary to their duty to use that influence for the purpose of bringing the administration of justice into contempt." In the case of *Krishna Sawmi Aiyar, In the matter of* (11) the Privy Council said of Pleaders that "they have also the general function, applicable not only to the Bar in general but also to solicitors at large, thatthey must in the conduct of all suits entrusted to them co-operate with the Court in the orderly and pure administration of justice."

A Pleader is an officer of the Court and is bound to assist the Court in the administration of justice. Criticism which is permissible to a private individual is not permissible to a Pleader. The co-operation of Pleader and Judge would be impossible if the Pleader were attacking the Judge in the public press. Nor would it be possible for the business of the Court to be conducted with dignity, decorum and impartiality when the Pleader is posing in public as the chastiser of the Judge. Such a writing is not only breach of the Pleader's duty to the Court but must also result in an actual obstruction to the administration of justice.

Here, even if the letter were written in good faith and even if it did not constitute an offence of libel, it would still be reprehensible in that it was a personal attack on the Sub-Judge alleging that he was indolent and took credit for cases not tried but compromised. The impropriety of such attacks was the subject of a forcible appeal by Sir Lawrence Jenkins, C. J., in the case of *Governor of Bengal* v. *Moti Lal Ghose* (14). His Lordship said: "The responsibility of a Judicial Tribunal is at all times great, and I do not think I ask too much when I ask in the interests of Judicial Officers working in the Mofussil Districts of this Presidency that the weight of that responsibility should not be increased, however unwittingly, by comments on the cases before them or on themselves in connection with those cases." Blackburn, J, in *Skipworth's case* (15) said: "It is not right that a Judge,...when personal attacks are made on him; should come forward and meet them and explain them and that is well-known to those who make the attack and certainly that knowledge does in any mind render the conduct of those who attack a Judge in that way, to use the mildest term, neither just nor decorous." The learned Judge was speaking of those who could in some measure protect themselves; how much more forcibly do his words apply to those who have not the power.

(12) 17 Ind. Cas. 544; 37 M. 238; 23 M. L. J. 447; (1912) M. W. N. 1029; 12 M. L. T. 615; 13 Cr. L. J. 800.

(13) 2 Ind. Cas. 264; 33 B. 252; 10 Bom. L. R. 1169.

(14) 20 Ind. Cas. 81; 41 C. 173; 14 Cr. L. J. 321; 17 C. W. N. 1253; 18 Cr. L. J. 452.

(15) (1874) 9 Q. B. 230.

ABDUL RAHIMAN, *In re.*

Mr. Elphinston admits that his client committed an error of judgment in writing to the public press, but urges that he acted in "good faith" and with an honest desire to expedite the business of the Court. But if Mr. M. really desired to improve the conduct of business in the Court he would have made a representation first to the District Judge and next to the Judicial Commissioner and in the last resort to the Local Government by whom the Sub-Judge was appointed. Mr. M., made an incidental reference to the conduct of business in the Court to the District Judge on the 15th January, but before orders were passed in that matter the letter appeared in the newspaper on the 21st January. He made no complaint to the Judicial Commissioner or to the Commissioner-in Sind. Mr. M. as his letter shows, was aware that his grievances—real or imaginary—could only be remedied by the superior officers of the Sub-Judge, for he asks the newspaper to bring the matter to their notice. Why does he address the superior officers through a public press? Why does he appeal to the public? Was it necessary to bring the administration of justice into contempt by warning the public not to file suits in that Court? The mode in which he sought redress, the inaccuracy of statements, the excessive language, all repel the notion of "good faith" or honesty of purpose, and seem to us to indicate a spirit radically opposed to that required of a Pleader whose duty it is to co-operate with the Court in the orderly and pure administration of justice.

We, therefore, find Mr. M. guilty of misbehaviour under section 16 of the Sind Courts Act.

In awarding punishment we cannot but feel that leniency would be misplaced. Mr. M. cannot plead youth or inexperience and this is not the first time that he has been before us for misbehaviour. In *Varanbai's case* (16) he was reprimanded for breach of duty to a client. He has now been guilty of a breach of duty to the Court. His offence is not mitigated by his insincere apology and his attempted justification. He claims to have the approval of other Pleaders. We are glad to be assured by the Government Pleader, who represents the Bar in this proceeding, that that is not the case. And indeed if it were, we should with regret consider that a reason for making the punishment exemplary. We also think that another reprimand would not suffice to mark our sense of the gravity of Mr. M.'s misconduct.

The least sentence that we can pass is that Mr. M. should be suspended from practice for a period of three months. He should deliver up his *sanad* to the Registrar of this Court or to the District Judge, Hyderabad, and may apply for it again after three months.

Pleader suspended from practice.

(16) 15 Ind. Cas. 785; 5 S. L. R. 222; 13 Cr. L. J. 513.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 344 OF 1917.

December 5, 1917.

Present:—Mr. Justice Heaton and Mr Justice Shah.

In re ABDUL RAHIMAN—APPLICANT.

Criminal Procedure Code (Act V of 1898), s. 344—Adjournment of case—Costs, order for, validity of.

The Criminal Procedure Code does not make special provision for costs in the course of a criminal trial and if section 344 of the Code is to be regarded as justifying an order as to costs, it can only be where the circumstances are exceptional and where for some reason or another the ordinary everyday method of conducting criminal cases must be departed from. [p. 343, col 1.]

Criminal application for revision from an order passed by the Magistrate, First Class, Thana.

Mr. *B. V. Desai*, for the Applicant.

JUDGMENT.

HEATON, J.—This is a case in which a Magistrate, when making an order for the adjournment of the case he was trying, made also an order that the accused should pay the day's costs of the complainant, which he assessed at Rs. 30. We are not prepared to say that this order was illegal. It will be seen from the case of *Mathura Prasad* v. *Basant Lal* (1) that the Allahabad High Court has

(1) 2 A. L. J. 831; 28 A. 207; A. W. N. (1905) 256; 2 Cr. L. J. 803.

come to the conclusion that such an order is permitted by the terms of section 344 of the Code of Criminal Procedure. The same conclusion, we gather, has been reached by the High Courts of Calcutta and Madras. But the Criminal Procedure Code does not make special provision for costs in the course of a criminal trial, and one thing seems to me to be perfectly clear, and it is this: that if section 344 is to be regarded as justifying an order as to costs, it can only be where the circumstances are exceptional and where for some reason or another the ordinary everyday method of conducting criminal cases must be departed from. I say this because I feel sure that if our criminal law intended orders as to costs to be a normal part of our criminal proceedings, it would be clearly provided for. We should not be compelled to seek for authority for making such an order in a section like 344 and in such words as those in which that section is framed. Taking it, therefore, as I do take it, that our common everyday practice, which is in accordance with the intentions of the Code, does not contemplate an order as to costs, then one has to see, whether, when an order as to costs has been made, the circumstances are so peculiar as to justify the order. In this case they do not seem to me to be in any way peculiar. It is an ordinary case, one with which we are very familiar. A party applies for a transfer and then applies for an adjournment of the case. Such an adjournment is commonly granted, and in certain cases, as the law provides, must be granted.

I think, therefore, that the order as to costs in this case should be set aside. The amount, if paid, should be refunded.

I quite realize the inconvenience that arises when one party makes an application for a transfer or for an adjournment without giving previous notice to the other side. Personally I should be very pleased to see that the legal profession recognized the desirability of always giving such notice.

SHAH, J.—I agree.

Order set aside.

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION No. 266 B OF 1917.

November 2, 1917.

Present:—Mr. Justice Ormond.

TAMBI *alias* ABDUL RAHMAN—APPLICANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 208 (2)—Cross-examination, whether can be postponed till all witnesses have been examined—Procedure—Evidence Act (I of 1872), s. 138.

The proper time for cross-examination of a witness is immediately after the examination-in-chief, and an order by a Magistrate allowing an accused, without any special reason, to postpone cross-examining the prosecution witnesses until they have been all examined-in-chief is a proceeding not contemplated by the Code of Criminal Procedure. [p. 344, col. 1.]

An accused has no right under section 208 (2) of the Criminal Procedure Code to postpone his cross-examination of the witnesses for the prosecution until they have been all examined-in-chief, but the Magistrate has power to re-call witnesses for further cross-examination if the circumstances of the case call for it. [p. 344, col. 1.]

Mr. *G. B. Dawson*, for the Applicant.

Mr. *Sutherland*, for the Respondent.

JUDGMENT.—The petitioner was being prosecuted for an offence of abetment of attempt to murder and the enquiry was being held under Chapter XVIII of the Code by the 2nd Additional Magistrate, Kyaikto. Eleven prosecution witnesses were examined-in-chief and the diary shows that the cross-examination was reserved until the Sessions. Then the doctor was examined as the 12th prosecution witness and the Pleader for the accused wished to cross-examine him but the Magistrate refused to allow it then, as the cross-examination of the previous witnesses had been postponed. This order was clearly wrong. Two other witnesses were then examined-in-chief and the diary shows that the cross-examination was reserved till the Sessions. Mr. Dawson then appeared for the accused and a discussion took place as to whether the cross-examination of the witnesses had been postponed till the Sessions or until the witnesses for the prosecution had all been examined-in-chief; and he obtained leave to re-call the witnesses for cross-examination, after the remaining witnesses had been examined. Mr. Sutherland who

appeared for the complainant then applied *ex parte* to the District Magistrate to set aside the order of the Additional Magistrate and his application was granted. The petitioner now applies in revision against that order of the District Magistrate.

It is clear that the District Magistrate had no power to cancel the order of the Additional Magistrate. He had power to call for the record and to submit the proceedings to this Court. But Mr. Sutherland contends, upon the authority of *Po Win* v. *Crown* (1), that if the order that was made by the District Magistrate without jurisdiction would be a proper order for this Court to pass, it is the duty of this Court to go into the case and to pass such an order. The first question, therefore, is:—was the order of the Additional Magistrate allowing an accused to re-call witnesses for the prosecution for the purposes of cross-examination a proper order or not. The proper time for cross-examination is no doubt immediately after the examination-in-chief—section 138, Evidence Act—and an order by a Magistrate allowing an accused without any special reason to postpone cross-examining the prosecution witnesses until they had been all examined-in-chief, is a procedure not contemplated by the Code. The following authorities bear out this view:—*In re Mohamed Kasim* (2), *Durga Dutt* v. *Emperor* (3) and *Emperor* v. *Channing Arnold* (4). On the other hand Mr. Dawson refers me to the case of *Fazar Ali* v. *Mazaharulla* (5), where it was held that the accused has the right to re call the prosecution witnesses for cross-examination so long as the prosecution case is not closed; and to the case of *Jogendra Nath Mukherji* v. *Moti Lal Chakravarti* (6), where it was held that it was open to the Magistrate under section 213 (sub-clause 2) of the Code to re-call witnesses for the prosecution if required by the defence for cross-examination. Upon the balance of authorities I am of opinion that the accused has no right to postpone his cross-examination of the witnesses for the prosecution until they have been all examined in-chief. But this is far from saying that the Magistrate would not be right in re-calling witnesses for further cross-examination if the circumstances of the case called for it. The Manual of this Court in paragraph 123 expressly lays down that it is the proper course, if the accused wishes it, for all the witnesses for the prosecution after having been examined-in-chief to be re-called for cross-examination. That direction has not the force of a judicial decision—though the Magistrate can hardly be blamed for acting under it; and as pointed out above it is not, I think, in accordance with the practice contemplated by the Code.

Now assuming that the order of the Additional Magistrate was not a proper order, what order should this Court pass? By prohibiting the accused from cross-examining the prosecution witnesses this Court would be prejudicing the accused's right in consequence of the accused having acted according to the direction of the Magistrate who acted under the direction of this Court's Manual. The utmost this Court could order would be to put the parties so far as is possible in *status quo*, which would be to allow the cross-examination to take place now. There are still ten witnesses to be examined for the prosecution. The order of the District Magistrate is set aside as having been made without jurisdiction and the Additional Magistrate is directed to allow the accused to re-call all or such of the 14 witnesses already examined as he may wish to cross-examine. They will be cross-examined and re-examined, if necessary, after which the remaining ten witnesses will be examined and cross-examined and the cross-examination of each witness will follow immediately after the examination-in-chief.

The case was sent up on the 10th April and evidence was not taken until the 23rd August, which seems to be an unnecessarily long time, and the Magistrate is directed to proceed with the case without delay.

Case sent back.

(1) 1 L. B. R. 311.
(2) 22 Ind. Cas. 173; 14 M. L. T. 532; 15 Cr. L. J. 29.
(3) 15 Ind. Cas. 75; 10 A. L. J. 144; 13 Cr. L. J. 443.
(4) 17 Ind. Cas. 813; 6 L. B. R. 129 at p. 132; 5 Bur. L. T. 239; 13 Cr. L. J. 877 (F. B.).
(5) 16 Ind. Cas. 336; 16 C. L. J. 45; 13 Cr. L. J. 688.
(6) 17 Ind. Cas. 406; 39 C. 885; 16 C. W. N. 1155; 13 Cr. L. J. 774.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 232 OF 1917.

November 13, 1917.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

MIR HASHAMALI MIR KASAMALI —APPLICANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 496, 498, 112, 118—Security for good behaviour, proceedings for—Bail, excessive - Fair trial.

When a man is arrested who is not accused of a non-bailable offence, no needless impediments should be placed in the way of his being admitted to bail. The intention of the law is that in such cases the man is ordinarily to be at liberty and it is only if he is unable to furnish such moderate security, if any is required of him, as is suitable for the purpose of securing his appearance before a Court pending enquiry, that he should remain in detention. [p. 345, col. 2; p. 346, col. 1.]

An order was made against the accused under section 112 of the Code of Criminal Procedure and he was then told that he would be admitted to bail only if he furnished his own recognisance for Rs. 10,000 and a surety for the same amount, these being the particular sums which were also stated in the order under section 112. The result was that owing to his inability to furnish such heavy security the accused remained in custody during the greater part of the enquiry. Finally an order was made against him under section 118 of the Code of Criminal Procedure:

Held, that the order requiring security for bail in such large sums was oppressive and that the accused had not, therefore, had a fair trial and that the order under section 118 must consequently be set aside. [p. 346, col. 1.]

Criminal application for revision from an order passed by the District Magistrate, East Khandesh, confirming that of the First Class Magistrate, Jalgaon.

Mr. *Binning* (with him Mr. *G. N. Thakor*), for the Applicant.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

HEATON, J.—In this case the applicant has been required to give security for good behaviour by an order made under section 118 of the Criminal Procedure Code. He has been required to give his own recognizance for Rs. 10,000 and one surety for Rs. 5,000. He has been unable to provide the surety. He appealed to the District Magistrate against the order who dismissed the appeal, and now he has applied to us in revision.

A good many points of some nicety have arisen in the course of the argument. The net result is, however, that in my opinion the order must be set aside, because I think the applicant has not had a fair trial. I use the word trial, although perhaps it is not technically the correct word to apply to proceedings under Chapter VIII of the Criminal Procedure Code. The reason why I think he did not have a fair trial is this: He was arrested under the provisions of section 55 of the Criminal Procedure Code, was taken before a Magistrate, and a complaint was presented by a Police Officer to the Magistrate demanding that security for good behaviour should be taken from him. So far the proceedings apparently were perfectly regular. But the applicant was then told that he would be admitted to bail only if he furnished his own recognizance for Rs. 10,000 and a surety for the same amount, these being the particular sums which were stated in the order made under section 112. Now it may be perfectly right to require security of that kind for future good behaviour from a person who is proved to be, or proved to be reputed to be, by habit a robber or receiver of stolen property and so forth. That is one thing, but it is quite a different thing when you have to consider what security a man should give for his appearance before the Magistrate during the progress of the inquiry which is to determine whether he is or is not such a person or reputed to be such a person. Having fixed this large security of Rs. 10,000, as the proper amount under section 112, it seems to me that when the Magistrate decided that he would only admit the applicant to bail during the inquiry on a surety for that same large amount, he was in fact, as the events proved, compelling this man by force of circumstances to remain in custody during the enquiry. After events showed that the applicant here was able to give very substantial security for his appearance, because he applied to the Sessions Judge, and the Sessions Judge modified the order and directed that he should be admitted to bail with a surety for Rs. 2,000 and this, after some time, the applicant was able to furnish. It is the intention of the law, as I understand it, that when a man is arrested, as this man was, who is not accused of a non-bailable offence, no needless impediments should be placed in the way of his being admitted to bail. The intention

of the law undoubtedly, as I understand it, is that in such cases the man is ordinarily to be at liberty, and it is only if he is unable to furnish such moderate security, if any is required of him, as is suitable for the purpose of securing his appearance before a Court pending inquiry, that he should remain in detention. And that is I believe the almost universal application of the law on this point. Therefore, I think that to require this security for Rs. 10,000, merely in order to ensure that this man should be present during the inquiry, was an oppressive act which resulted in this: that the man was in custody, under detention, during the more important part of the inquiry when he ought to have been at large. This seems to me to constitute an unfair trial. In this case, therefore, the applicant has not had a fair trial, and I think the order made against him ought to be set aside.

A very interesting point arose in the course of the argument, and it was as to whether the Magistrate had power to order detention at all in the case of this applicant. The question may be stated thus: whether the applicant having been arrested as he was and being brought before the Magistrate for the purpose for which he was brought, that Magistrate had power to direct his detention if he failed to give bail; or whether the Magistrate was not bound forthwith to release him and treat him as a person who is merely required to attend the proceedings, that is to say, to treat him as a person on whom a summons has been issued. In the view I take of the matter it is unnecessary to decide this interesting and, it may be, somewhat difficult point, and, therefore, I express no opinion whatever on that point.

SHAH, J.—I am of the same opinion.

Order set aside.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 64 OF 1917.

May 24, 1917.

Present:—Mr. Pratt, J. C., and Mr. Hayward, A. J. C.

KHUSHALDAS MOOLCHAND—APPLICANT

versus

EMPEROR—RESPONDENT.

Bombay District Municipal Act (III of 1901), ss. 92, 96—Re-construction of old building—Failure to give notice—Offence—Scope and object of s. 96.

The reference to section 92 in section 96, clause (1), of the Bombay District Municipal Act does not govern the whole of the clause but is limited to the clause describing projecting portions of buildings in respect of which the Municipality are empowered by that section to enforce a removal or set-back, so that notice or permission is requsiite in case of all buildings whether on a public road or in a private *mahala*. [p. 347, col. 1.]

Section 96 of the Bombay District Municipal Act does not empower the Municipality to deprive owners of the legitimate use of their land or to refuse permission to build at all, but it does confer on the Municipality a very wide power of regulating buildings. The object of the power is to secure the safety and sanitation of buildings to be newly erected. This power, though an encroachment on private rights, is not inconsistent with the Act. [p. 347, col. 1.]

Application for revision against the order of the Resident Magistrate, Tatta.

Mr. *G. A. Kikla*, for the Applicant.

Mr. *E. Raymond*, Public Prosecutor Sind, for the Crown.

JUDGMENT.

PRATT, J. C.—The applicant has been convicted under section 96 (5) of the Bombay District Municipal Act, 1901, of erecting a building without giving the notice to the Municipality required by section 96 (1) and fined Rs. 10.

The applicant contends that he has only re-constructed an old building, but under the explanation to the section the re-construction of an old building is included in the phrase "erect a building."

It is next contended that the reference to section 92 in section 96 (1) governs the whole clause and that notice or permission is only requisite in cases of buildings on a public street and that applicant's building is in a private *mahalla*. But the section is perfectly plain and does not bear this construction. Section 92 only

refers to the clause describing projecting portions of buildings in respect of which the Municipality are empowered by that section to enforce a removal or set-back. The very wide words "Any building" also forbid this construction which is opposed to the plain words of the section.

Lastly, it is contended that it is inconsistent with the Act that the Municipality should pass orders in respect of private buildings and so interfere with private rights. The section does not empower the Municipality to deprive owners of the legitimate use of their land. It does not empower the Municipality to refuse permission to build at all, but it does confer on the Municipality a very wide power of regulating buildings. This was recognised in *Nagar Valab Narsi* v. *Municipality of Dhandhuka* (1), *Municipality of Thana* v. *Fazal Karim* (2), *Tribhovan Chunilal* v. *Ahmedabad Municipality* (3); *Municipality of Karachi* v. *Mahomed Alli Essaji* (4) and in respect of a similar section of the Madras Act in *Queen-Empress* v. *Veerammal* (5). The object of the power is, as indicated in the section itself, to secure the safety and sanitation of buildings to be newly erected. This power, though an encroachment on private rights, is not inconsistent with the Act. The section, therefore, applies in the present case and the conviction is legal.

We, therefore, reject this application.

Application rejected.

(1) 12 B. 490; 6 Ind. Dec. (N. S.) 810.
(2) 3 Bom. L. R. 342.
(3) 27 B. 221; 5 Bom. L. R. 48.
(4) 33 Ind. Cas. 675; 9 S. L. R. 126 at p. 130.
(5) 16 M. 230; 1 Weir 733; 5 Ind. Dec. (N. S.) 867.

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION No. 267A OF 1917.

November 24, 1917.

Present:—Mr. Justice Rigg.

EMPEROR—PROSECUTOR

versus

U GYAW—CONVICT.

Burma Forest Act (IV of 1902), rr. 22, 98—License to fell timber, breach of condition of—Licensee, liability of, for acts of servants.

A licensee or other person permitted to fell timber in accordance with certain conditions under rules framed under the Forest Act is liable to be punished under those rules for the acts of his servants, whether authorised by him or not, and even if the acts are in contravention of his instructions, provided that those servants were acting within the scope of their master's authority and unless the master can show that he acted in good faith and did all that could be reasonably expected of him to prevent the breach of the conditions under which he is permitted to fell the timber. [p. 348, col. 2.]

Mr. *Gaunt*, Assistant Government Advocate, for the Crown.

JUDGMENT.—U Gyaw has been convicted under rule 98, read with rule 22, of the Burma Forest Act for having felled undersized *kamaung* trees in contravention of a license issued in the joint names of U Mra Tha Tun and himself. The case was tried summarily, and the facts are not as clearly stated as is desirable. They have not, however, been challenged, and the only point argued is whether on the Magistrate's finding, the accused is liable to be convicted of any offence. The Magistrate found that three undersized *kamaung* logs were cut by coolies employed by the accused; that the accused did not remove the logs (possibly because he had already been fined for a similar offence) and that in any case, whether the cutting was authorised by the accused or not, he was responsible and liable to the punishment prescribed by rule 98.

Rule 22 is as follows:—

"No person shall fell, cut, girdle, mark, lop, tap or injure by fire or otherwise..... any teak tree or any other tree of the kinds specified in the First Appendix and within the areas therein specified.....save under and in accordance with the conditions of a special agreement with Government or a license, etc...." This Rule is framed under the powers conferred on the Local Government by section 31 of the Act. Section 31 is in Chapter III, which is headed "General Protection of Forests and Forest Produce." The object of the Forest Act is to enable the Local Government to control the administration of forest areas by declaring some areas to be reserved forest, by regulating the felling of trees and the extraction of forest produce, and by imposing duty to be paid for privileges granted to individuals to trade and work within areas under forest. To secure this control, rules have been framed, and licenses are issued. It is wellknown that licensees seldom fell trees themselves and employ coolies for such work. The accused pro-

bably held a license under Form III, the 8th condition of which is that any breach of the conditions of the license will render him liable to lose his license and to the punishment prescribed in the Act or the rules made thereunder. In *Shin Gyi* v. *Emperor* (1) a Full Bench of this Court held that a licensee of a liquor shop whose agent or servant permits drunkenness is punishable under the provisions of section 50 of the Excise Act. The principle on which the decision in that case proceeded is that the object of the Excise Act would be defeated if a licensee was permitted to excuse himself on the ground that his servants had disobeyed his orders, provided that the servants were acting within the scope of their authority. This principle is very clearly stated in the *Metropolitan Police Commissioner* v. *Cartman* (2) by Lord Russell, C. J., in the following passage: "How do they (the licensees) carry on their business? From the nature of the case it must be largely carried on by others...; it is true that sometimes the licensee keeps in his own hands the direct control over his own business, but in the great majority of cases it is not so, the actual direct control being deputed to other persons: are the licensees in these cases to be liable for the acts of others? In my opinion they are, subject to this qualification, that the acts of the servant must be within the scope of his employment... It makes no difference for the purposes of this section that the licensee has given private orders to his manager not to sell to drunken persons; were it otherwise, the object of the section would be...defeated." A similar principle was applied in *Strutt* v. *Cliff* (3), which was a case under the Customs and Inland Revenue Act, 1888, in which case the appellant was held liable for the unauthorised act of his bailiff in bringing back his family from the station in a milk cart and using the milk cart thus without a license. It seems to me that having regard to the objects of the Forest Act a similar responsibility must be attached to persons felling timber by coolies, otherwise the provisions of that Act would be rendered nugatory. The correct rule seems to be as follows:—A licensee or other person permitted to fell timber in accordance with certain conditions under rules framed under the Forest Act is liable to be punished under those rules for the acts of his servants, whether authorised by him or not, and even if the acts are in contravention of his instructions, provided that those servants were acting within the scope of their master's authority, and unless the master can show that he acted in good faith and did all that could be reasonably expected of him to prevent the breach of the conditions under which he is permitted to fell the timber.

There is no reason for interference with the conviction in the present case, and the proceedings are returned.

Conviction upheld.

(1) 43 Ind. Cas. 81; 9 L. B. R. 81; 19 Cr. L. J. 49.
(2) (1896) 1 Q. B. D. 655; 65 L. J. M. C. 113; 74 L. T. 726; 44 W. R. 667; 18 Cox C. C. 341; 60 J. P. 357.
(3) (1910) 27 T. L. R. 14; 8 L. G. R. 989; 74 J. P. 471.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 271 OF 1917.

November 12, 1917.

Present:—Mr Justice Heaton and Mr. Justice Shah.

In re RAMRAO N. BELLARY—APPLICANT.

Criminal Procedure Code (Act V of 1898), s. 195 (1) (b)—Offence committed before First Class Magistrate—Sanction to prosecute, application for—Magistrate transferred—Court, proper.

An offence of abetment of perjury was committed during an enquiry into a murder case before a First Class Magistrate. An application for the grant of sanction to prosecute the accused was made to the Magistrate, but before the application could be disposed of the Magistrate was transferred and was succeeded by a Second Class Magistrate who had not the power to commit to the Court of Session. Before giving over charge the First Class Magistrate sent the papers to the District Magistrate, who granted the sanction required:

Held, that the District Magistrate had jurisdiction to dispose of the application, inasmuch as he was the successor of the First Class Magistrate to the extent that he had power to commit to the Court of Session, and was "such Court" referred to in section 195 (1) (*b*) of the Criminal Procedure Code. [p. 349, col. 2.]

Criminal application for revision from an order passed by the Sessions Judge, Dharwar, confirming that of the District Magistrate, Dharwar.

Mr. *Weldon* (with him Messrs. *V. V. Bhadkamkar* and *H. B. Gumaste*), for the Applicant,

RAMRAO N. BELLARY, *In re.*

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

HEATON, J.—The applicant in this matter has asked us to set aside the sanction given by the District Magistrate of Dharwar to prosecute him for abetting the giving of false evidence. On the merits of the case we say nothing. But a question has been raised as to whether that District Magistrate had jurisdiction to make this order, a question the answer to which it is not so easy to give.

What happened is this. The First Class Magistrate of Ranebennur enquired into a case of murder and committed it to the Court of Session, and it is in relation to the proceedings of this First Class Magistrate's Court that the alleged offence was committed. Before the alleged offence of abetting the giving of false evidence can be enquired into by a Magistrate, there must be a sanction either of the Court in which were pending the proceedings in relation to which the alleged offence was committed or of some Court to which that Court is subordinate. The Court before which the proceedings were pending when the offence, if any, was committed, was the Court of the First Class Magistrate. But some time after the murder case had been disposed of by the Court of Session and after a question arose as to whether sanction should be granted and before that question was settled, the First Class Magistrate was transferred, and it seems he was succeeded in office by a Magistrate who had only a Second Class Magistrate's powers and had not power to commit to the Court of Session. It seems to me that the incoming Magistrate had no power to grant sanction in this case for these reasons.

We are dealing with a Court, and not with an officer. The Court of the Magistrate of Ranebennur which had power to commit cases to the Court of Session was not a Court of which the incoming Magistrate could take charge. For that reason the incoming Magistrate could not, in my opinion, succeed to any jurisdiction relative to a case which had been committed to the Court of Session. This difficulty seems to have been anticipated by the outgoing Magistrate, who before he left sent the papers to the District Magistrate. The latter took the matter on to his own file, issued the necessary notices, held an inquiry and gave the sanction

It is argued that this sanction was without jurisdiction. It seems to me that it was not without jurisdiction, for this reason. There was somewhere a successor to the outgoing Magistrate in the Court which, as regards the Ranebennur Taluka, had power to commit cases to the Court of Session, and that successor to this Court wherever he might be, would, in my opinion, be the Judge of the "such Court" referred to in sub-clause (*b*), clause 1, of section 195 of the Criminal Procedure Code.

I have already explained that this Court would not be the Court of the incoming Magistrate. It would be either the Court of the Sub-Divisional Magistrate or the Court of the District Magistrate. For either of them would have the power of committing to the Court of Session cases occurring in the Ranebennur Taluka, and as either of them would have that power, it seems to me that either of these Courts would be the "such Court" referred to and could grant the sanction.

It may be said that in the ordinary course of events cases in the Ranebennur Taluka which had to be committed to the Court of Session would go to the Sub-Divisional Magistrate, and not to the District Magistrate. That, no doubt, is true. In the ordinary course of events they would go to the Sub-Divisional Magistrate. Nevertheless, the District Magistrate had jurisdiction. Any such case might be sent to his Court and he could call for and himself deal with any such case, and as it happened, his was the Court to which these papers came and he was the Magistrate who dealt with the matter. I myself am unable to see that it can properly be said that he was without jurisdiction to grant the sanction. I am not at all sure but that the jurisdiction could also be upheld as being based on a transfer of the case to his own Court made by the District Magistrate in accordance with the powers he possesses under section 528, but I prefer definitely to base my conclusion on the other ground. This is that the District Magistrate was clearly at least one of the officers on whom devolved the disposal of committal of cases in the

Ranebennur Taluka. So he was an officer who had jurisdiction to give sanction in this particular case.

As I have said, we say nothing on the merits, and as the only point of law of any substance has been decided against the applicant, we must discharge this Rule.

SHAH, J.—I am of the same opinion.

Rule discharged.

CALCUTTA HIGH COURT.

CRIMINAL REVISION CASE No. 593 OF 1911.

June, 17, 1911.

Present:—Mr. Justice Caspersz and Mr. Justice Sharfuddin.

ABDUL ALI FAKIR AND ANOTHER—PETITIONERS

versus

NETALI FAKIR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 378—Trees in possession of landlord cut by tenant—Offence.

Where trees standing on a demised land are in the possession of the landlord, it is theft on the part of the tenant to sever them from the ground, apart from any question of the possession of the land itself.

A clause in a *kabuliyat* provided that if the tenant cut any trees he would pay to the landlord compensation at a certain rate. The tenant knowing this clause *mala fide* cut the trees in order to injure the landlord:

Held, that the tenant was guilty of theft.

Maulvi *Mahommad Mustapha Khan*, for the Petitioners.

Mr. *S. P. Sinha* and Babu *Ramani Mohan Chatterjee*, for the Opposite Party.

JUDGMENT.—The substantial question in this Rule is whether on the facts found the offence of theft was committed.

The facts are that the petitioners cut down a large number of valuable fruit trees—mango, jack, areca—on the land of one Jamir who, it is said by the defence, had conveyed his right to the petitioners. In Jamir's *kabuliyat* there is a clause to the effect that if he cut any trees he would pay to the landlord compensation at the rate of Rs. 10 per tree. It has been found that the petitioners, knowing this clause perfectly well, *mala fide* cut the trees in order to injure the landlord.

There can be no question that cutting down a large number of valuable fruit trees is a wanton act and the question in the present case is whether it amounts to theft.

Now it is clear from Explanation 1 to section 378, Indian Penal Code, that as soon as a tree is severed in order to the taking thereof, theft is committed; and it has been found that the petitioners severed these trees and removed some or all of them. They do not justify having cut down the trees. They say that they did not cut the trees and that if they did they had a right to. We take it that they did cut the trees. The question is whether they acted dishonestly.

The only reported case to which our attention has been drawn regarding the cutting down of trees is the case of *Emperor* v. *Sabalsang* (1). There the subject-matter of the charge was a *babul tree* and Aston, J., pointed out that to cut and remove such trees might be theft and was in that case to be regarded as theft because of the finding of dishonest intention of the accused person. It was held that the assertion of a *bona fide* belief in the claim set up by the accused ousts the jurisdiction of the Criminal Court; but it cannot be said on the facts of the present case that there was any such *bona fide* belief; rather the defence is a denial of cutting the trees and an assertion of claim to the land itself. But assuming that the land is in the possession of the petitioners, that does not give them a right to cut the trees which are in the possession of the landlord; because the trees cannot be dealt with by the tenants without the permission of the landlord. This is clear from the clause in Jamir's *kabuliyat*. The trees were wholly and solely in the possession of the landlord and it was theft to sever them from the ground, apart from any question of possession of the land itself.

We think, therefore, that the conviction is correct but, having regard to the dispute which exists between these parties, we think the ends of justice will be met by reducing the term of rigorous imprisonment to one of one month in the case of each of the petitioners. The fines will stand.

The Rule is discharged with this variation.

The petitioners will be remanded to jail.

Order modified.

(1) 4 Bom. L. R. 936.

EMPEROR *v.* JHANDA SINGH.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 665 OF 1917.

October 20, 1917.

Present:—Mr. Rattigan, Chief Judge, and Mr. Justice Scott-Smith.

EMPEROR—APPELLANT

versus

JHANDA SINGH—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 415, 420—Cheating—Disposing of woman by misrepresenting caste and obtaining money—Offence.

To palm off a woman as belonging to a caste different to the one to which she really belongs with the object of obtaining money amounts to the offence of cheating as defined in section 415 of the Penal Code.

Appeal from the order of the Sessions Judge, Gurdaspur, dated the 13th March 1917.

Mr. *Mul Chand*, for the Appellant.

Mr. *Anant Ram*, for the Respondent.

JUDGMENT.

SCOTT-SMITH, J.—The finding of the Magistrate in the case out of which the present appeal arises was that *Musammat* Santi, a sweeper woman whose husband is alive, was represented by Jhanda Singh, accused, to be a Jat by caste and a widow, and that thereby complainant was induced to pay Rs. 300 to Jhanda Singh which he would not have done but for the deception practised upon him. In accordance with this finding the Magistrate convicted Jhanda Singh of cheating under section 420, Indian Penal Code, and sentenced him to one year's rigorous imprisonment and to a fine of Rs. 50. Jhanda Singh appealed to the Sessions Judge, who held that the facts as found constituted no offence. He, therefore, accepted the appeal and acquitted the accused. From this order of acquittal the Local Government have filed an appeal in this Court.

The Sessions Judge's view is that no person has any right to sell an adult woman and as such a sale is void, that what the complainant purchased was a worthless or imaginary title to the woman, that he himself knew this perfectly well and that the misrepresentation, if any, made no difference to him. No doubt a woman cannot legally be sold, but in the Punjab at all events it is common knowledge that women are practically sold by persons who consider that they have a right to dispose of them in marriage, and both parties to such transactions look upon them as perfectly valid according to custom and the woman herself usually acquiesces in the arrangement. Whether such transactions are legally valid or not does not appear to us to be material. In our opinion the sole question for decision in the present case is whether Jhanda Singh, by deceiving the complainant as to whether the woman was a widow and as to her caste, fraudulently or dishonestly induced him to pay Rs. 300 to him, by which act he caused, or was likely to cause, damage or harm to the complainant in body, mind, reputation or property. In our opinion, if Jhanda Singh by representing *Musammat* Santi to be a Jat widow, when she was really a sweeper whose husband was alive, induced the complainant to pay Rs. 300 to him, he committed the offence of cheating as defined in section 415, Indian Penal Code, for there can be no doubt that the complainant's payment of Rs. 300 was likely to cause him loss. If any authority is needed in support of our conclusion it will be found in the cases reported as:—

Durga Das v. *Emperor* (1), *Empress* v. *Sheeram* (2), *Queen* v. *Komul Dass* (3), *Queen* v. *Puddomonie* (4) and *Queen* v. *Dabee Singh* (5).

In all of these cases it was held that to palm off a woman as belonging to a caste different to the one to which she really belongs with the object of obtaining money amounts to the offence of cheating.

The learned Sessions Judge has not gone into the evidence or recorded any finding on the merits. We, therefore, accept the appeal and setting aside the order of acquittal remand the appeal for re-decision to the lower Appellate Court.

Appeal remanded.

(1) 13 P. R. 1904 Cr.; 114 P. L. R. 1904; 1 Cr. L. J 949.
(2) A. W. N. (1882) 237; 3 Ind. Dec. (N. S.) 191.
(3) 2 W. R. Cr. 7.
(4) 5 W. R. Cr. 98.
(5) 7 W. R. Cr. 55.

ANANGA MOHAN DUTTA *v.* EMPEROR.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 1183 OF 1917.

December 7, 1917.

Present:—Justice Sir Charles Chitty, KT., and Mr. Justice Smither.

ANANGA MOHAN DUTTA—PETITIONER

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 182 - False information—Suspicion, expression of, whether amounts to giving false information.

Accused made a complaint to the Police that a *hukka* had been stolen from his house and that he suspected two persons. It was found that the *hukka* had really been stolen:

Held, that the stating of his suspicion by the accused did not amount to giving false information.

Babus *Manmatha Nath Mukherjee* and *Sasadhar Roy* (for Babu *Upendra Kumar Roy*), for the Petitioner.

JUDGMENT.—In this case a Rule has been issued to show cause why the prosecution of the petitioner under section 182, Indian Penal Code, should not be quashed. It appears that in his complaint the petitioner made no statement which can be said to be false. It is not denied that the *hukka* was stolen from his house. As to the person or persons who stole it, all that he said in his complaint was that he suspected two persons. That does not amount to giving false information. The Rule is accordingly made absolute and the proceedings against the petitioner are quashed.

Rule made absolute.

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 749 OF 1917

September 6, 1917.

Present: —Mr. Justice Shadi Lal.

LAL KHAN—CONVICT—PETITIONER

versus

EMPEROR RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 106—Security on conviction—Appellate Court, when can order security—Conviction by Second or Third Class Magistrate.

One of the essentials for justifying an Appellate Court in requiring security under section 106 of the Code of Criminal Procedure is that the accused must have been tried and convicted by a Court of the description mentioned in the first paragraph of the section, *i.e*, a Magistrate not inferior to a Magistrate of the First Class, and an appellate Court is, therefore, not competent to require security while hearing an appeal from a conviction by a Second or Third Class Magistrate.

LAL KHAN *v.* EMPEROR.

Revision from the order of the Sub-Divisional Magistrate, Pindigheb, with appellate powers, dated the 13th March 1917.

JUDGMENT.—It is very doubtful whether the Appellate Court could make an order under section 106, Criminal Procedure Code, requiring the convict to furnish security for keeping the peace, considering that he was convicted by a Magistrate of the 3rd Class. One of the essentials for justifying the Appellate Court in requiring security is that the accused must have been tried and convicted by a Court of the description mentioned in the first paragraph of section 106, *i. e.*, by a Magistrate not inferior to the Magistrate of the 1st Class, and Appellate Court is, therefore, not competent to require security while hearing an appeal from a conviction by a 2nd or 3rd Class Magistrate. This is the view taken by the Calcutta High Court, *vide, inter alia, Emperor* v. *Momin Malita* (1) and also by this Court, *vide Gopal Singh* v. *King-Emperor* (2). The Bombay High Court has, however, held that the word "also" in sub-section (3) of section 106, Criminal Procedure Code, means that an order may be made by an Appellate Court irrespective of the powers of the original Court, *Emperor* v. *Bhausing* (3). The matter is not free from doubt, but I see no sufficient reason to dissent from the view taken by this Court.

Further, the lower Appellate Court itself finds that "the whole affair was a very petty one" and that being the case, I do not think there was any necessity for passing an order under section 106, Criminal Procedure Code. Accordingly I accept the application for revision so far as to set aside that order. In all other respects the order of the lower Appellate Court is upheld.

Revision accepted.

(1) 35 C. 434; 7 C. L. J. 602; 12 C. W. N. 752; 8 Cr. L. J. 9; 4 M. L. T. 340.

(2) 21 P. R. 1908 Cr.; 9 Cr. L. J. 84.

(3) 1 Ind. Cas. 454; 33 B. 33; 10 Bom. L. R. 759; 8 C. L. J 267.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 163 OF 1916.

March 23, 1917.

Present:—Mr. Stuart, A. J. C., and Mr. Kanhaiya Lal, A. J. C.

BENI MADHO SINGH AND OTHERS —PLAINTIFFS—APPELLANTS

versus

THE TAHSILDAR OF UNAO, LIQUIDATOR OF DEWARA BANK—DEFENDANT —RESPONDENT.

Co-operative Societies Act (II of 1912), s. 42—Liquidator, order of payment made by—Declaration, suit for, whether maintainable—Jurisdiction—Oudh Civil Digest (1917), para. 272—Certificate of fee—Government Pleader appearing for liquidator, whether bound to file certificate.

A Civil Court cannot, in view of section 42 (6) of the Co-operative Societies Act, entertain a suit for a declaration that an order of the liquidator passed under section 42 (2) of the Act is *ultra vires* and without jurisdiction and cannot be executed [p. 353, col. 2]

Paragraph 272 of the Oudh Civil Digest is mandatory and a Government Pleader appearing in a case for a Tahsildar, who has been impleaded in his capacity as a liquidator appointed under section 42 (1) of the Co-operative Societies Act, is not exempted from filing his fee certificate as required by the paragraph. [p. 354, col. 1.]

Appeal from the decree of the Subordinate Judge, Unao, dated the 30th November 1916.

Babus *Puttoo Lal* and *Mukund Behari Lal*, for the Appellants.

Babu *Ajit Prasad*, for the Respondent.

JUDGMENT.—Beni Madho Singh, Bijai Singh and Dulam Singh instituted a suit in the Court of the Subordinate Judge of Unao against the Tahsildar of Unao as liquidator of the Dewara Bank on the following allegations:—The Dewara Bank was a village bank established in 1907. It was a society deemed to be registered under Act II of 1912, although it went into liquidation on 22nd June 1910. The provisions of section 42 of Act II of 1912 have application. The Tahsildar defendant was appointed as liquidator and he had the powers under section 42 of the Act from the date that it came into operation. On 8th October 1915 he passed an order under the provisions of section 42 (*b*) and (*d*), by which he directed Sheoratan Lal, Beni Madho Singh and Bijai Singh, members of the society, to contribute Rs. 5,632-8-9 towards the assets. This order was under the provisions of section 42 (5) enforceable by a Civil Court having local jurisdiction in the same manner as a decree of the Court.

The three plaintiffs instituted this suit for a declaration that the order in question was *ultra vires* and without jurisdiction and that it could not be executed. The Subordinate Judge dismissed the suit, partly on merits but mainly on the ground that under the provisions of section 42 (6) a Civil Court had no jurisdiction in respect of any matter connected with the dissolution of a registered society under the Act. The present appeal is preferred.

It is quite clear from reading the order in question that the Tahsildar, who was the liquidator under the Act, basing his authority on the provisions of the Act, has made what on the face of it is a perfectly legal order. He was well within his authority in making this order. It has been argued before us that he had passed this order against the plaintiffs not as members of the society but as officials and that under the provisions of the section he had no right to determine contributions to be made by the officials. This plea would in any circumstances have no effect in the case of persons who are also members. The plaintiffs were officers under the Act but they were liable to contribute. Other points have been taken in appeal to the effect that the liquidator did not give the benefit of some unspecified rule of limitation to the plaintiffs, and that he has saddled them with a greater liability than that they should justly bear. The appellants have asked the Civil Courts to decide in effect whether the order of the Tahsildar was a fair and just order based on correct legal principles. This is what the Civil Courts are not allowed to decide. The section is perfectly clear. The order of a liquidator cannot be questioned in the Civil Court in the ordinary way. The Local Government under section 43 (*t*) may make a rule permitting an appeal from the order made by a liquidator to the Court of the District Judge. Up to date no such rule has been made. Thus the order of a liquidator cannot be questioned at present, by way of an appeal to the Court of the District Judge and Civil Courts are expressly barred from interfering with such an order. The learned Subordinate Judge rightly decided that he had no jurisdiction to hear the suit.

ASGAR ALI *v.* DOST MOHAMMAD.

There is only one point to be added. The appellants attack the order awarding costs on the ground that the Government Pleader of Unao who appeared for the defendant in lower Court did not file a certificate. The rule applicable is rule 272 of the Oudh Civil Digest. The rule in question is clear upon the point. A legal practitioner appearing for the Crown, or Government, or the Court of Wards, or a local authority need not file a certificate. All other Pleaders must file a certificate. If they do not do so the fee cannot be entered as taxed costs. Here the defendant was neither the Crown, the Government, nor the Court of Wards, nor a local authority. The circumstance that the Pleader was the Government Pleader did not remove the necessity of filing a certificate. The rule is mandatory and we have no discretion. It must be applied. We, therefore, cut out the item for Pleader's fee from the decree. But as the appellants have failed on all the main points we direct that they pay thier own costs and those of the respondent in this appeal.

Appeal dismissed.

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6) PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1477 OF 1916.

December 21, 1917.

Present:—Mr. Justice Jwala Prasad.

ASGAR ALI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Mian DOST MOHAMMAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Registration Act (XIX of 1843), s. 2—Registration Act (XVI of 1908), s. 50—Unregistered sale-deed accompanied by delivery of possession—Subsequent registered deed—Priority.

A prior unregistered sale-deed, which is not compulsorily registrable and which is accompanied by delivery of possession, is not invalidated by a subsequent registered sale-deed of the same property either under section 2 of the Registration Act of 1843 or under section 50 of the Registration Act of 1908. The person claiming under the prior unregistered deed, however, must not only prove the deed but also the delivery of possession. [p. 356, col. 1; p. 357, col. 1.]

A title which has once vested by virtue of a deed, be it unregistered, cannot be divested by a subsequent registered document. [p. 356, col. 1.]

Appeal from a decision of the Subordinate Judge, Shahabad, dated the 21st September 1916.

FACTS appear sufficiently from the judgment.

Mr. *Parmeshwar Dayal*, for the Appellants, contended that the defendants' sale-deed of 7th June 1863 was executed when the Registration Act XIX of 1843 was in force. It was an unregistered document. Section 2 of Act XIX of 1843 provided that a registered deed of sale would invalidate any deed which was unregistered, whether the latter document was executed prior or subsequent to the registered one. The plaintiff's document was a registered one. The defendants' unregistered sale-deed had no force as against the plaintiff especially when there was no finding of the Court below that the defendants got possession of the property under their unregistered deed. He relied on *Sibendrapada Banerjee* v. *Secretary of State for India in Council* (1), *Boikuntonath Sett* v. *Russick Loll Burmono* (2), *Nathu Ram* v. *Phulchand* (3). Section 54 of the Transfer of Property Act, 1882, provides that a sale of immoveable property of a value below Rs. 100 could be effected by registered instrument or by delivery of possession. An unregistered sale-deed could pass no title in the property from the vendor to the vendee unless it was accompanied by possession. Delivery of possession was an essential element to pass title where the sale was sought to be effected by an unregistered document. This was the law prior to 1882 when the Transfer of Property Act was passed and at the time when the defendants' unregistered document was executed. It was, therefore, necessary for the defendant to prove that he got possession in 1863 by virtue of his unregistered document. Relied on *Bhyroo Chunder Misser* v. *Ramchunder Bhuttacharjee* (4), *Salim Shaikh* v. *Boidonath Ghuttuck* (5).

Mr. *Haribhusan Mukerjee* (with him Mr.

(1) 34 C. 207; 5 C. L. J. 390.
(2) 10 W. R. 231.
(3) 6 A. 581; A. W. N. (1884) 183; 14 Ind. Dec. (N. s.) 218.
(4) 1 Hay 261.
(5) 12 W. R. 217 at p. 220; 3 B. L. R. A. C. J. 312.

Jadubans Sahai), for the Respondents, contended that at the time when the sale-deed of 1863 was executed, the registration was not compulsory. The execution of an unregistered deed was sufficient to pass title from the vendor to the vendee. The sale-deed, although it was an unregistered document, completely passed the ownership in the property to the vendee. The fact that the vendee was in possession of the property at the time of the institution of the suit, sufficiently proved that the possession was also delivered along with execution of the sale-deed in 1863.

[JWALA PRASAD, J.—It must be proved that the respondents got possession under the unregistered document in their favour.]

Yes, but because the respondents are in possession of the property, the presumption would be that they got possession of it at the time of the execution of the sale-deed and since then they are in possession by virtue of it. The plaintiffs sue for possession. They must prove that they have been in possession of the property in dispute within 12 years.

JUDGMENT.—The plaintiffs are the appellants. They brought a suit in the Court of the Additional Munsif of Buxar for declaration of their title to and recovery of possession over the lands marked in the sketch attached to the plaint as *K* and *L*. The learned Munsif gave a decree to the plaintiffs in respect of both the plots.

On appeal the learned Subordinate Judge of Shahabad, by his judgment dated 21st September 1916, upheld the judgment of the Munsif as regards the plot marked *L* and dismissed the suit as regards the plot marked *K*. We are, therefore, concerned in this appeal only with the plot marked *K*.

The claim of the plaintiffs is based upon a sale-deed executed by one Ibrahim on the 24th of *Kuar* 1307, corresponding to 21st September 1900. This deed is a registered one. The plaintiffs alleged that they were in possession of the land under the *kabala* referred to above; that their names were entered in the Survey Record-of-Rights and that they were interfered with in their possession by the defendants trying to construct a wall upon a portion of the land which caused their dispossession in *Magh* 1322 *Fasli*. The suit is, therefore, for recovery of possession after declaration of the title of the plaintiffs.

The defendants, on the other hand, *inter alia*, contend that the vendor Ibrahim had no right to sell the disputed land to the plaintiffs and challenge the plaintiffs' sale-deed as being collusive and fraudulent, and further allege that the land in suit was purchased by Faqira, the ancestor of the defendants, from Sohait, the father of Ibrahim, on 6th *Asadh* 1270, corresponding to 7th June 1863, under a sale deed. The defendants' sale-deed is not a registered one. The Munsif held that the defendants' sale-deed was not executed by Sohait as alleged by them and the deed was a fraudulent one in order to defeat the title of the plaintiffs based upon the registered document. The Munsif further held that the oral evidence of possession adduced by the plaintiffs is superior to that adduced on behalf of the defendants.

Upon the above findings the Munsif gave decree for possession to the plaintiffs. The learned Subordinate Judge held that the sale-deed of the defendants was a genuine one and duly executed by Sohait, father of Ibrahim, and that Ibrahim had no subsisting interest in the property in 1900 when the land purports to have been sold to the plaintiffs.

The learned Vakil, for the appellants, contends that the finding of the Subordinate Judge is wrong in law. The defendants' sale-deed of 7th June 1863 was executed when the Registration Act XIX of 1843 was in force. Section 2 of that Act provided that a registered deed of sale or gift of real property would invalidate any other deed of sale or gift for the same property which may not have been registered, whether the second or other document was executed prior or subsequent to the registered one. It is needless to go into the history of the legislation on the point as to the various changes that took place from 1843 to the present moment. In the interval between 1864 and 1877 registration did not take priority as is provided for under section 2 of the aforesaid Act of 1843, but thereafter the state of law as existed in

1843 was restored in Act III of 1877 and in the present Act XVI of 1908 whereby "every document shall, if duly registered, take effect as regards the property comprised therein, against every unregistered document relating to the same property." No doubt there has been some change in the expression used in section 2 of Act XIX of 1843, namely, "invalidate" in that section has been substituted in the present section by the words: "Shall take effect against a document." But neither under the old Act of 1843 nor under Act III of 1877, nor under the present Act of 1908, I am prepared to hold that the effect of subsequent registration of the plaintiffs' sale-deed would be to annul and invalidate the defendants' sale-deed, though unregistered, executed long prior to that of the plaintiffs, if possession was delivered to the defendants under the deed. It is a well-known principle that the title once vested by virtue of a deed, be it unregistered, cannot be divested by a subsequent registered document. It must be remembered that in this particular case the document was not compulsorily registrable, the value of the property sold being less than one hundred rupees. The principle is recognized in section 54 of the Transfer of Property Act, IV of 1882, which provides that transfer of a property of the value of less than a hundred rupees may be made by an unregistered sale-deed provided possession is delivered under the deed. Delivery of possession has always been considered in every country as an effective mode of transfer of any property, as has been fully discussed and demonstrated in the case of *Salim Shaikh* v. *Boidonath Ghuttuck* (5). It is needless to go over the ground again. Suffice it to say that I am entirely in agreement with the view expressed in that ruling. In the recent case of *Sibendrapada Banerjee* v. *Secretary of State for India in Council* (1) it was held that delivery of possession under an unregistered deed must be proved under section 54 of the Transfer of Property Act. The position appears to be the same prior to the Transfer of Property Act and in respect of documents governed by the Registration Act of 1843. The case of *Bhyroo Chunder Misser* v. *Ramchunder Bhuttacharjee* (4) is a direct authority on the point. The facts of that case are on all fours with the present one. I may with propriety quote the language of that ruling in support of my view:—

"The gift having been made seven years prior to the sale, and the gift having been fully proved, *as well as the possession under it*, no question arises as to which of these deeds is entitled to preference. Had these two deeds been contemporary transactions, and had evidence as to each been equally balanced, then the provisions of Act XIX of 1843 would have decided in favour of the registered deed. But in the case now actually before us, the vendor had divested himself of the proprietary right in the lands in suit seven years before he executed the deed of sale to the defendant. The mere fact of the petitioners obtaining the registration of the deed of sale cannot entitle them to annul every preceding transaction, in respect to the same property, done in good faith and carried out in its provisions years before. The sale, by reason of the prior alienation by gift, was not a valid sale, and registration can have no benefit in such a case."

The sale-deed in favour of the plaintiffs would not be of any avail against the sale deed in favour of the defendants though unregistered, provided *effect to it was given and possession was held under it.*

The plaintiffs alleged in the plaint that they were in possession since their purchase in 1900 and that the Survey Record-of-Rights of 1912 recorded their possession and that they were dispossessed by the defendants in 1322 (1915). The defendants on the other hand asserted their possession under their sale-deed of 1863 but did not deny that the Survey entry in respect of the land was made in favour of the plaintiffs. The Munsif held that the plaintiffs had proved their possession. The Subordinate Judge, while holding that the document in favour of the defendants was a genuine one, did not find whether the defendants' ancestor or the defendants were, in terms of the aforesaid authority, in possession of the land in dispute *under that sale-deed.* This brings us to the second contention of the plaintiffs, *viz.*, that the finding of the learned Subordinate Judge that the defendants' document

is genuine is not enough to give title to the defendants unless possession was delivered to the defendants under that sale-deed. This contention of the plaintiffs must prevail.

The defendants ought, therefore, not only to prove that they had an unregistered sale-deed in their favour, but that under that it was completed by delivery of the property to them. Their having obtained possession on dispossessing the plaintiffs in 1322 will not give them title. The defendants or their ancestors must show that they obtained possession under the deed. Their possession prior to the plaintiffs' deed of 1900 might afford a good presumption in their favour of having obtained possession under the deed of 1863. The finding of the Court below is, therefore, not sufficient to dispose of the appeal.

The case must, therefore, be remitted to the Court below in order to find whether effect was given to the transaction embodied in the sale-deed of the defendants, namely, the deed of June 1863, and whether the defendants are in possession under that deed. The finding of the Court below should be returned to this Court by the second week of February 1918. The costs will abide the result.

Case sent back.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 73 OF 1917.

July 10, 1917.

Present:—Mr. Kanhaiya Lal, A. J. C.

KHADIM HUSAIN AND OTHERS —PLAINTIFFS—APPELLANTS

versus

Musammat JAMIL BIBI—DEFENDANT —RESPONDENT.

Jurisdiction of Civil and Revenue Courts—Landlord and tenant—Under-proprietary right, claim for—Evidence—Proof—Suit, maintainability of—Oudh Rent Act (XXII of 1886), s. 108 (10).

At the time of the first regular settlement in 1877 a suit was brought by certain persons claiming to be under-proprietors of an entire village. The Settlement Court dismissed the suit on the ground that each under-proprietor should bring a separate suit for the *sir* plots in his possession. One of those persons then brought a separate suit for a declaration of his rights to certain *sir* plots, impleading the superior proprietors as defendants in his suit. His allegation was that he was one of the old proprietors of the village and had been in possession of the plots in dispute in proprietary right on payment of a certain amount of annual rent to the superior proprietors. Some of the superior proprietors admitted the claim. The suit was, however, dismissed otherwise than on merits, and it was left open to the said person to sue for his rights after the bar to the trial of the suit was removed. No such suit was thereafter filed by that person or his successors-in-interest. But, in 1882, the then superior proprietor issued a notice of ejectment against that person, who contested it and succeeded in getting it cancelled on the ground that he was a *zemindar* and that his right as such had been admitted by the persons from whom the then superior proprietor derived his title. In 1902 the superior proprietors sought to eject the successors-in-interest of the said person, *i. e.*, the present plaintiffs, from the said plots, by notice through the Revenue Court. The plaintiffs contested the notice on the ground that they were under-proprietors, but the finding of the Revenue Court was against them and they were ejected in 1903. Then they brought a suit for possession of the plots in the Civil Court, alleging that they were under-proprietors and had been wrongfully ejected by the Revenue Court, but their suit was dismissed on the ground that they should first seek their remedy under section 108 (10) of the Oudh Rent Act. They accordingly went to the Revenue Court, but that Court dismissed their suit on the point of limitation. Then followed the present suit for possession and damages, filed in the Civil Court in 1915, similar to the previous suit dismissed by that Court:

Held, (1) that under the above circumstances the plaintiffs' under-proprietary title was satisfactorily established. [p. 359, col. 1.]

(2) that the present suit in the Civil Court was not barred by reason of the fact that the plaintiffs' remedy under section 108 (10) of the Oudh Rent Act had been found by the Revenue Court to be barred by time. [p 359, col. 2.]

Chandrika Bakhsh Singh v. *Raghunath Kunwar*, 18 Ind. Cas. 284; 16 O. C. 105, *Ram Pargash* v. *Raja Adiya Dat Udai Partab Singh*, 2 Ind. Cas 269; 12 O. C. 90 *Khadim Husain* v. *Jamil Bibi*, 7 Ind. Cas. 608; 13 O. C. 188 and *Mohammad Abul Husan Khan* v. *Prag*, 38 Ind. Cas. 814; 20 O. C. 8; 15 A. L. J. 113; 21 M. L. T. 102; 19 Bom. L. R. 102; (1917) M. W. N. 232; & 456; 32 M. L. J. 388; 21 C. W. N. 583 26 C. L. J. 165 (P. C.), considered.

Appeal from the decree of the Subordinate Judge, Sultanpur, dated the 9th December 1916, modifying that of the Additional Munsif, Sultanpur, dated the 27th November 1915.

Babu *Bisheshwar Nath Srivastava*, for the Appellants.

The Hon'ble Pandit *Gokaran Nath Misra*, for the Respondent.

JUDGMENT.—The dispute in this case relates to six plots of land, of which the plaintiffs claim to be the under-proprietors. The defendants are the superior proprietors of the village, in which the said plots stand. They sought to eject the plaintiffs through the Revenue Court under section 54 of the Oudh Rent Act (XXII of 1886). The present plaintiffs contested that notice on the ground that they were under-proprietors, but the finding of the Revenue Court was against them, and they were accordingly ejected on the 5th June 1903. They then brought a suit for possession of the said plots in the Civil Court alleging that they were under-proprietors and had been wrongfully ejected by the Revenue Court; but their suit was dismissed on the ground that they should first seek their remedy under section 108, clause (10), of the Oudh Rent Act. The decision of this Court in that case is contained in *Khadim Husain* v. *Jamil Bibi* (1). They then went to the Revenue Court and sued for the recovery of the occupancy of the land from which they had been dispossessed, alleging that they were under-proprietors of the same. But that suit was dismissed by the Revenue Court on the ground that it was not brought within one year from the date of dispossession, as required by section 129 of the Oudh Rent Act. The present suit then followed, in which a claim was made for possession and damages. It was filed on the 14th May 1915 within 12 years from the date when the dispossession originally took place.

The Courts below dismissed the suit on the ground that the plaintiffs had failed to establish that they were under-proprietors or had acquired under-proprietary rights by adverse possession. The lower Appellate Court further held that the suit was not maintainable, inasmuch as the remedy of the plaintiffs under section 108, clause (10), of the Oudh Rent Act was found to be barred by time.

In regard to the under-proprietary right set up by the plaintiffs, it is not disputed that in 1877 a suit was brought by certain persons claiming to be under-proprietors of the entire Chak Satar, in which the plots in dispute are situated. The Settlement Court dismissed the suit on the ground that each under-proprietor should bring a separate suit for the *sir* plots in his possession. Mohammad Hussain, who was one of the claimants before the Settlement Court and is the predecessor-in-interest of the present plaintiffs, then brought a separate suit for a declaration of his rights to certain *sir* plots, including those now in dispute, impleading the superior proprietors, Har Prasad, Hanoman Prasad and Sarju Prasad, as defendants in his suit His allegation was that he was one of the old proprietors (*zemindar qadim*) of the village, and had been in possession of the plots in dispute in proprietary right on payment of a rental of Rs. 33 per year to the superior proprietors. Har Prasad appeared in person and admitted the claim, stating that Mohammad Husain was entitled to a decree by virtue of his *zemindari* right. The statement made by Har Prasad appears to have been supported by Sarju Prasad also, whose signature it purports to bear, though his name is not mentioned in the body of the statement. The Assistant Commissioner, who was trying the case, found that the entire village was held *kham* by the Deputy Commissioner who was no party to the suit, and that so long as the village was held *kham*, the plaintiff could not sue for his rights. He, therefore, dismissed the suit leaving it open to the plaintiff to sue for his rights after the village was released.

No suit appears to have been thereafter filed by Mohammad Husain or his successors-in-interest; but it is significant that in 1882 Sheo Charan Lal, the then superior proprietor, issued a notice of ejectment against Mohammad Husain, who contested it and succeeded in getting it cancelled on the ground that he was a *zemindar* and that his right as such had been admitted by the persons from whom the then superior proprietor had derived his title (Exhibit 7). This order was passed on the 8th June 1882 and covered all the plots now in dispute except Nos. 71/2 and 71/3 *khasra*.

The Courts below do not treat the admission made by Har Prasad in 1878 as binding on his co-sharers or as evidencing the under-proprietary title claimed by Mohammad Husain. They also treat the order cancelling the notice as insufficient to invest Mohammad Husain or his successors-in-interest with an under-proprietary title by

(1) 7 Ind. Cas. 608; 13 O. C. 188.

adverse possession. But as pointed out in *Raja Bhagwan Bakhsh Singh* v. *Mazhar Husain* (2), an acknowledgment by the *taluqdar* may be sufficient proof of an under-proprietary title, particularly when it is made in a suit in which the plots in question were claimed as having been held by the claimant as his *sir* by virtue of his being an old *zemindar*. The finding of the Revenue Court in the suit filed by Mohammad Husain to contest the notice of ejectment issued by Sheo Charan Lal also supports the same conclusion. The plaint filed by Mohammad Husain is not available, but the fact that such an adverse order was passed against the predecessor-in-interst of the present superior proprietors was enough to set limitation running as against him and as held in *Harnandan* v. *Raja Bhup Indar Bikram Singh* (3) and *Har Dayal* v. *Udit Narain Singh* (4), the right of Mohammad Husain and his successors-in-interest as under-proprietors, even if it did not originally exist, has been perfected in respect of the land comprised in the notice of ejectment by adverse possession since 1882. In the lower Appellate Court defendant No. 2, one of the superior proprietors, admitted the under-proprietary title of the plaintiffs in the plots in dispute to the extent of her half share of the superior proprietary interest. As against defendant No. 1, owning the remaining half, the plaintiffs' under-proprietary title is satisfactorily established.

The next question for consideration is whether the present suit of the plaintiffs is barred by reason of the dismissal of the previous suit filed by them in the Revenue Court for the occupancy of the land in dispute under section 108, clause (10), of the Oudh Rent Act. Section 108 gives to the Revenue Court exclusive jurisdiction over suits for the recovery of the occupancy of any land which has been treated by the landlord as abandoned or from which an under-proprietor or a tenant has been illegally ejected by the landlord. It does not, however, give to the Revenue Court exclusive jurisdiction to decide questions of under proprietary title or the right to under-proprietary possession. When an under-proprietor is ejected by his landlord from the land in his occupation, he cannot, as pointed out in *Chandrika Bakhsh Singh* v. *Raghunath Kunwar* (5), get back the occupancy or physical possession of that land, unless he files a suit against the landlord for the said purpose within the period of one year allowed by section 129 of the Oudh Rent Act. But if he does not file such a suit, his under-proprietary right is not thereby annulled or lost, for all that he loses is his summary remedy to be restored to actual occupation of the land on the strength of his previous possession which the Revenue Court is exclusively competent to grant. In *Ram Pargash* v. *Raja Adiya Dat Udai Partab Singh* (6), which was followed in *Khadim Husain* v. *Jamil Bibi* (1), it was held that if a person who claims to be an under-proprietor, was illegally ejected by the superior proprietor by means of the machinery provided by the Oudh Rent Act or in any other manner, he should in the first instance sue under section 108, clause (10), of that Act; and if his suit be thrown out by the Revenue Court, he could then sue the landlord for possession in the Civil Court and ask for a declaration of his rights. It may be doubted whether section 108, clause (10), was intended to cover cases of ejectment by the process of law. But anyhow the remedy given by that section, so far as it extends, does not oust the jurisdiction of the Civil Courts, to decide whether or not a person in possession of land holds a proprietary or under-proprietary right therein, and as poined out by their Lordships of the Privy Council in *Mohammad Abul Husan Khan* v. *Prag* (7), the decision of the Revenue Court on a question of that character is not final or conclusive. It was open, therefore, to the plaintiffs, after they had been unsuccessful in getting back the occupancy of the land of which they had been deprived, to sue in the Civil Court for a declaration of their under-proprietary title or for possession of their under proprietary right. The dismissal of their suit under section 108, clause (10), had no other

(2) 9 O. C. 167.
(3) 4 O. C. 207.
(4) 8 O. C. 30.

(5) 18 Ind. Cas. 284; 16 O. C. 105.
(6) 2 Ind. Cas 269; 12 O. C. 90.
(7) 38 Ind. Cas. 814; 20 O. C. 8; 15 A. L. J. 113; 21 M. L. T. 102; 19 Bom. L. R. 102; (1917) M. W. N. 232 & 456; 32 M. L. J. 388; 21 C. W. N. 583; 26 C. L. J. 165 (P. C.).

effect than that of depriving them of the benefit of the summary remedy provided by that section and obtaining back the physical occupation of the land on the strength of their previous occupation; and the present suit for possession of the under-proprietary right as such, as distinct from the tilling right, is maintainable. The object of section 108, clause (10), in providing a summary remedy enforceable within a limited period evidently was to obviate the tilling right being kept under suspense for any length of time. In the case of a tenancy the remedy so provided is exclusive, but it has no effect in determining proprietary or under-proprietary rights, where they exist.

The appeal is, therefore, allowed and the plaintiffs' claim decreed for under-proprietary possession of the plots in dispute with costs throughout. The contesting defendant will bear her own costs in all the Courts.

Appeal allowed.

SIND JUDICIAL COMMISSIONER'S COURT.

APPLICATION No. 75 OF 1917.

August 20, 1917.

Present:—Mr. Crouch, A. J. C.

Seth DWARKAPARSAD —PETITIONER

versus

FIRM OF DIPCHAND PARSRAM AND ANOTHER—RESPONDENTS.

Arbitration Act (IX of 1899), ss. 5, 8—Arbitration—Arbitrator neglecting to act—Reference, whether revocable without leave of Court—Procedure.

Once a valid submission has been made to an arbitrator, it is irrevocable without leave of the Court, under section 5 of the Arbitration Act, and if the arbitrator refuses or neglects to act, the procedure laid down by section 8 of the Act should be adopted. So long as the arbitrator holds his mandate unrevoked, the parties cannot appoint a fresh arbitrator.

Mr. *E. Castellino*, for the Petitioner.

Mr. *Kimatrai Bhojraj*, for the Respondents.

JUDGMENT—This is an application to file an award under the Indian Arbitration Act. The application is opposed on the ground (*inter alia*) that the arbitrator whose award it is sought to file was not validly appointed.

It is admitted that both parties appointed Bhai Relomal as their arbitrator and that a reference to him was duly signed. This was on the 7th February.

At that time, Bhai Relomal was not in Karachi and, on the 8th February, Messrs. Beharilal Keshowdas, through their Pleader, called on Messrs. Dipchand Parsram to nominate another arbitrator. To this, Messrs. Dipchand Parsram replied as follows:—

"The delay is on part of your client, as, when we had given Bhai Relomal's name, he was here and your client replied after a long time. The arbitrator is expected within a week and if he does not come, we shall appoint another arbitrator." This letter was sent on the 9th February. On the 13th Messrs. Castellino and Sobhanmal for Beharilal called on Dipchand Parsram to nominate another arbitrator, and, on the 28th February, having received no reply, they again wrote (Exhibit 8) nominating Dwarkaparsad as their arbitrator and warning them that, if they did not nominate some other person within 7 days, they would appoint the gentleman named as sole arbitrator. On the 14th March, Beharilal Keshowdas signed a reference on behalf of both parties to Dwarkaparsad. The reference ignores the previous nomination of Bhai Relomal.

Mr. Kimatrai, for Dipchand Parsram, contends that, once there had been a submission to Bhai Relomal, it was irrevocable without the leave of the Court and that, if Bhai Relomal neglected to act, the other side should have proceeded under section 8 of the Act. This contention must prevail. Mr. Castellino suggests that by their letter of the 9th February (Exhibit 9) Dipchand Parsram agreed to revoke, and did revoke, the submission to Relomal. But that letter contained nothing more than an expression of intention and, even if we were to construe it as a legal agreement to name an arbitrator, the proper procedure, on its breach, would have been under section 8 of the Act. Further, Relomal, on the 14th March, still held his mandate from the parties; it is not suggested, and there is no evidence, that he had surrendered it. This mandate was, under section 5, irrevocable without leave of the Court.

I must hold that the award was improperly procured and set it aside.

The application is dismissed with costs.

Application dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1037 OF 1915.

July 31, 1917.

Present:—Sir Asutosh Mookerjee, Kt., and Mr. Justice Beachcroft.

Sheikh NASIRUDDIN MIDDA—PLAINTIFF—APPELLANT

versus

Sheikh SIDHOO MIA AND OTHERS—DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), s. 77—Suit to enforce registration—Procedure—Suit for recovery of possession on declaration of title by purchase or on specific performance of contract of sale, maintainability of—Frame of suit—Alleged transferee from vendor, whether can be joined as party.

Before a plaintiff can institute a suit under section 77 of the Registration Act to enforce registration of a document, he must follow strictly the procedure prescribed by the Act for obtaining registration of documents. [p. 362, col. 1.]

B executed a conveyance of certain land in favour of *A* but did not register it. Neither did he put *A* in possession of the land. *A* brought a suit against *B* praying for possession on declaration of title or on specific performance of the contract of sale. *A* made *C* a party to the suit, on the ground that the latter held a *kobala* of the land executed in his favour by *B*:

Held, that in such a case though *A* could not sue for enforcement of registration under section 77 of the Registration Act without following strictly the procedure laid down in the Act for enforcing registration of documents, yet as the agreement to sell remained unperformed, *A* was entitled to claim specific performance of the agreement to sell. [p. 362, col. 1.]

Held, further, that to avoid multiplicity of suits it was necessary for the plaintiff to join *C* as a party to the suit properly framed for specific performance. [p. 362, col. 2.]

Appeal against the decree of the Officiating Subordinate Judge, 3rd Court of Midnapore, dated the 9th March 1915, reversing that of the Officiating Munsif, 1st Court of Tamluk, dated the 15th of December 1913.

FACTS appear from the judgment.

Babu *Panna Lall Banerjee* for Babu *Manmatha Nath Mukherjee*, for the Appellant.—The Court of Appeal below has erred in holding that as the plaintiff had not followed the provisions of the Registration Act for obtaining registration of the conveyance executed by the defendants Nos. 1 to 4, the present suit was not maintainable. Even assuming that the claim for obtaining registration of the document under section 77 of the Registration Act is not maintainable, the alternative claim made in the suit for specific performance of the agreement to sell ought to have been allowed. The defendants did enter into a contract with the plaintiff to sell the land, and that contract of theirs still remains unperformed by them. The plaintiff is, therefore, entitled to proceed against his vendors to compel them to fulfil their contract.

Babu *Jyotish Chandra Hazra*, for the Respondents.—The whole suit is based not upon the agreement to sell but upon the executed conveyance which the defendants refused to register. The suit being principally a suit for declaration of title and for recovery of possession based upon an unregistered conveyance, the lower Appellate Court was right in dismissing it.

The defendant No. 5, the transferee, is not a necessary party to this suit and the plaintiff is not entitled to claim any relief against him in this suit.

Babu *Panna Lall Banerjee*, for the Appellant in reply.—With a view to avoid multiplicity of suits the defendant No. 5, the alleged transferee, has been rightly joined as a party to this suit.

JUDGMENT.—This is an appeal by the plaintiff in a suit instituted by him on the 21st December 1912 for recovery of possession of land on declaration of title by purchase or on specific performance of a contract of sale. The case for the plaintiff is that the disputed property belonged to the first four defendants, that he obtained a conveyance from them on the 30th November 1912 and that his vendors had not only failed to register the document and to place him in possession but had transferred the property to the 5th defendant. The latter conveyance bears date the 29th November 1912, but the plaintiff asserts that the document is collusive and has in fact been antedated. The Court of first instance found on the merits in favour of the plaintiff and decreed the suit. The Court held that the sale

to the 5th defendant was collusive and without consideration and that although it purported to be anterior to the agreement whereon the plaintiff relied, the transaction took place really after the institution of this suit. Upon appeal the Subordinate Judge has reversed the decision of the Trial Court and has dismissed the suit, on the ground that the plaintiff was not competent to seek registration of the conveyance executed in his favour as he had not followed the provisions of the Indian Registration Act to compel registration of the document. In support of this view, the Subordinate Judge has relied upon the decisions in *Edun* v. *Mahomed Siddik* (1), *Lakhimoni Chowdhrain* v. *Akroomoni Chowdhrain* (2) and *Sheikh Rahmatulla* v. *Sheikh Sariutulla Kagchi* (3). In our opinion, the decree of the Subordinate Judge cannot possibly be upheld.

The plaintiff framed his suit in the alternative. As regards the claim to enforce registration of the document executed in his favour by his vendors he was, no doubt, bound to follow strictly the procedure prescribed by the Indian Registration Act before he could institute a suit under section 77 to compel registration. But as regards the alternative claim to enforce specific performance of the agreement to sell there was really no answer to the suit. Although the vendors had executed the document, they could not be deemed to have completely performed their part of the agreement. The agreement in essence was not merely to execute a conveyance which until registered would be inoperative in law, but to transfer the full title from themselves to the plaintiff as purchaser. Such title could be transferred only by means of a registered instrument; consequently, the execution of the conveyance not followed by registration could not be regarded as fulfilment of the contract. The true position then is that the agreement to transfer remained unperformed and the plaintiff was entitled to proceed against his vendors to compel them to fulfil their contract. This is not opposed to the decision in *Sheikh Rahmatulla* v. *Sheikh Sariutulla Kagchi* (3) as the plaintiff does not seek to found his title on the unregistered conveyance which is inoperative in law.

It was necessary for the plaintiff to join the 5th defendant as a party to the suit properly framed for specific performance. That defendant claimed title under a conveyance ostensibly anterior in date to the agreement which is the foundation of the alleged title of the plaintiff. If the conveyance was in reality anterior to the agreement, the plaintiff has clearly no enforceable claim against that defendant. But if, on the other hand, the conveyance in favour of the 5th defendant has been antedated, the plaintiff can enforce his claim not merely against his vendors but also against that defendant, provided it is established that the latter has taken with notice of the agreement with the plaintiff. This relief could not have been obtained in a suit framed and instituted in accordance with section 77 of the Indian Registration Act. We cannot thus hold that the only remedy, of the plaintiff was a suit of that description because the consequence would be that the plaintiff if successful in such a litigation would be driven to institute a second suit against the 5th defendant for establishment of his title and for recovery of possession. To avoid multiplicity of litigation, it was open to the plaintiff to frame his suit as he has done and to seek relief as well against his vendors as against their alleged transferee.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and the case remitted to him in order that he may re-hear the appeal on the merits The question for investigation will be, whether the plaintiff has an enforceable claim against the 5th defendant on the basis of the agreement of sale alleged to have been made with him on the 30th November 1912. In this connection the question raised in the fourth issue will require consideration. The appellant is entitled to his costs both here and in the lower Appellate Court.

Appeal allowed; *Case remanded.*

(1) 9 C. 150; 11 C. L. R. 440; 5 Shome L. R. 35; 4 Ind. Dec. (N. S.) 752.

(2) 9 C. 851; 12 C. L. R. 527; 4 Ind. Dec. (N. S.) 1217.

(3) 10 W. R. 51; 1 B. L. R. F. B. 58; 4 Mad. Jur. 102; 1 Ind. Dec. (N. S.) 93.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION APPLICATION No. 17 OF 1917.

June, 1, 1917.

Present:—Mr. Pratt, J. C. and Mr. Crouch, A. J. C.

HYDERABAD MUNICIPALITY—APPLICANT

versus

MOORIJMAL MUSHTAKRAM—OPPONENT.

Bombay District Municipal Act (III Bom. of 1901), s. 160 (3)—Land Acquisition Act (I of 1894), s. 23 (2)—Award of compensation by District Court—Power of Court to award 15 per cent. on market value—"Procedure," meaning of—Revision—High Court, power of interference of—Civil Procedure Code (Act V of 1908), s. 115.

Under section 160 (3) of the Bombay District Municipal Act, the matter of the compensation is to be determined by the District Court, which decides the question in the exercise of its jurisdiction as a Civil Court. Its proceedings are, therefore, subject to revision by the Judicial Commissioner's Court under section 115 of the Civil Procedure Code. [p. 366, cols. 1 & 2; p. 365, col. 2.]

The word "procedure" in section 160 (3) of the Bombay District Municipal Act is used in its popular and not in its strictly legal sense, and a District Court in awarding compensation under that section has power to award 15 per cent. of the market value in addition to such value. [p. 366, col. 2.]

Application for revision against the order of the Joint Judge, Hyderabad.

Mr. *Hirdaram Mewaram*, for the Applicant.

Mr. *Kimatrai Bhojraj*, for the Opponent.

JUDGMENT.

CROUCH, A. J. C.—This is an application under section 115, Civil Procedure Code, against an order of the Joint Judge, Hyderabad, under section 160, District Municipal Act, awarding 15 per cent. of the amount of the market value for compulsory acquisition.

The learned Judge made it clear in his judgment that, in his opinion, it was not lawful to give the 15 per cent. compensation: in previous cases he had refused it; but in this case he gave it out of deference to this Court which had, on its original side, awarded such compensation in a case where the point was not in issue.

Applicant contends that the case is a fit one for the exercise of this Court's extraordinary power of revision, inasmuch as the point decided is one of great and general importance, that the law is clear, and that the learned Judge has acted improperly in deciding contrary to what he believed to be the law.

If there be no obstacle in the way of applying the provisions of section 115, I am of opinion that the case is a fit one for revision, assuming that the applicant can satisfy the Court that the 15 per cent. compensation cannot be lawfully awarded. But Mr. Kimatrai, for the opponent, raises the preliminary objection that section 115 has no application to an award under section 160, District Municipal Act. It is necessary to decide this objection before hearing arguments on the merits.

The history of section 115 is well known. In the Code of 1859 no revisional powers were conferred on the Courts. Under Act XXIII of 1861, the Sudder Court might call for the record of any case decided on appeal in which no further appeal lay, if the subordinate Court, on hearing the appeal, appeared to have exercised a jurisdiction not vested in it by the law. By section 222 of the Code of 1877, the words "or to have failed to exercise a jurisdiction so vested" were added; and, lastly, by section 92 of Act XIII of 1872 the power of revision was extended to cases where the Court had acted in the exercise of its jurisdiction illegally or with material irregularity.

It is clear that it was the intention of the Legislature, in framing this section, to give to the High Court powers of supervision and superintendence. The powers, as originally conferred, differed materially from those of an Appellate Court; and though, as enlarged, they approximate to those of an Appellate Court, yet the scope and intention of the section remain distinct. The High Court is to see that its subordinate Courts do not interfere in matters of which they have no cognizance, that they do not fail to exercise their jurisdiction and that they do not abuse their powers or act illegally in the exercise of them.

It was held in *Chunilal Virchand* v. *Ahmedabad Municipality* (1) that no appeal lies from the decision of a District Court under clause (3) of section 160 of the Bombay District Municipal Act, and this

(1) 12 Ind. Cas. 540; 36 B. 47; 13 Bom. L. R. 958.

decision has not been questioned by the applicant.

For his contention that no application under section 115 is competent, Mr. Kimatrai relies on *Balaji Sakharam* v. *Merwanji Nowroji* (2) and *Municipality of Belgaum* v. *Rudrappa Subrao Sutar* (3). In the former case, the District Judge, in an order passed under section 23 of the District Municipal Act of 1884, had made an order for the payment of certain costs. In an application to the High Court under section 622, Civil Procedure Code, it was held that a District Judge acting under section 23 of Bombay Act II of 1884 was not a Court within the meaning of the word in section 622, Civil Procedure Code, that he was merely a *persona designata* and, if he had jurisdiction to award costs at all, there was nothing to prevent him from awarding them on the scale he did. It appears that this was a case in which the High Court would not properly have exercised its powers under section 622 even if there had been no doubt as to its competency to do so.

In the latter case, the District Judge had found on a preliminary issue that the Court could not proceed with the suit without the claims of defendants Nos. 2 and 3 being first submitted to arbitration, and had dismissed the suit. In his order discharging the rule Batchelor, J., stated: "The object of this application is to obtain from the Court a decision that although no appeal would lie, yet an application in revision does lie." Such a decision would, in our opinion, be seriously anomalous, and we do not think that the words of the Statute require us to make such a pronouncement. In *Balaji Sakharam* v. *Merwanji Nowroji* (2) the Court had held that it has no jurisdiction to revise the order of a District Judge acting under section 23 of the Bombay District Municipal Act of 1884. And although the words occurring in that section are 'District Judge' whereas the words occurring in section 160, last clause, are 'District Court,' we do not think that the distinction is sufficient to support the argument that an application for revision is competent, although admittedly no appeal would lie."

A comparison of section 23 of Act II of 1884 with section 160 of the Bombay District Municipal Act of 1901 discloses some important distinctions.

Section 23 runs as follows:—

"If the validity of any election of Municipal Commissioner is brought in question by any person qualified either to be elected or to vote at the election to which such question refers, such person may, at any time within ten days after the date of the declaration of the result of the election, apply to the District Judge of the District within which the election has been or should have been held."

The District Judge may, after such inquiry as he deems necessary, pass an order for confirmation or amending the declared result of the election, or for setting the election aside.

For the purposes of the said inquiry the District Judge may exercise any of the powers of a Civil Court, and his decision shall be conclusive.

Section 160 (3) runs thus:—

"In the event of the *Panchayet* not giving a decision within one month from the date of the selection of the *Sir Panch*, or of the appointment by the District Court of such members as may be necessary to constitute the *Panchayet*, the matter shall, on application by either party, be determined by the District Court, which shall in cases in which the compensation is claimed in respect of land, follow as far as may be the procedure provided by the Land Acquisition Act, 1894, for proceedings in matters referred for the determination of the Court."

In the former case, the application is to be made to the District Judge, that is, to the Presiding Officer of the District Court, in the latter the application is to the District Court, that is, the principal Civil Court of original jurisdiction within the district [section 2 (4) and (8), Civil Procedure Code.]

Any presumption that District Judge is intended to be synonymous with District Court in the earlier Act is rebutted by the declaration that he is, for the purposes of the said inquiry, vested with the powers of a Civil Court.

(2) 21 B. 279; (11 Ind. Dec. (N. S.) 189.
(3) 34 Ind. Cas. 21; 18 Bom. L. R. 340; 40 B. 509.

The decision, therefore, in *Balaji's case* (2) did not cover the facts with which the Court had to deal in the *Belgaum case* (3); nor need it embarrass us in deciding this one.

It has been argued that if no appeal lies, it would be anomalous to hold that relief can be given under section 115, and reliance is placed on the judgment of Batchelor, J., above cited. But the question whether or not there would be any anomaly in entertaining an application under section 115 in this case depends on whether or not the District Court acted illegally or with material irregularity. There can be no anomaly in exercising the powers conferred by the section even though there be no appeal, if the conditions of the section be fulfilled.

As the case in which our interference is sought was decided by the District Court as such, *prima facie* this Court can call for it under section 115.

It has been suggested that the Court in making its award acts in an executive or administrative capacity. But the terms of the Act do not support this view. A perusal of section 160, Bombay District Municipal Act, 1884, discloses that, while no instructions are given to the *Panchayet* as to the lines which they are to follow in assessing the compensation, detailed instructions are given to the District Court. The members of the *Panchayet* are expected to assess the compensation as arbitrators, not as legal experts or as men accustomed to adjudicate on complicated questions of fact. But, as soon as the matter is vested in the District Court, a detailed procedure is laid down for its guidance; the Code of Civil Procedure applies to all proceedings before the Court. There can be no doubt that the Legislature contemplated that there would be a judicial proceeding and the object of handing over the determination of any case, which a *Panchayet* is unable to dispose of, to the District Court is to ensure that there shall be such a proceeding. The Court is not given the wide powers of the *Panchayet*, but its procedure is strictly defined and its discretion in assessing the compensation is carefully restricted.

There are good reasons why the award of the District Court should not be the subject of appeal. It is most desirable that the owner of property who is compelled to come to Court merely that a sale transaction may be carried through should not be dragged into lengthy litigation. Provided that the District Judge follows the elaborate procedure laid down for his guidance, the margin of possible error is not very wide.

But what reason is there to suppose that the Legislature contemplated that the District Court, when exercising its judicial authority under section 160, would be exempted of all control and superintendence by the High Court? Surely, one of the reasons that influenced the Legislature in entrusting the final decision of the question of compensation to the District Court was that the Court formed part of a well administered system. There is no anomaly whatever in conferring on a Court the power to give a final decision on any matter so long as it observes certain well defined rules, and yet making such Court subject to control whenever it transgresses those limits.

The District Court of Hyderabad is a Court subordinate to this Court; the case, the record of which we are asked to call for, was a case decided by the District Court. We are asked to call for the record because the Judge gave a decision which he admitted to be, in his opinion, contrary to law, a decision which is likely to result in grave and irreparable injury to the applicant if not remedied. I consider that the case is one with which we are competent to deal.

But I see no reason for interference with the order of the lower Court. Section 160, Bombay District Municipal Act, declares that the District Court shall follow, as far as may be, the procedure provided by the Land Acquisition Act, 1894, for proceedings in matters referred for the determination of the Court. On reference to that Act we find the heading to part III "Reference to Court and procedure thereon", and it seems obvious that the intention of the Legislature was that the Court should follow the procedure laid down in part III.

Further, it is to be noted that both the *Panchayet* and the Court have to determine what compensation should be awarded to

the owner. Compensation is not the same as market value; it is the equivalent in money of the value of land to the owner. The old Common Law rule for ascertaining compensation for expulsion was that it should be determined on the same principles as damages in an action of trespass; and it was the usual practice to add a certain percentage to the market value for compulsory purchase (Halsbury's Laws of England, Vol. VI, paragraphs 36 and 42).

Section 23 of the Land Acquisition Act lays down the lines which the Court should follow in determining the amount of compensation and in doing so it follows closely the English practice; the Court has to ascertain the market value and then add a percentage.

Under section 41 of the Bombay District Municipal Act, when there is any hindrance to the acquisition of any land, the Government may acquire under the Land Acquisition Act and vest it, when so acquired, in the Municipality. It is wholly unlikely that the Legislature intended that the amount of compensation payable under section 41 should differ materially from that payable under section 160, notwithstanding that the procedure to be followed for ascertaining such compensation was to be the same under each section.

The procedure followed in the case reported as *Karachi Municipality* v. *Khatanmal Hiranand* (4) both by the Municipality and this Court was correct. The Municipality had offered compensation which included a percentage on the market value; the Court awarded the market value and 15 per cent. thereon in addition.

I would dismiss this application with costs.

PRATT, J. C.—I concur.

Under section 160, clause (3) of the Bombay District Municipal Act, 1901, the matter of the compensation is to be determined by the District Court. This distinguishes the case from section 23 of the Bombay District Municipal Act, 1884, where the matter there referred to is decided by the District Judge as a *persona designata* and the High Courts has, therefore, no jurisdiction. *Balaji Sakharam* v. *Merwanji Nowroji* (2).

It seems to me clear that under section 160 (3), the District Court decides the question in the exercise of its jurisdiction as a Civil Court. Its proceedings are, therefore, subject to revision by this Court. I differ from the case of *Municipality of Belgaum* v. *Rudrappa Subrao Sutar* (3), for I see no anomaly in the High Court revising an order or decree that is not appealable.

The case of section 5 of the Religious Endowments Act XX, of 1863, presents a very close analogy. That section confers on the Civil Court jurisdiction to appoint a manager of a religious establishment. The Privy Council held in *Minakshi Naidu* v. *Subramanya Sastri* (5) that no appeal lay from the order. Nevertheless the Madras High Court held in *Gopala Ayyar* v. *Arunachalam Chetty* (6) that an application for revision to the High Court was competent.

I also agree that there is no ground for our interfering in revision.

I do not think the District Judge erred in awarding 15 per cent. over the market value. It is said that the right to this 15 per cent. is a matter of substantive right and not of procedure. Possibly the word procedure, in section 160 (3) is not very felicitous, but I think it is used in its popular and not in its strictly legal sense. I am quite clear that it does not mean procedure in the sense of the adjective law enacted in the Code of Civil Procedure. Section 53 of the Land Acquisition Act applies that law to proceedings in Court under the Act. If section 160 (3) referred to this only, it would have mentioned the Civil Procedure Code and not the Land Acquisition Act. What was meant was that the District Court should frame the same issues and be guided by the same considerations as it would under the Land Acquisition Act. Under that Act it has to decide the market value under sections 23 and 24 and then add 15 per cent. to arrive at the compensation to be awarded. It is no great strain on the word 'procedure' to say

(4) 27 Ind. Cas. 326; 8 S. L. R. 126.

(5) 11 M. 26; 14 I. A. 160; 5 Sar. P. C. J. 54; 11 Ind. Jur. 393; 4 Ind. Dec. (N. S.) 18 (P. C.).

(6) 26 M. 85.

that the District Court under section 160 (3) should follow this procedure and assess compensation by the same method of valuation.

Application dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1138 OF 1916.

November 8, 1917.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

KHAJI SAYYID YUSUF SAHIB AND OTHERS—PLAINTIFFS—APPELLANTS

versus

EDIGA NARASIMHAPPA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 11, Expl. VI, 91—Injury to plaintiff in exercise of public right—Damages, suit for—Finding as to nature of right—Res judicata.

A private individual is not competent to obtain a declaration that a right is a public one, but he is entitled to sue for damages for injuries sustained by him in the exercise of his privileges connected with a public right. [p. 367, col. 2, p. 368, col. 1.]

Where the Court gives a finding in such a suit that the right is a public right, it becomes *res judicata* in a subsequent litigation by virtue of Explanation VI of section 11, Civil Procedure Code. [p. 367, col. 2.]

Second appeal against the decree of the Court of the District Judge, Bellary, in Appeal Suit No. 113 of 1914, preferred against that of the Court of the Additional District Munsif, Penukonda, in Original Suit No. 69 of 1914.

Mr. *L. A. Govindaraghava Aiyar*, for the Appellants.

Mr. *H. Balakrishna Rao*, for the Respondents.

JUDGMENT.—The matter has been fully argued before us and we have come to the conclusion that the District Judge's judgment cannot be supported. In the previous litigation the present 1st plaintiff's father claimed a right of way over the path in question. The case was taken up to the High Court and it was held in *Khaji Syyad Hussain Saheb* v. *Ediga Narasimhappa* (1), accepting the finding of the lower Appellate Court in that behalf, that the path was a public one and that the plaintiff was not entitled to maintain the suit without alleging special damage. Accepting this decision the present 1st plaintiff, who is the son of the plaintiff in the previous litigation, sued along with three others the same defendants for a declaration that the path is a public one. The necessary sanction under section 91 of the Civil Procedure Code was obtained to institute the suit. The defendants now plead that it is a private right of way. The District Munsif overruled this plea and gave plaintiffs a decree. On appeal the District Judge has reversed this judgment and has dismissed the suit.

Apart from the view we take in regard to the binding nature of the previous judgment, it seems to us that it would not conduce to the proper administration of justice, if a defendant who has been defeated on a particular view of the facts put forward by him is allowed to resile from that position and to raise a defence inconsistent with his original contention. Even if there is no question of *res judicata*, we would have held that the defendants are estopped from questioning the judgment to which they were parties. See *Sayam Ramamoorthi Dhora* v. *Secretary of State* (2).

But we think that the present contention is *res judicata* and that Explanation VI to section 11 governs this case. The essence of a litigation, which is carried on by a private party for injuries sustained by him in the exercise of a right common to him and others, is that there is a public right and that the party suing has suffered special damage in enforcing that right. The fact that in obtaining this individual remedy, it is not open to him to get a declaration embodied in the decree that the right is a public one, will not affect the principle of *res judicata*. Mr. Balakrishna Rao's citations from English decisons only established that a private individual is not competent to obtain a declaration that a right is a public one. The vindication of such a right is either by indictment or by a suit by the Attorney-General. But no authority has been quoted for the proposition that an individual is not entitled in his own right

(1) 16 Ind. Cas. 962, 23 M. L. J. 539; 12 M. L. T. 491; (1913) M. W. N. 991.

(2) 19 Ind. Cas. 656; 24 M. L. J. 469; 36 M. 141.

to seek redress in respect of the injuries sustained by him in the exercise of his privileges connected with a public right. That is a common law right; and when that right is put in Court there must necessarily be a finding whether the special injury was sustained by the plaintiff in exercising his rights as a member of the public. When that adjudication is given, the finding regarding the right becomes *res judicata* in a subsequent litigation by virtue of Explanation VI to section 11 which gives a comprehensive definition of the terms "under whom they or any of them claimed." Mr. Balakrishna Rao's argument that the enactment of section 91 prohibits a member of the public from obtaining a finding regarding the public right would render nugatory Explanation VI to section 11 and would strike at the root of the common law right which every individual possesses in these matters. There is authority also for the view we have taken. *Gedimella Rangamma* v. *Panchangam Narasimhacharyulu* (3) decides the converse of the present case, but the principle is there recognised as argued by Mr. K. V. Krishnaswami, Ayyar that the right litigated in the first litigation need not be on behalf of the general public, provided the foundation of the claim is that the injury was suffered in exercising a right common to the plaintiff and others. *Muhammad Amir* v. *Sumitra Kuar* (4) is also to the same effect. The decision in *Rama Das* v. *Hanumantha Row* (5) under section 92 of the Code enunciates the same principle.

For these reasons we are of opinion that the finding in the previous litigation that the suit path is public one operates as *res judicata* in the present suit and that it is not open to the defendants to go behind that finding.

We must reverse the decree of the District Judge and restore that of the District Munsif with costs here and in the lower Appellate Court.

Appeal allowed.

M. C P.

(3) 35 Ind. Cas. 116; 31 M. L. J. 26; (1916) 2 M. W. N. 258.

(4) 24 Ind. Cas. 97; 36 A. 424; 12 A. L. J. 643.

(5) 12 Ind. Cas. 448; 36 M. 364; 21 M. L. J. 952; 10 M. L. T. 356; (1911) 2 M. W. N. 387.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 60 OF 1915.

July 6, 1917.

Present:—Mr. Lindsay, J. C., and Mr. Stuart, A. J. C.

Thakur BISHESHAR BAKHSH SINGH—PLAINTIFF—APPELLANT

versus

Raja RAMESHAR BAKHSH SINGH—DEFENDANT—RESPONDENT.

Taluqa, *suit for possession of—Lord Canning's Proclamation of* 1858, *result of—Second Summary Settlement, effect of—Governor-General's letter dated* 10*th October* 1859, *effect of*—Sanads, *title conferred under, nature of—Hindu widow holding* sanad *in her name, position of—Trustee—Succession to* taluqa—*Oudh Estates Act* (*I of* 1869), *s.* 22—*Limitation Act* (*IX of* 1908), *Sch. I, Arts.* 141, 144—*Limitation to be determined on case set up in plaint—Evidence Act* (*I of* 1872), *s.* 116—*Estoppel of tenant, not applicable to person setting up under-proprietary title by adverse possession—Civil Procedure Code* (*Act V of* 1908), *s.* 11 *Expl. IV*—Res judicata, *partial.*

At the time of the annexation of Oudh a *taluqa* was in the possession of a Bais Thakur *B. S.* After the annexation the First Summary Settlement of the *taluqa* was made with him. He died issueless in 1857 and was succeeded in possession by his widow *D. K.* belonging to the clan of Amethia Thakurs. She was in possession when Lord Canning's Proclamation of confiscation was issued in 1858.

The Second Summary Settlement of the *taluqa* was made with her and in the various proceedings relating to this settlement she was described as the wife or widow of *B. S.* She never in any way acknowledged that any third person had a right in the *taluqa*, although she made subsequent declarations to the effect that she had no intention of giving it to Amethia Thakurs. She was still in possession when the letter of the Governor-General, dated the 10th of October 1859, was published, by which it was declared that every *taluqdar* with whom a Summary Settlement had been made subsequent to the date of the re-occupation of Oudh had thereby acquired permanent, heritable and transferable proprietary rights in the *taluqa* for which the engagement had been taken.

As provided by this letter, a *sanad* in the original form was granted to *D. K.* in her own name in 1860. In 1861 a *sanad* in the revised form, *i.e.*, the primogeniture *sanad*, was similarly granted to her Her name was subsequently entered in Lists I and II of the Oudh Estates Act.

After her husband's death she took steps to provide for the devolution of the *taluqa* upon a collateral relative of her deceased husband *B. S.*, but later on cancelled the provision in 1866 and 1873 In the proceedings held at the time of the First Regular Settlement she described herself as the wife or widow of *B. S.* and gave the history of the *taluqa*, as having come down in the family of *B. S.* This Regular Settlement was made with her not on the basis of these representations but on the ground that she had acquired the full title to the *taluqa* under the *sanads.*

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She continued in possession of the *taluqa* till her death intestate in 1893, after which the above-mentioned collateral relative of *B. S.* took possession of the entire *taluqa*.

Then *R. B. S.*, as the right heir of *D. K.*, being her brother's grandson, sued the collateral relative of *B. S.* for possession of the *taluqa* and succeeded in obtaining a decree in 1900. In 1911 *R. B. S.*, setting out his title to the entire *taluqa* under this decree, brought a suit in ejectment against *B. B. S.* as a trespasser, who was at that time in possession of one of the villages comprised in the *taluqa*. *B. B. S* was at that time aware of the facts upon which he relied in the present suit, mentioned below, for the purpose of showing that he was the rightful owner of the whole *taluqa*, but he set up an under-proprietary title in respect of the village, his case being that he and his predecessors had been in adverse possession as under-proprietors for many years upon payment of the revenue and cesses due in respect of the village. The suit of *R. B. S.* was, however, decreed in 1911 on the finding that *B. B. S.* was not an under-proprietor of the village.

In 1913 *B B S.* instituted the present suit against *R. B. S.* He claimed to be the nearest male heir of *B. S.* and as such to be entitled to possession of the *taluqa* in preference to *R. B. S.* who was a stranger to the family. *R. B. S* relied upon his title arising from the provisions of section 22, clause 6, of the Oudh Estates Act and pleaded limitation as well as *res judicata* as a bar to the suit:

Held, (1) that Lord Canning's Proclamation of 1858 having resulted in divesting all landed property from proprietors in Oudh and transferring and vesting the same in the British Government, the Second Summary Settlement did not of itself vest the absolute proprietary and heritable rights in *taluqas* but amounted to a permission to the persons with whom the settlements were made to engage for the payment of the Government revenue; the effect of the declaration contained in the Governor-General's letter, dated the 10th of October 1859, being to invest the *taluqdars* in possession under the Summary Settlements with permanent, hereditary and transferable proprietary rights in their *taluqas*, including the perpetual privilege of engaging with the Government for the revenue of those *taluqas*; the two *sanads* addressed to *D. K* having purported to confer upon her and her heirs for ever the full proprietary right, title and possession of the *taluqa*, and the intention of the Government in the matter being deducible from the acts of the Government itself and not from the conduct and declarations of *D. K*, *D. K.* took the *taluqa* in her own right as full owner, and not in the right of her husband *B. S.* as a Hindu widow, nor as such widow with special powers of alienation superadded, so that if she failed to exercise the special powers of transfer conferred upon her the *taluqa* would revert after her death to the nearest male heir of her deceased husband according to the rule of primogeniture, nor even as a trustee for the reversioners of her deceased husband *B. S.*, for there was no evidence to show that she had by any express or implied acknowledgment, declaration or conduct constituted herself such a trustee: and that, therefore succession to the *taluqa* was governed by the terms of section 22 of the Oudh Estates Act, under which *R. B. S.* was the right heir of *D. K.*; [p. 374, col. 2; p. 375, cols. 1 & 2; p. 376, col. 1; p. 377, col. 1; p. 379, cols. 1 & 2; p. 383, col. 1.]

(2) that *D. K.* having been found to be in possession of a full estate, the case was governed by Article 144 and not by Article 141, Schedule I, of the Limitation Act; but that, as the point of limitation was to be determined in view of the plaint allegations, which were to the effect that the plaintiff was entitled to succeed on the death of *D K.* not as her heir but as an heir of her husband *B. S.*, Article 141 applied and the suit was barred; [p. 390, cols. 1 & 2; p. 391, col. 1.]

(3) that *B. B. S.* not being debarred under section 116 of the Evidence Act from raising in the previous suit the proprietary title in respect of the village then in dispute, inasmuch as he asserted at that time an adverse subordinate title and not a title derived from the superior proprietor, or from setting up both proprietary and under-proprietary titles at one and the same time on the ground of inconsistency, the present suit was barred by *res judicata* under section 11, Explanation IV, Civil Procedure Code, so far as the said village was concerned, and not in respect of the entire *taluqa*, inasmuch as title to the entire *taluqa* was not a point which properly belonged to the subject of the previous litigation. [p. 393, col 2; p. 394, cols. 1 & 2; 395, col. 1.]

Appeal from the decree of the Subordinate Judge, Mohanlalganj (Lucknow), dated the 31st March 1915.

Sir *Rash Behary Ghose*, the Hon'ble Mirza *Samiullah Beg*, the Hon'ble Syed *Wazir Hasan* and Sheik *Shahabuddin*, for the Appellant.

Sir *Sundar Lal*, Mr. *Mohammad Nasim*, the Hon'ble Pandit *Gokaran Nath Misra* and Pandit *Harkaran Nath Misra*, for the Respondent.

JUDGMENT.—This appeal has arisen out of a suit for possession brought by the plaintiff-appellant, Thakur Bisheshar Bakhsh Singh, against the defendant-respondent, Raja Rameshar Bakhsh Singh. The property in dispute is the Samarpaha *taluqa* which is situated in the Rae Bareli district; and before proceeding to discuss the points which are in issue before us we think it will be expedient to set out as far as possible certain facts relating to the history of this estate. At the time of the annexation of Oudh the property was in possession of Basant Singh who was a Thakur belonging to the Bais clan. After the annexation the First Summary Settlement of this Taluqa was made with Basant Singh, who died thereafter on the 12th of November 1857, during the Mutiny. Thakur Basant Singh left no issue and was succeeded in possession by his widow, Thakurain Dariao Kuar, whose age at that time appears to have been about 18 or 19 years. At the time when the pro-

clamation of confiscation was issued by Lord Canning in the month of March 1858 Dariao Kuar was in possession of the estate which had belonged to her husband. On the 8th of May 1858 an application was made to have the Second Summary Settlement of this Taluqa made with her. This application was presented on her behalf by an agent of hers named Ram Sarai. The application was accepted and two days afterwards, that is to say, on the 10th of May 1858, an order was issued by Major Barrow, Special Commissioner sitting at Lucknow, directing that the settlement should be made with Dariao Kuar. Dariao Kuar was still in possession when the letter of the Governor-General, dated the 10th of October 1859, was published, by which it was declared that every Taluqdar with whom a Summary Settlement had been made subsequent to the date of the re-occupation of Oudh had thereby acquired permanent, hereditary and transferable proprietary rights in the Taluqa for which the engagement had been taken. This letter is incorporated in the Oudh Estates Act (1 of 1869), and in paragraph 4 it was directed by the Governor-General that *sanads* should be issued in his name by the Chief Commissioner of Oudh. We find from certain official correspondence which is on the record that a *sanad* was granted to Dariao Kuar in the month of December 1860 (*cf.* Exhibit A 5, a letter addressed by the Deputy Commissioner of Rae Bareli to the Commissioner of the Baiswara Division). This must have been a *sanad* in the original form set out in Sykes' Compendium of Taluqdari Law at page 385. Later on we find that a *sanad* in the revised form, namely, the primogeniture *sanad*, was granted to Dariao Kuar. A copy of this *sanad* is on the record (plaintiff's Exhibit No. 9). It was signed by the Chief Commissioner on the 8th May 1861. The evidence on record shows that this *sanad* was delivered to Dariao Kuar on the 25th of October 1861.

Subsequently when the Oudh Estates Act (I of 1869) came into force Dariao Kuar was treated as the Taluqdar and her name was entered in Lists I and II prepared under section 8 of that Act. It is admitted that Dariao Kuar continued in possession of the Samarpaha Taluqa till the date of her death, namely, the 10th of November 1893. She died intestate.

In order to explain the course of the litigation regarding this estate which took place after the lady's death, it is necessary to travel back to the period immediately succeeding the re-occupation of Oudh in March 1858 and to refer to certain events which took place about that time.

Basant Singh, as we have said, was a Bais Thakur and his estate was one of the numerous large estates in the Rae Bareli district held by the members of that clan. His wife belonged to the Amethia clan of Thakurs and it may be taken as an established fact that the Thakurs of the Bais clan viewed with some apprehension the prospect of the estate passing away from their clan into the clan of the Amethias. We have already mentioned the fact that Basant Singh left no male issue. It is proved that after her husband's death Dariao Kuar took steps to provide for the devolution of the estate upon a collateral relative of her deceased husband. Acting no doubt in consultation with the members of her husband's family in the year 1860 she took a boy named Sher Bahadur, whose age at that time was 11 or 12 years, to live with her with the intention that he should be brought up in the family house and should succeed to the estate upon her death. It was alleged in subsequent litigation that Dariao Kuar had adopted Sher Bahadur as a son to her husband, but it was decided that no valid adoption had ever taken place.

On the 1st September 1886 in obedience to a letter addressed to her by the district authorities, Dariao Kuar prepared a formal deed (plaintiff's Exhibit No. 8) by which she declared Sher Bahadur Singh to be the person who would succeed to the Samarpaha Taluqa after her death; the document was styled a Will. This arrangement which Dariao Kuar had made failed to prove satisfactory. Sher Bahadur Singh as he grew older seems to have given great offence to the lady; and, instigated most probably by certain members of the Bais clan, he began to press for an immediate transfer of the whole estate to himself. The lady refused to entertain any such proposition and turned Sher Bahadur Singh out. The relations between her and Sher

Bahadur Singh formed the subject of various petitions and counter-petitions addressed by the parties to the district authorities. Eventually in the year 1866 Sher Bahadur Singh addressed an application to the Chief Commissioner (Exhibit A3), dated 10th of September 1866, in which he asked that a *sanad* for the Samarpaha Taluqa should be granted to him on the ground that he had been adopted in the year 1265 *Fasli*, corresponding to 1858-59. He asserted that the *sanad* had been granted by mistake to Dariao Kuar and that in fact he was the proper person to receive it. He made certain allegations that the widow was wasting the property and giving it away to her own relatives, and represented that if the *sanad* were left in the name of Dariao Kuar the result would be that the entire Taluqa would pass away from the family to which it belonged. On receipt of this petition the Chief Commissioner called for reports from the local authorities and the matter was finally dealt with by the Chief Commissioner in his order (Exhibit A7), dated 29th of March 1867. He declined to take any action on Sher Bahadur Singh's petition, saying that no alteration could now be made in the *sanad*, that Dariao Kuar was the proper person to receive it and that he refused to interfere in any way with the rights which the British Government had conferred upon the Thakurain. After this order had been issued Sher Bahadur Singh made an attempt to have it reviewed by presenting a petition (Exhibit A9), dated the 24th of April 1867. This petition was rejected by the Chief Commissioner by his order (Exhibit A 10), dated the 6th of May 1867. Meantime Dariao Kuar had in consequence of the conduct of Sher Bahadur Singh presented a petition to the Deputy Commissioner, dated the 27th of December 1866, in which she represented that her formal appointment of Sher Bahadur Singh by the document dated the 1st of September 1861 was to be considered as revoked.

Sher Bahadur Singh having been worsted in his attempt to secure possession of the Taluqa had recourse to a suit for recovery of possession of the estate, which he filed in the Court of the Deputy Commissioner of Rae Bareli on the 1st of September 1873. A copy of the plaint in this suit is on record and is marked Exhibit A64. As soon as the suit had been filed Dariao Kuar by way of answer to it executed a formal document (Exhibit A63), which was duly registered and by which she formally set aside the document of the 1st of September 1861 by which she had appointed Sher Bahadur Singh as the person to succeed to the estate. In the suit which he brought Sher Bahadur Singh claimed to be the adopted son of Basant Singh and to be entitled to possession of the estate on the ground that Dariao Kuar was holding the property in trust for him. He relied upon certain letters said to have been written by Dariao Kuar for the purpose of showing that she had acknowledged her position as trustee. The Deputy Commissioner dismissed this suit on the 15th of November 1873, on the ground that Dariao Kuar had the full title to the estate under the terms of the *sanad* (*vide* Exhibit A66, a certified copy of the Deputy Commissioner's judgment). This decision was upheld in appeal by the Commissioner (*cf.* Exhibit A68, dated the 22nd of April 1874). An appeal was then taken to the Privy Council. Their Lordships on the 10th of November 1877 (*cf.* Exhibit A69) passed an order remanding the suit for disposal on certain points which had been left undetermined. In this order their Lordships expressed their agreement with the opinion given by the Commissioner to the effect that Dariao Kuar had under the *sanad* a title which could not be assailed. They pointed out, however, that, although the title which Government had conferred upon Dariao Kuar was absolute and overruled all other titles, a Taluqdar to whom such a title had been granted might nevertheless by express declaration constitute himself a trustee. Their Lordships directed that the claim should be further investigated and that the plaintiff Sher Bahadur Singh should be given an opportunity to show, if he could, by means of the letters and any other evidence of surrounding circumstances that Dariao Kuar had declared herself or agreed to be a trustee for him (Sher Bahadur Singh). The case was dealt with by the Commissioner of Rae Bareli in his judgment of the 29th of October 1878 (Exhibit A70). He was of opinion that the letters upon

which Sher Bahadur Singh relied for the purpose of proving that a trust had been declared in his favour were not proved. He held in addition that there was no satisfactory proof that Sher Bahadur Singh had been validly adopted as the son of Basant Singh. This decision became final, for although Sher Bahadur Singh applied for leave to appeal to Her Majesty in Council the application was eventually dismissed by reason of his failure to deposit the necessary security for costs (see the order of the Commissioner, dated the 29th of July 1879, Exhibit A72).

The next event to which we have to refer is the taking of possession of the entire estate by Sher Bahadur Singh after the death of Thakurain Dariao Kuar in the month of November 1893. This led to the next litigation, which began in the year 1899. On the 27th of May in that year Raja Rameshar Bakhsh Singh, who is the defendant in the present proceedings, filed a suit claiming possession of the entire Taluqa on the ground that he, as the right heir of Dariao Kuar, was entitled to the property. This suit was decided in favour of Raja Rameshar Bakhsh Singh on the 12th of October 1900. The decree of the Subordinate Judge was maintained on appeal to this Court, and was upheld by their Lordships of the Privy Council in their judgment dated the 27th of July 1906 [*cf. Thakur Tirbhuwan Bahadur Singh* v. *Raja Rameshar Bakhsh Singh* (1)]. It may be explained here that Sher Bahadur Singh died while the appeal was pending in the Privy Council and he was represented before their Lordships by his son Tirbhuwan Bahadur Singh. Their Lordships held that Sher Bahadur Singh had failed to prove any title by adoption, that succession to the estate was governed by the provisions of section 22 of Act I of 1869 and that Raja Rameshar Bakhsh Singh, as the right heir of Dariao Kuar, was entitled to the property under clause 6 of the section in question.

We have now to refer to further litigation which began in the year 1911. Raja Rameshar Bakhsh Singh having executed the decree obtained in his favour got possession of the entire estate with the exception of a single village called Shayestabad or Bharkaspur. It seems that at the time when the judgment of their Lordships was delivered this village was in the possession of *Musammat* Gajraj Kuar, the mother of Sher Bahadur Singh. She appears to have continued in possession asserting that she had a right to remain in possession as "*kham thekadar*," being entitled to collect the rents subject to the payment of a yearly sum of Rs. 1,126 to the Taluqdar. Gajraj Kuar died on the 15th of December 1906 and according to what was set out in the plaint filed by Raja Rameshar Bakhsh Singh in this litigation, Bisheshar Bakhsh Singh (who is the plaintiff in the present suit) took wrongful possession after the lady's death. Raja Rameshar Bakhsh Singh brought a suit in ejectment against Bisheshar Bakhsh (*cf.* Exhibit A 79, plaint, dated 4/6th June 1910). In that plaint Raja Rameshar Bakhsh Singh set out his title to the entire *taluqa* by virtue of the decree which had been passed in his favour. He asked for the ejectment of Bisheshar Bakhsh, saying that he was a trespasser. In the alternative he prayed for a declaration that the defendant Bisheshar Bakhsh had no right or interest in this village except that of a *kham thekadar*. Bisheshar Bakhsh defended the suit. He admitted that Rameshar Bakhsh had obtained a decree for possession of the whole Taluqa and that this village of Bharkaspur was one of the villages belonging to the estate, but he pleaded that Rameshar Bakhsh Singh had no cause of action for the suit. Bisheshar Bakhsh set up an under-proprietary title, saying that he and his ancestors had held the village as owners in subordination to the Taluqdar since before the time of the British rule and that the village had been held by himself and his predecessors on payment of the revenue only. It was asserted that Dariao Kuar had always recognised the under-proprietary status of the defendant and his predecessors. A further plea of title as under-proprietor by adverse possession was set up. Another defence was to the effect that Rameshar Bakhsh Singh was estopped from denying Bisheshar Bakhsh's title as under-proprietor, on the ground that he had accepted payment of the Government revenue from *Musammat* Gajraj Kuar and afterwards

(1) 33 I. A. 156; 10 C. W. N. 1065; 8 Bom. L. R. 722; 3 A. L. J. 695; 4 C. L. J. 405; 9 O. C. 377; 16 M. L. J. 440; 28 A. 727; 1 M. L. T. 265 (P. C.).

from the defendant himself. He pleaded that he was not bound by the decree which Rameshar Bakhsh Singh had obtained against Sher Bahadur Singh inasmuch as he was no party to the proceedings, and he claimed that the decree in question could not in any way affect his under-proprietary right. The suit was decided in favour of Rameshar Bakhsh Singh. It was held that the defence set up by Bisheshar Bakhsh Singh to the effect that he was an under-proprietor was a false defence. The Subordinate Judge also was of opinion that Rameshar Bakhsh Singh was in no way estopped from denying the under-proprietary title put forward by Bisheshar Bakhsh Singh.

This is a brief history of the events relating to this estate, which took place prior to the institution of the present suit which was brought into Court on the 7th of April 1913. The plaintiff Bisheshar Bakhsh Singh, according to the pedigree which is exhibited with his plaint, claims to be the nearest male heir of Thakur Basant Singh and as such to be entitled to possession of the estate in preference to the defendant, who is a stranger to the family. It was admitted in the third paragraph of the plaint that after the death of Basant Singh in the month of November 1857 his widow Dariao Kuar succeeded him in possession of the estate, and in the fourth paragraph of the plaint it is admitted that the Second Summary Settlement was made with this lady. It is stated in this paragraph that Dariao Kuar applied for the settlement "in her character of widow of Basant Singh." In the fifth paragraph of the plaint it is admitted that a *sanad* was granted by the British Government to Dariao Kuar in the year 1861, but it is asserted that the grant was made to her as widow of Basant Singh. The seventh paragraph of the plaint after amendment alleges that the purpose of the Second Summary Settlement and the object of the grant of the estate to Dariao Kuar and the terms of the *sanad* granted to this lady indicate that the estate was to descend after the death of Dariao Kuar to the nearest male heir of Thakur Basant Singh. In paragraph 9 of the plaint reference was made to a Will alleged to have been executed by Dariao Kuar on the 24th June 1878. We are no longer concerned with this document. The learned Subordinate Judge has declared it to be a forgery and it has not been relied on in any way for the purpose of supporting the plaintiff's case here in appeal. The plaint was further amended by introducing an allegation in paragraph 9 (*a*), to the effect that the estate which had been granted by the British Government to Dariao Kuar constituted her *stridhan*. In paragraph 10 the custom relating to succession to estates held by the Bais Talnqdars is set out, the case being that the person who succeeds is the eldest amongst the nearest of the deceased's relations. It was also asserted by way of amendment in this paragraph that the custom applied also to the case of property held as *stridhan*. After reciting the fact of Dariao Kuar's death on the 13th November 1893, it was alleged in the 12th paragraph of the plaint that at the time the lady died the plaintiff's father Sheodat Singh was still alive and was, according to the pedigree exhibited with the plaint, the heir to the estate. Reference is then made to the taking of possession of the estate by Sher Bahadur Singh after the death of Dariao Kuar and to his subsequent ejectment in consequence of the decree which was passed against him in favour of the defendant Rameshar Bakhsh Singh. In paragraph 14 of the plaint it is stated that the defendant, who is the grandson of Dariao Kuar's brother, has no right whatever to the property now in dispute and is a trespasser. The defendant relies upon the title which was affirmed by the decree of their Lordships of the Privy Council. Shortly put, his case is that the full estate was granted by the British Government to Dariao Kuar and her heirs. He claims that succession to the estate is governed by Act I of 1869 and that he being the next heir of the lady has the title to the estate in accordance with the provisions of clause 6, section 22, of the Oudh Estates Act (I of 1869). The defendant also put forward two other pleas by way of defence with which we shall have to deal in disposing of the appeal, namely, pleas of limitation and *res judicata*.

The lower Court found in favour of the defendant upon all the material issues. It was decided that the title to the estate lay with the defendant, that the plaintiff's claim

was barred by limitation and that the suit was not maintainable on the ground of *res judicata*. The three questions which have been argued before us are (1) the plea of *res judicata*, (2) the question of limitation and (3) the question of title. They were argued in this order, but we think it expedient to deal in the first place with the question of title. The decision of the issue of limitation is involved in this, for the point of limitation has to be determined in accordance with the view we may take as to the nature of the interest which was acquired by Dariao Kuar in the Taluqa of Samarpaha.

TITLE.

To proceed then to a consideration of the question of title, we start with the facts that the Second Summary Settlement was made with Dariao Kuar; that thereafter in the year 1861 a *sanad* in the primogeniture form was granted to her; that on the passing of the Oudh Estates Act (I of 1869) the name of Thakurain Dariao Kuar was recorded in Lists I and II prepared under section 8 of the Act; that she was, therefore, a Taluqdar, and lastly that she died on the 13th of November 1893 intestate. It has already been mentioned that the First Summary Settlement of the estate was made while Thakur Basant Singh was still alive, and that Dariao Kuar came into possession of the Taluqa on the death of her husband in November 1857. Lord Canning's proclamation of confiscation was issued on the 15th March 1858 and the result of that was to destroy any interest which the lady or any of the reversionary heirs of her husband had in this property. A great deal of discussion seems to have been permitted in the Court below regarding the legal operation of the proclamation and the Subordinate Judge has referred at great length to a large number of State papers and other documents for the purpose, apparently, of ascertaining the meaning and effect of the proclamation. At the hearing of the appeal we have ruled out all this evidence as being irrelevant. It is too late at the present day to argue that the proclamation of Lord Canning resulted in anything but the complete destruction of proprietary rights in Oudh. The language of the proclamation has been interpreted repeatedly by the highest judicial authority and it would have been quite sufficient for the learned Subordinate Judge to refer to one or other of the decisions of their Lordships of the Privy Council in which the effect of the proclamation has been expounded. It is enough for us to say that it has been laid down that the effect of the proclamation was to divest all landed property from proprietors in Oudh and to transfer it to and vest it in British Government. The proprietary right in land in Oudh was confiscated to the British Government and was liable to be disposed of in such manner as the Government might think fit. We might also refer to a decision which we shall have further occasion to mention in the course of this judgment, namely, the case of *Brij Indar Bahadur Singh* v. *Ranee Janki Koer* (2), in which speaking of a case like the present in which a widow was in possession at the time of the proclamation, their Lordships observed as follows:—"Her interest as widow and that of the reversionary heirs were absolutely destroyed and put an end to by the confiscation under Lord Canning's proclamation." The next matter we have to notice is that the Summary Settlement of this Taluqa was made with Dariao Kuar on the 10th of May 1858. The documentary evidence on record shows that on the 8th of May 1858 an application (Exhibit A1) was presented to the authorities by one Ram Sahai, who described himself as the agent of the wife of Basant Singh the Taluqdar of the villages in the Samarpaha Taluqa. It was stated by Ram Sahai in the application that the Taluqa consisting of 72 villages had long been in the possession of his client. It was mentioned that in the year 1264 *Fasli* immediately after the annexation, 17 villages were detached from the estate and settled with other persons. It was alleged that during the Mutiny possession had been resumed over these 17 villages. It was declared that the lady had no co-sharer in the estate and that she was ready to pay Government all the arrears of Government revenue. On the 10th of May an order was passed that settlement of the entire estate be made with

(2) 5 I. A. 1; 1 C. L. R. 313; 3 Sar. P. C. J. 753; Bald. 148; 3 Sath. P. C. J. 474; Rafique & Jackson's P. C. No. 48 (P. C.).

Basant Singh's wife as Taluqdar, that an instalment of the Government revenue should be taken from her and that she should be directed to send her authorised agent to Mr Tucker, the Commissioner. From other documents on the record it is proved that this order for Summary Settlement was made by Major Barrow, Special Commissioner of Lucknow (*cf.* Exhibit No. 1). Pausing here we may consider what was the effect of this Summary Settlement being made with Dariao Kuar. It is clear from the authorities that the making of this settlement did not amount *per se* to a grant of proprietary rights to the lady. The arrangement was a temporary measure and meant no more than that the person with whom it was made was permitted to engage for the payment of revenue for a period of three years. It did not amount in any way to the acknowledgment of the existence of any proprietary title; nor could it, bearing in mind the fact that the proclamation which had been issued less than two months before had swept away all rights in landed property in Oudh and had vested them in the British Government. Up to the date on which the Summary Settlement was made no grant of those rights had been made to any one by the Government. The legal effect of the making of the Second Summary Settlement has been declared in the judgment of their Lordships of the Privy Council in the well-known case of the *Ranee of Chillaree* v. *Government of India* (3), where it is stated that this temporary Revenue Settlement did not of itself vest the absolute proprietary and heritable right in the Taluqa, but amounted only to a permission to the person with whom the settlement was made to engage for the payment of the Government revenue.

We now come to a consideration of the letter of the 10th of October 1859 from the Secretary to the Government of India, Foreign Department, to the Chief Commissioner of Oudh, which is incorporated to the First Schedule to Act I of 1869. In paragraph 2 of this letter the Governor-General in Council, after expressing his agreement with the Chief Commissioner regarding the expediency of removing all doubts as to the intention of the Government to maintain the Taluqdars in possession of the Taluqas for which they had been permitted to engage, was pleased to declare that every Taluqdar with whom a Summary Settlement had been made since the re-occupation of the Province had thereby acquired a permanent, hereditary and transferable proprietary right, namely, in the Taluqa for which he had engaged, including the perpetual privilege of engaging with the Government for the revenue of the Taluqa. By paragraph 4 of the letter the Chief Commissioner was directed to prepare a list of the Taluqdars upon whom a permanent proprietary right had now been conferred and that *sanads* should be prepared to be issued to the Taluqdars at the time of His Excellency's arrival in Lucknow. The effect of the declaration contained in this letter has been the subject of decision of their Lordships in the *Chillaree's case* (3) which has been mentioned above. According to that judgment the object of the Government in issuing this declaration was "to maintain in possession those Taluqdars who then were in possession under Summary Settlements entered into with them after the re occupation of the Province". The Taluqdars who were declared to have acquired the right conferred by the letter were those who had been permitted to engage Dariao Kuar, being one of the Taluqdars who had been admitted to engage for the Revenue Settlement and who was still in possession at the time when this letter of the Governor-General in Council issued, must, therefore, be treated as a person who had acquired a permanent, hereditary and transferable proprietary right in the Taluqa of Samarpaha, including the perpetual privilege of engaging with the Government for the revenue of that estate. Following upon this letter we know that a *sanad* in the earlier form was granted to Dariao Kuar, a *sanad* in the form which is set out in Sykes' Compendium at page 385. According to the language of this document the Chief Commissioner, acting under the authority of the Governor-General in Council, conferred upon Dariao Kuar the full pro-

(3) 4 I. A. 208 (*note*); Sup. Vol. I. A. 237; 3 Sar. P. C. J. 298; 3 Suth. P. C. J. 12; Rafique & Jackson's P. C. No. 24 (P. C.).

prietary right, title and possession of the estate of Samarpaha. It is recited that the *sanad* was granted to Dariao Kuar in order that it might be known to all whom it might concern that the estate of Samarpaha had been conferred upon her and her heirs for ever subject to the payment of such annual revenue as might from time to time be imposed and subject to certain other conditions which are specified in the document. The *sanad* winds up with a declaration that as long as the obligations specified were observed by Dariao Kuar and her heirs in good faith, so long would the British Government maintain her and her heirs as proprietors of the Samarpaha estate. A copy of the second *sanad* which was given to the lady in substitution for the earlier one is to be found on the record (Exhibit 9). This document like the earlier one is addressed to "*Musammat* Dariao Kuar, Taluqdar", and it purports to confer upon her the full proprietary right, title and possession of the estate of Samarpaha. It declares that this estate has been conferred upon her and her heirs for ever. It lays down a rule of succession to be observed in the devolution of the estate, the descent being to the nearest male heir according to the rule of primogeniture. It is further declared that Dariao Kuar and all her successors are to have full power to alienate the estate or any portion of it to whomsoever they please, and, as in the former document, there is a further declaration that subject to the performance of the obligations which are recited the British Government would maintain Dariao Kuar and her heirs as proprietors of the Taluqa. There is nothing, therefore, in the language either of the letter of the 10th of October 1859, which is a letter in general terms, or in the language of the two *sanads* which were addressed by name to Dariao Kuar to indicate that the interest which was being conferred upon her by the British Government was anything less than that of an absolute estate in the property specified. It has, however, been argued here, as it was in the Court below, that by reason of certain facts established by evidence it should be held, notwithstanding the language of the documents we have just mentioned, that (to quote the language of paragraph 7 of the plaint) "the purpose of the Second Summary Settlement, the object of the grant of the estate to Thakurain Dariao Kuar and the contents of the *sanad*" indicate that the intention of Government was that the property should be held by Dariao Kuar for her life and should descend thereafter to the nearest heir of her deceased husband who might be alive at the time the succession opened.

This proposition has been condensed in argument by saying that Dariao Kuar took the estate not in her own right but in the right of her husband Basant Singh, and it has been contended that as she took in that capacity the interpretation which must necessarily be placed upon the acts and declarations of the British Government between the time of the making of the Second Summary Settlement and the grant of the *sanad* is that the intention was, so to speak, to restore the Taluqa to the family to which Basant Singh belonged by providing that it should devolve upon Basant Singh's heir as soon as the lady died. It was pointed out that in the litigation between Sher Bahadur Singh and the present defendant, which was concluded by the judgment of their Lordships of the Privy Council reported as *Thakur Tirbhuwan Bahadur Singh* v. *Raja Rameshar Bakhsh Singh*. (1), it had been admitted that Dariao Kuar took the estate in her own right. The words used by Lord Macnaghten in this connection are to be found at page 162 of the report and are as follows:—"It is not disputed that the Thakurain became Taluqdar not in right of her husband Basant Singh but in her own right". Assuming that this language conveys the meaning now sought to be attached to it, namely, that the words "became Taluqdar" are equivalent to "took the estate," it is stated now that in the present suit there is no such admission as was made in the suit between Sher Bahadur Singh and the present defendant. The case for the plaintiff here is that Dariao Kuar took the estate in right of her husband and not in her own right, and of course it cannot be suggested that any admission made in the Court of the previous litigation is binding upon the plaintiff who was not a party to it.

The real question which has to be determined is, what was the interest which the Government intended to confer upon Dariao Kuar by the various proceedings which took place from the time of the Second Summary Settlement up till the date of the delivery to her of the *sanad*. What Dariao Kuar took can only be what the Government intended to confer upon her. The entire proprietary rights in the Taluqa were vested in the British Government and we have to decide to what extent the Government parted with those rights in favour of Dariao Kuar. The intentions of the Government in this matter can only, we think, be deduced from the acts of the Government itself. The conduct and declarations of Dariao Kuar cannot be appealed to for the purpose of ascertaining the intentions of Government, except in so far as it can be shown that any conduct on her part affected the purpose of the Government in its dealings with her. We pass on now to consider the various acts and declarations of the lady which have been referred to by the learned Counsel for the appellant in this connection. We have already adverted to the fact that when an application was made by Dariao Kuar on the 8th of May 1858 for the purpose of having the Summary Settlement made with her, she was described in the petition as the wife of Basant Singh. Exhibit A-1 is an official document described as "Settlement Statement A." In the fourth column of this statement the heading of which is "name of Taluqdar or Zamindar", the entry is "wife of Basant Singh". The agent who signed the application on behalf of the lady described her as being the wife of Basant Singh. Similarly in Exhibit 2, described as "Statement B," we find in the fifth column, which is meant to show the name of the person paying the revenue, the entry "wife of Basant Singh". Basant Singh's own name is shown in column 2 of the statement which is designed to indicate the name of the Taluqdar. (It may be observed here that the entry in column 2 is an obvious mistake, for it is common ground that Basant Singh had died in the month of November 1857). Similar entries are to be found in other documents relating to this settlement (*cf.* Exhibit 3 and Exhibit 1). We have also had our attention called to Exhibits A84 and A85 which show that, in response to an order of the authorities calling for certain information regarding the family, Dariao Kuar sent in a family pedigree which is admittedly the pedigree not of her own family but of her husband's family. Again Exhibit A 2 is a copy of an order or *rubkar* in which it is stated that the settlement of the whole Taluqa comprising 72 villages was made for a lump sum of Government revenue with the wife of Basant Singh. This document bears date the 20th of September 1859. These are the only documents which are anterior in date to the letter which was issued by the Governor-General-in-Council on the 10th of October 1859 (*cf.* Schedule I, Act I of 1869). Certain other documents subsequent to that date have also been pressed upon our attention. Exhibit A 207 is an extract from a list of Taluqdars which was prepared in consequence of certain directions issued under the authority of the Chief Commissioner. In the column of remarks contained in this list there are exhibited certain replies purporting to have been received from various Taluqdars and showing the rule of succession which obtains in the family. Opposite the entry relating to the wife of Basant Singh there is a statement which appears to have been made by Dariao Kuar, in which is described the rule of succession as it obtained in the family of her deceased husband. Exhibit 146 may be read in connection with the above exhibit. It is a certified copy of the letter which led to the preparation of Exhibit A207. It shows that inquiries were being made as to the extent to which the rule of primogeniture obtained amongst the Taluqdars. Another document is Exhibit 4 which is dated the 8th of February 1860. This is a copy of a petition or application put in by the "widow of Basant Singh deceased." In this petition the lady after reciting the fact that the British Government had conferred upon her the proprietary right in the *ilaqa* of Samarpaha, etc., for generation after generation, expressed her desire that after her death the estate should continue in the name of Sher Bahadur Singh, her adopted heir, entire and undivided according to the custom of

raj-gaddi. Exhibit 145 is another list of Taluqdars which was prepared with a view to ascertaining the extent to which the rule of primogeniture prevailed. Here again there is an entry relating to the estate held by the widow of Basant Singh. In the column of remarks attached to this statement there is a note which appears to have emanated from the Deputy Commissioner, Mr. Capper. According to this note Dariao Kuar survived her husband and succeeded to the estate. It was added that her husband's next of-kin would succeed unless she adopted a younger member of the family. A good deal of stress appears to have been laid upon this particular entry in the Court below. We are, however, doubtful whether the entry was at all admissible in evidence; but on the assumption that it can be admitted under the provisions of section 35 of the Indian Evidence Act as being an entry in a public register made by a public servant in the discharge of his official duty, we are of opinion that as evidence it is of no value. It seems to us to express nothing more than the opinion of the gentleman who was responsible for it, and we certainly cannot assume in the absence of any evidence that it is a record of any statement made by Dariao Kuar herself. Exhibit A 95 has also been referred to. This is a copy of a deposition made by two Qanungos before the Assistant Settlement Officer of Rae Bareli on the 19th of March 1863. The statements seem to have been taken with a view of preparing a history of the estate and we find the deponents saying that Basant Singh's estate was given to his widow who now managed it. It was further said in the course of the deposition that the heir-apparent to the estate was Sher Bahadur Singh, an adopted son. Exhibit 9 is another document relied upon by the appellant. This, as we have mentioned before, is a copy of the primogeniture *sanad*. Exhibits 6 and 7 also purport to be certain statements made by the lady with reference to the history of the estate and the pedigree of the family. It is clear from these that in response to the invitation of the authorities she sent in a history of her husband's family. Exhibit 8 dated the 1st of September 1861 is a document to which we have already called attention. It is the deed by which Dariao Kuar designated Sher Bahadur Singh as the person who would succeed to the estate on her death "for the purpose of perpetuating the name of the family." The other documents to which our attention has been called relate to the period during which the First Regular Settlement was going on, that is, from the year 1863 onwards. It seems to us that for the purposes of ascertaining the extent of the interest which Government intended to confer upon Dariao Kuar these documents are of no value at all. By the time the Regular Settlement began, the titles of the Taluqdars as proprietors of their estates had already been settled and the First Regular Settlement was made with them on the basis of the title conferred in virtue of the Summary Settlement, the letter of the 10th of October 1859 and the *sanads* which were subsequently granted. Nothing was done by the Government in the course of these Regular Settlement proceedings which could add to or detract from the interest already conferred upon the Taluqdars, except so far as steps were taken to define and secure the rights of the inferior Zamindars and village occupants to which a reference is made in paragraph 3 of the letter of the 10th of October 1859 and also in paragraph 4 of the letter of the 19th October 1859, which is to be found as No. II in the First Schedule to the Oudh Estates Act.

After a perusal of these documents it cannot be doubted that in various proceedings relating to the Second Summary Settlement Dariao Kuar was described as the wife or widow of Basant Singh. The question is whether this fact is to be treated as being of any importance or weight in connection with the matter under inquiry, namely, the intention of the Government in making a grant of the proprietary rights. Is there anything to show that the declaration of Dariao Kuar that she was the wife of Basant Singh in any way affected the intentions of the Government at the time when the letter of the 10th of October 1859 was issued or, still later, when the two *sanads* were granted in succession to Dariao Kuar? We have already expressed our opinion that no proprietary rights can be deemed to have been conferred upon Dariao Kuar prior to the letter of the 10th of October 1859,

It is, of course, possible to argue that the decision to allow Dariao Kuar to engage for the payment of the Government revenue for a period of three years subsequent to May 1858 was influenced by the fact that she was Basant Singh's widow, and it may perhaps be conceded that the order for making the settlement with her (which, as we have mentioned, was passed on the third day after she had made the application) would not have been made had it not been that she was Basant Singh's widow and in possession of his property. But while these facts may be taken to have constituted the motive which determined the selection of Dariao Kuar as being the person who should be permitted to engage for the period of the Summary Settlement, we are unable to see how they could affect the nature of the interest which was afterwards conferred upon her. It need not be supposed that in the interval between the making of the Summary Settlement with the various Taluqdars and the issue of the letter of the 10th of October 1859 Government was not aware of the fact that this Taluqa Samarpaha and other Taluqas were in possession of widows. There is plenty of evidence on the record to show that information regarding the various estates and their histories had been sought for and obtained before the Governor-General issued his letter of the 10th of October 1859 in response to the urgent solicitations of the Chief Commissioner of Oudh. Had it been the intention either of the Chief Commissioner or of the Governor-General to lay down any particular terms regarding the estates which were in possession of widows, we think that some clear expression of the intention would have been found in the letter of the 10th of October 1859. But as has been pointed out, the declaration contained in the second paragraph of this letter is a perfectly general one. It is made in favour of "every Taluqdar" with whom a Summary Settlement had been made and must be deemed, therefore, to include the cases in which the person admitted to engage for the revenue was a woman. We can find nothing in this letter of the Governor-General to indicate that it was his intention to bestow in any case anything less than the full estate described in the letter; and the language of the *sanads* which were subsequently addressed to the individual Taluqdars confirms this opinion; and while it may be true that, in the various proceedings relating to the Second Summary Settlement, Dariao Kuar was described as the wife or widow of Basant Singh, it is important to notice that in Exhibit 9, which is the copy of the primogeniture *sanad* the lady is described by her own name and not as Basant Singh's widow, the *sanad*, addresses her as "*Musammat* Dariao Kuar, Taluqdar." We are unable therefore, to yield to the argument that the description of Dariao Kuar as the wife or widow of Basant Singh in these various documents is a fact which can be treated as having weighed with Government when it came to make the grant of the proprietary rights in the Taluqa of Samarpaha.

We have now to notice an argument which was very strongly pressed upon us by the learned Counsel for the appellant. It is said that, although the confiscation of the 15th of March 1858 may have made a clean sweep of all existing rights, the effect of the "restoration" of Taluqas to their former owners was to re-instate them in their old position, subject only to such modifications as were made by the Government either by way of curtailing or enlarging the rights formerly possessed by them; and it is claimed that the documents to which we have referred show conclusively that the grant made by the Government to Dariao Kuar operated as a restitution; and so it is argued that in accordance with well-established principles of law in such cases any rights which could have been enforced against Taluqdars before the confiscation would be revived. In other words, the argument is that the effect of the grant made by the British Government was to restore the *status qua ante* and to put Dariao Kuar in the position of a person holding the estate of a Hindu widow with special powers of alienation superadded, the result being that if she failed to exercise the special powers of transfer conferred upon her, the estate would revert after her death to the nearest male heir of her deceased husband.

It would, we think, be difficult to discover, either in the language of the letter of the 10th October 1859, or in

the language of the *sanads* which were granted subsequently, anything which might lead us to conclude that the intention of the British Government was merely to restore the position as it existed before the date of the confiscation. Here again we may say that had this been the policy of the Government, we might reasonably expect to find words clearly expressing this intention. An examination of the letter of the 10th of October 1859 appears to us to negative any hypothesis of this kind. The policy of the Government seems to have been to perpetuate the fiscal arrangement which had been carried out by means of the Second Summary Settlement, to maintain the existing possession of the persons with whom that Summary Settlement had been made, and for this purpose it was thought proper to declare that every person with whom such a settlement had been made and who in the month of October 1859 was still in possession of the estate for the revenue of which he had contracted was to be deemed to have acquired thereby a permanent, hereditary and transferable right in the Taluqa. Paragraph 4 of the letter refers in the plainest language to the permanent proprietary right "which has now been conferred." It seems to us that this letter does not in any way purport merely to restore a former title or to proclaim that the Taluqdars were to be deemed to be in again as of their old estates. On the contrary, there was the grant of a fresh title altogether and not merely the acknowledgment and restoration of a title which had existed prior to the confiscation and had been destroyed thereby. With regard to the argument that in cases where a grant operates merely by way of restitution there is a revival of all rights which might have been enforced against the grantee prior to the confiscation, it may be pointed out that there is positive evidence, in the history of the legislation which took place subsequent to the grant of the *sanads*, to show that the rights of mortgagors to redeem mortgages on property which had become included in the estates covered by the *sanads* had, as a matter of law, been confiscated by the proclamation, although it seems that that result was not intended. In the year 1866 an Act was passed (XIII of 1866) to exempt certain suits in Oudh from the operation of the rules of limitation in force in that Province. The suits so exempted included suits for the redemption of mortgages with possession executed on or after the 13th of February 1844. This Act was passed with the consent of the Taluqdars, who agreed to waive the objections they might legally be entitled to make to the redemption of mortgages. It was afterwards discovered, however, that the language of this Act XIII of 1866 was ambiguous and that it was very doubtful whether a suit to redeem a mortgage of property comprised in a Taluqa was not legally barred. In fact it was brought to the notice of the Government that in spite of the provisions of Act XIII of 1866 to which the Taluqdars had assented, one of them had actually pleaded in Court that the redemption of a mortgage of property comprised in his estate was barred by the terms of the *sanad*. It was to remove all doubts regarding the right to redeem these mortgages that section 6 of Act I of 1869 was passed. We may take it, therefore, that it was not understood by the Government that the effect of the letter of the 10th of October 1859 and of the *sanads* which followed upon it was to revive all rights which might have been enforced against the Taluqdars prior to the time of the confiscation; otherwise there would have been no necessity for this subsequent legislation intended to protect the rights of persons who had made mortgages at a date prior to the annexation of Oudh. We may also observe here that the terms of the letter of the 10th of October 1859 disclose to what extent the Government then contemplated the revival of rights which could be enforced against the Taluqdars. Paragraph 3 of this letter declared the intention of Government to take steps for the protection of inferior Zamindars and village occupants and for upholding their rights in the soil in subordination to the Taluqdars; and in this connection we may also refer to the letter of the 19th of October 1859, which is included in the First Schedule to the Oudh Estates Act and in which the intentions of the Government as expressed in paragraph 3 of the former letter are more fully declared. It was notified that when a Regular Settlement of the Province should be made, means would be taken to

secure the rights of the Zamindars or other persons who held an interest in the soil intermediate between the *ryot* and the Talqdar. It seems clear, therefore, that it was at this time the intention of the Government, in spite of the grant of full proprietary rights to the Taluqdars, to revive as against them the rights of certain subordinate Zamindars and tenure holders; but beyond this there is nothing in the language of this letter of the 10th of October 1859 to indicate that Government had any intention of restoring or reviving other rights, such for example as the rights of the reversionary heirs of a deceased Hindu expectant on the death of the Hindu widow in possession of the estate. We are led to hold for the reasons just given that Government had no intention whatever of reviving any such reversionary rights. On this part of the case the learned Counsel for the appellant pressed us with the decision of their Lordships of the Privy Council in the *Hunsapore case* [*Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee* (4)]. That was a case in which a Raj had been confiscated by Government, who kept possession of it for upwards of 20 years and ultimately granted it to a younger member of the family to which the estate had previously belonged It was held there that although the Zamindari was to be treated as the self-acquired property of the grantee, yet the grant, being from the ruling power, in the absence of evidence of the intention of the Government as grantor to the contrary, carried the incident of the family tenure as a Raj. It was held in the circumstances that the Government's intention must be taken to have been to restore the estate as it existed before confiscation with no change other than such as affected the former owner and his descendants. Consequently the grant was held not to take effect as the creation of a new tenure but to operate simply as a change of tenant by the exercise of a *vis major*. It is to be observed with reference to this decision that in this case there was no issue of a fresh *sanad*. The only evidence of the intention of the grantor which was before their Lordships of the Privy Council was to be found in certain proceedings and correspondence which afforded no means of ascertaining the precise grounds upon which the Government determined to confer the property upon the new grantee. As their Lordships observed, there was no clear expression of intention on the part of the Government to alter the nature of the tenure. The facts relating to the confiscation and the granting of estates in Oudh are altogether different. We do not treat the decision of their Lordships in the *Hunsapore case* (4) as laying down any general rule defining the incidents of estates which are re-granted after confiscation. We take it that what is laid down in the judgment is that in each case the question is purely one of the intention of the Government as grantor and every case must be decided on its own facts. We have in the present case clear and precise evidence, to be found in the formal declaration of the Government contained in the letter of the 10th of October 1859 and in the language of the *sanads* which followed, to show that the intention was not merely to restore the estates with all the incidents which attached to them before the confiscation took place. We think in the case of estates in Oudh the situation was not merely that of a change of tenant by the exercise of *vis major*. There was a fresh grant conferring a fresh title and a new estate with incidents which were unknown prior to the time when confiscation took place.

It has been said in the course of argument that if the Government chose to confer upon a Hindu widow powers of alienation not possessed by her under the ordinary Hindu Law, the reversionary heir would be precluded from questioning the validity of any transfer made by her, but his right to succeed to the undisposed of estate would not be affected in any way. This is an echoe of the argument which was raised before their Lordships of the Privy Council in *Janki Koer's case* (2), where it was urged that what had been granted to the widow was a widow's estate with a general power of appointment, failing the exercise of which the estate would descend to the husband's heirs.

Their Lordships dealt with this argument in the following language to be found at page 11 of the report :—

(4) 12 M. I. A. 1; 9 W. R P. C. 15; 2 Suth. P. C. J. 114; 2 Sar. P. C. J. 348; 20 E. R. 211

" They consider that the *sanad* conferred and was intended to confer a full proprietary and transferable right in the estate upon Kablas and her male heirs according to the law of primogeniture, and not merely to confer upon her an estate for life with full power of alienation and with remainder to the male heirs of her husband in the event of her dying intestate without having alienated it in her lifetime."

If this is the interpretation which their Lordships put upon the *sanad* granted to Kablas Kuar, we certainly should not consider ourselves at liberty to construe the very same language which is to be found in the *sanad* given to Dariao Kuar in a different sense. The *sanads* are identical in terms and we take it that their Lordships intended to rule that the nature of the estate conferred was to be deduced from the language of the document which constitutes the evidence of the grant.

While it may be true that a peculiar estate of the kind mentioned in the learned Counsel's argument, namely, a life-estate in a Hindu female with a general power to appoint, is not unknown to the Hindu law, we think we may safely say that such an estate is rarely to be met with. There is an instance of an estate of this kind to be found in the Reports *cf. Bai Motivahu* v. *Bai Mamubai* (5)]. This was a case in which their Lordships of the Judicial Committee had to deal with the interpretation of the Will of a Hindu testator who devised his immoveable property upon trust for the income to be appropriated to the maintenance of his widow and daughter, and of the children that might be born of the daughter, the property to be divided among the heirs of such children. It was further provided by the Will that if there should be no children born of the daughter, the property covered by the Will was to devolve upon those to whom the daughter might direct it to be delivered by making her Will. It was held that " The daughter having no children there was not an absolute gift to the daughter and that the persons to whom the property was given, though to be designated by her, did not take the gift from her but from the testator. " This, therefore, was a case of a bequest to a daughter of a life-estate with a general power to appoint by Will and the estate so created was declared by their Lordships to be a valid estate under the Hindu Law, on the ground that the testator himself might have designated the person to take in the event of the daughter's having no child. The gift would then have been valid as an executory bequest, supported by preceding life-interests, but the taker so designated must have been, either actually or in contemplation of law, in existence at the death of the testator. Here the language in the Will which gave rise to this estate was clear. The testator had provided that if his daughter Mamubai should have no children, then after her death and the death of the widow Motivahu the trust was to become void and the property was to be delivered to such persons as the daughter might appoint by Will. We think we are correct in saying that any intention to create a peculiar estate of this kind would have to be expressed in the clearest possible language. We take it that this argument, which contends for the grant of a life-estate to Dariao Kuar with a general power of appointment superadded, is based upon the language of the penultimate clause of the primogeniture *sanad*, which declares that the grantee and her successors are to have full power to alienate the estate, either in whole or in part, by sale, mortgage, gift, bequest, or adoption, to whomsoever they might please. By the terms of the preceding clauses there is a grant to Dariao Kuar, and the suggestion appears to be that the special mention of the power of alienation to be found in the third clause of the *sanad* indicates that the intention was to give a limited estate, but to confer upon the grantee full powers of alienation. But it is to be observed that what is granted by the earlier clauses of the *sanad* is the full proprietary right, title and possession of the estate of Samarpaha, and it appears to us that no such significance as is contended for can be attributed to the language contained in the third clause which relates to the power of alienation. It seems clear enough that the special mention of the power of alienation contained in this third clause was made merely to prevent the raising of any doubts as to the meaning

(5) 21 B. 709; 24 I. A. 93; 1 C. W. N. 366; 7 Sar. P. C. J. 140; 11 Ind. Dec. (N. S.) 477 (P. C.).

of the previous words which settled the rule of descent by the law of primogeniture. In other words, the third clause lays down that the estate is to descend by primogeniture in the event of the grantee, or of any of her successors, dying intestate, but it is to be understood that the operation of this rule can be prevented by the exercise of the full power of alienation which has been conferred upon the grantee; and indeed it seems to us impossible to put any other construction upon the language of the *sanad* when it is remembered that the grant, of which this *sanad* is merely evidence, had been made by the letter of the 10th of October 1859. We have already expressed our opinion that the effect of this letter was to confer upon all Taluqdars with whom a Summary Settlement had been made the full proprietary title in the estates for which they had engaged, and there is certainly nothing in the language of that letter to indicate in any way that in the case of the Taluqdars who were Hindu widows it was Government's intention to confer merely a life interest with a general power of transfer superadded. Again it has been argued that in the dealings between herself and the British Government after confiscation Dariao Kuar was acting in a representative character. It is said that she was representing the complete estate, namely, her own limited interest together with the interest of the reversionary heirs. That may have been the situation in the eye of the law up till the time when the proclamation of the 15th of March 1858 was issued: but any such legal character borne by her was put an end to by the confiscation, and after the proclamation Dariao Kuar, like all other proprietors in Oudh, was in the situation of a person stripped of all immoveable property. She then represented nothing in the way of estate, for there was nothing to represent We have already said that there is no evidence to satisfy us that in the dealings which took place between the lady and the British Government subsequent to the date of the confiscation she was regarded by the Government in the light of a representative. On the contrary, it seems to us that at the time when the declaration contained in the letter of the 10th of October 1859 was made, Dariao Kuar was treated by Government as being merely one of a number of individuals with whom a Summary Settlement had been made and who was by reason of that fact considered to be a fit object of the bounty of Government. It was this fact, namely, the making of the Summary Settlement with her which constituted the reason for the grant, and it was in that character; and in that character only, that the estate appears to have been bestowed upon her. In short this argument is merely the restitution argument put in another form and we have already disposed of that by what we have just said above.

We now come to another part of the plaintiff appellant's case as argued before us. It has been contended that for certain reasons Dariao Kuar, although the *sanad* was granted to her, should be considered to have held the position of a trustee for the reversioners of her deceased husband Basant Singh. The case in this respect seems to have developed considerably after the filing of the plaint, for an examination of this document would indicate that the only grounds suggested for the plea that Dariao Kuar was a trustee are to be found in paragraph 7 of the plaint to which we have already referred, and it may perhaps be taken that the allegations contained in the 4th and 5th paragraphs of the plaint, that Dariao Kuar engaged for the Second Summary Settlement and obtained the *sanad* in her character of the widow of Basant Singh, were intended to suggest that Dariao occupied this position. In the course of the preliminary arguments before the lower Court before the issues were struck the plaintiff's Counsel informed the Court that he did not raise the case that Dariao Kuar acquired the Taluqa in trust for herself and others in the technical sense of the term, but only that the grant to her was subject to certain equities which flowed, first, from her position as a Hindu widow and, secondly, from the circumstances under which the grant was made. These latter circumstances it was said would be disclosed by evidence contained in Dariao Kuar's own applications to the Settlement Courts and in other official papers. A reference was made by the plaintiff's Counsel to certain decisions of their Lord-

ships of the Privy Council, in which it had been held that the Taluqdar to whom the *sanad* had been granted took the property in trust and it was pleaded that in the present case there were circumstances which would give rise to equities similar to those which were recognised in the decisions of their Lordships of the Privy Council. A reference to the judgment of the learned Subordinate Judge goes to show that other points were also argued before him for the purpose of showing that Dariao Kuar was nothing but a trustee. One argument was that her situation in the eyes of the law was similar to that of a life-tenant who renews a lease or acquires the revision of the leasehold property and who would be treated in equity as a trustee for the remainderman. Then again an appeal seems to have been made to what we may call the doctrine of graft; in other words, it was argued that Dariao Kuar had the precarious estate of a Hindu widow upon which there had been grafted a general power of appointment. And, lastly, stress was laid upon certain acts and declarations of Dariao Kuar by reason of which it was argued that she had made herself a trustee for Basant Singh's reversionary heirs. All these arguments have been repeated before us in appeal and we now proceed to deal with them.

There can be no doubt that in a number of cases which have come up for disposal before the Judicial Committee it has been decided that the person to whom the *sanad* has been granted is a trustee in spite of the terms of the grant. We might in this connection refer to the remarks of their Lordships in their judgment of 1877 given in the suit which Sher Bahadur Singh brought against Dariao Kuar in respect of this very estate. A copy of this judgment is on the record and is marked Exhibit A 69 [*cf. Thakur Shere Bahadur Singh* v. *Thakurain Dariao Kuar* (6)]. They refer to "the tenor of some recent decisions whereby, although undoubtedly the doctrine is affirmed that the title conferred by the Government is absolute and overrides all other titles, nevertheless it has been held that the grantee under the Government may by an express declaration of trust constitute himself a trustee". In another case of this kind their Lordships observe that the legal owner might either by express agreement or by his conduct constitute himself trustee for others as to the whole or part of the beneficial interest.

We have been referred to all the cases in which this point was considered, beginning with the case of *Musammat Thukrain Sookraj Koowar* v. *Government and Baboo Ajeet Sing* (7) down to the case reported as *Maharaj Kedar Nath* v. *Thakur Ratan Singh* (8) An examination of these cases goes to show that in all instances in which it was held that a trust had been raised there was before their Lordships definite evidence of acts upon which they came to the conclusion that in spite of the terms of the *sanad* the grantee held the property, either in whole or in part, for the benefit of third persons.

In the *Bhinga case* [*Musammat Thukrain Sookraj Koowar* v. *Government and Baboo Ajeet Sing* (7)] there were definite acknowledgments in writing made by the grantee by which he admitted the title of the lady, and it was proved that these admissions of title had induced the lady who was suing to stand aside and forbear from pressing her claims to a grant of the estate.

In the *Sessendee case* [*Widow of Shunker Sahai* v. *Rajah Kashi Pershad* (9)] there was evidence to show that the widow's proprietary title to a portion of the property covered by the *sanad* had been acknowledged by the Taluqdar when he made his application for the Second Summary Settlement. Similarly in the *Mourawan case* [*Hurpurshad* v. *Sheo Dyal* (10)] the evidence was sufficient to show that the grant, although expressed to be made to one member of a

(6) 3 C. 645; 3 Sar. P. C J 769; 3 Suth. P. C. J. 472; Rafique & Jackson's P. C. No 47; 2 Ind. Jur. 47; 1 Ind. Dec (N s) 994.

(7) 14 M. I. A. 112; 2 Sar. P. C. J. 705; 20 E. R 728.

(8) 7 Ind. Cas. 648; 37 I. A. 161; 12 Bom. L. R. 656; 14 C. W. N. 985; 8 M. L. T. 193; 12 C. L. J. 225; 32 A. 415; 20 M. L. J 90.; (1910) M. W. N. 311; 13 O. C. 332 (P C.).

(9) I A. Sup. Vol. 220; 4 I. A. 198; 3 Sar. P. C. J. 289; 3 Suth. P. C. J. 4; Rafique & Jackson's P. C. No. 28 (P. C.).

(10) 3 I. A. 259; 26 W. R. 55; 3 Sar. P. C. J. 611; Bald. 25; 3 Suth. P. C. J. 304; Rafique & Jackson's P. C. No. 41 (P. C).

joint family, was in reality made to the entire family.

In the case of *Thakoor Hardeo Bux* v. *Thakoor Jawahir Singh* (11) there was proof on the Settlement Record of an admission of title made by the Taluqdar and this was treated by their Lordships as having the same force as an express writing so as to constitute between the parties the relation of trustee and beneficiary. In other cases such as those reported as *Seth Jaidial* v. *Seth Sita Ram* (12) and *Maharaj Bedar Nath* v. *Thakur Ratan Singh* (8), effect was given by their Lordships to family arrangements come to between the parties previous to the grant of the *sanad*. A similar case of family arrangement is that reported as *Thakurain Ramanund Koer* v. *Thakurain Raghunath Koer* (13), a case in which several widows were in possession after the husband's death and had executed an agreement between themselves relating to the manner of the enjoyment of the estate. In this case the defendant Thakurain Raghunath Kuar who received the *sanad* was found to have held herself out all along, and certainly from April 1856 up till the time she got the *sanad*, as claiming the estate under her husband's Will which made provision for the successive enjoyment of the estate by the widows. The only other case we think it necessary to notice is one reported as *Hasan Jafar* v. *Muhammad Askari* (14). Here the Taluqdar had at the time of applying for the Second Summary Settlement, expressly stated that he was only one of several co-sharers in the estate. It was proved that the settlement was directed to be made with him on this basis and definite orders were passed to provide for the rights of the absent co-sharer, if he returned. It was further proved that this arrangement was agreed to by the Taluqdar.

In every one of these reported cases, therefore, there was some definite evidence of acknowledgment of the title of a third party, either by express admission or by execution of a deed of family arrangement or by a solemn declaration made at the time of the granting of the Second Summary Settlement. They are all cases in which the conduct of the Taluqdar was held to amount either to an express or constructive declaration of trust. Is there any evidence of this kind in the case now before us? We are of opinion that there is not. We have already touched upon some of the evidence which is relied upon in this connection, namely, various declarations made by Dariao Kuar up till the time the *sanad* was granted. It is true she described herself as the widow of Basant Singh, that in answer to inquiries relating to the history of the property she gave the history of her husband's family, but so far as we are able to see she never in any way acknowledged that any third person had a present right in the Taluqa. It is true that in the year 1861 she made a declaration that Sher Bahadur Singh would succeed to the property after her death; but this obviously cannot be treated as a declaration of trust in favour of Sher Bahadur. The document was one in the nature of a Will which Dariao Kuar could revoke, and did subsequently revoke, and in the litigation between Sher Bahadur Singh and Dariao Kuar this document was never treated as amounting to a declaration of trust.

A good deal of reliance has been placed upon Exhibit No. 12 which is a copy of a letter, dated the 27th of December 1866, which Dariao Kuar addressed to the Deputy Commissioner of Rae Bareli in connection with a dispute then pending between herself and Sher Bahadur Singh. This was the time when Sher Bahadur was moving the Chief Commissioner and the Government of India to recall the *sanad* from Dariao Kuar and grant it to him. In this letter the lady refuted the suggestion that had been made against her, namely, that she was alienating the estate to her brothers, men of the Amethia clan She went on to say that when the time came when she should think it right to make over the estate to someone else, she would make an application to the Deputy Commissioner to entrust the estate to a member of her family (*apne khandan*) of approved

(11) 4 I. A. 178; 3 C. 522; 3 Sar. P.C.J. 704; 3 Suth. P. C. J. 427; Rafique & Jackson's P. C. No. 45; 3 Ind. Jur 337; 1 Ind. Dec. (N. s) 917 (P. C.).

(12) 8 I. A 215: 4 Sar. P. C. J. 297; Bald. 400; Rafique & Jack on's P. C. No. 65 (P. C.).

(13) 9 I. A. 41; 8 C. 769; 6 Ind. Jur 328 & 332; 11 C. L. R. 149; Rafique & Jackson's P C. Nos. 67 & 68; 4 Sar P. C. J. 316; 4 Ind Dec (N s) 496 (P C.).

(14) 26 I A. 229; 26 C. 879; 4 C. W. N. 65; 7 Sar. P. C. J. 550; 13 Ind. Dec (N. s.) 1163.

good character. We do not look upon this document as containing any declaration of trust or any admission by the lady that she was holding the property for the benefit of her husband's relatives. The statement that she would not give the estate to the Amethias in her life tied her down to nothing. She might have exercised her power of alienation at any time before her death in favour of any one she pleased, and although she may have protested that she had no intention of handing over the property to Amethias, that statement would not raise any trust in favour of any particular person belonging to the Bais clan to which her husband belonged. As for what she says regarding her intention at the proper time to hand over the estate to a well-behaved member of the family, in view of what she had already said, she probably did mean a member of her husband's family. However, all that need be said regarding this is that she never took any such action and by dying intestate left the estate to go where the law directed it should go. Exhibit 141 is another letter, dated the 24th of January 1867, which Dariao Kuar addressed to the Deputy Commissioner. This too relates to the dispute then going on between herself and Sher Bahadur. The lady repudiates the charges brought against her and justifies her conduct and she refers to the previous declaration she had made, namely, that she had no intention of giving the estate to the Amethias.

Next it is said that certain proceedings in the Courts of the Settlement Officers during the First Regular Settlement afford evidence of acknowledgment of a trust. We have already observed that no acts or declarations of Dariao Kuar at this period could be taken into account for the purpose of ascertaining the intention of Government in conferring the estate and for the purpose of determining the extent of the estate so conferred, for all that had been settled long before the proceedings of the First Regular Settlement were commenced. We proceed to notice the various documents which are relied upon by the plaintiff in this connection. Exhibits 16 to 21 and 24 to 38, which are all of the period between 1864 and 1865, are copies of petitions which were made by Dariao Kuar for regular settlement of the various villages comprised in the Taluqa. In a great many of these documents she styles herself as the widow of Basant Singh and the property is described as "ancestral" or "inherited" property or property which had for generations past been "in the possession of her ancestors" or herself. Then Exhibits A 16 to A 58 are copies of orders, decrees or judgments passed by the Settlement Officers who dealt with the applications for the regular settlement. In some of these orders the claim of Dariao Kaur is described as being a claim by inheritance, as well as a claim under a right conferred by the *sanad*. The claim is allowed in all cases and in some instances it is stated that the settlement is made with her because she has acquired a full proprietary right. Exhibits A 59 to A 62 are copies of certain *kabuliyats* or engagements executed by the lady in which she is described as the wife or widow of Basant Singh. Then we have a number of village administration papers (Exhibits 39 to 123) containing the history of various villages comprised in the Samarpaha Taluqa and in which mention is made of the fact that the property had descended in the family of Basant Singh. The result then is that in a variety of documents relating to the regular settlement of the Taluqa we have repeated declarations of Dariao Kuar that the property was ancestral property, that it was inherited and that it had been in possession of her and her ancestors for generations. We have no doubt that in using this language the lady was describing the history of property which had come down in her husband's family, for it could hardly be suggested that she was making a declaration notoriously untrue, namely, that the property had belonged to her own family before the time of the annexation. But what do these declarations amount to? There can surely be no ground for saying that in making these statements of fact Dariao Kuar had any notion of holding herself out as a trustee for the heirs of her husband. It is perfectly clear that the regular settlement was not made with her on the basis of these representations that she was Basant Singh's widow and that

the property had been in her husband's family for many years, but on the ground set out in the decrees and orders of the Settlement Courts, namely, that she had acquired the full title to the property under the *sanad*. All these declarations are naturally explained on the assumption that they are nothing but mere statements of history; not statements of any intention to create a trust or acknowledgments of title made with the intention of admitting the existence of any beneficial interest in the property in third parties. We are unable to hold that on this evidence it is proved that Dariao Kuar either expressly or by implication constituted herself a trustee for the reversionary heirs of her husband. The only ground then left for any argument that Dariao Kuar was a trustee is the fact that she was the widow of Basant Singh, and it was admitted by the learned Counsel for the appellant when he came to sum up his arguments that the whole question of title in this case is narrowed down to this, namely, whether Dariao Kuar acquired the Taluqa "in right of her husband." If she did, it is argued the succession must be to her husband's reversioners. We have already discussed this question, holding that the matter for decision is really what the intention of the Government was in making the grant. We have expressed the opinion that the Government in conferring the estate by the letter of the 10th of October 1859 and by the *sanad* which followed had no regard to her position as a Hindu widow, but gave her the full proprietary right solely on the ground that she was a person who had been permitted to engage for the Second Summary Settlement. We may finally dispose of this part of the case by referring to an authority which in our opinion is conclusive of the matter in debate. We refer to the ruling reported as *Brij Indar Bahadur Singh* v. *Ranee Janki Koer* (2). A great deal of time and ingenuity has been expended in an attempt to distinguish that case from the present one, but, in our opinion, without success. The facts of the two cases are for all practical purposes identical Any differences which have been discovered appear to us to be altogether negligible and cannot possibly affect the principles upon which the case was decided. The main question which their Lordships were called upon to determine in *Janki Koer's case* (2) was the nature of the estate conferred upon Thakurain Kablas Kuar to whom, as in the present case, a primogeniture *sanad* had been granted. The Taluqa had belonged to one Mahpal Singh, who died in the years 1852-3 prior to annexation leaving two widows, one of whom was Kablas Kuar. At the time of the annexation Kablas Kuar was in possession of the estate which had descended to her as the surviving widow of Mahpal Singh. As in the present case, Kablas Kuar was in possession of the estate at the time of confiscation and after confiscation the Second Summary Settlement was made with her. In the *kabuliyat* which she executed Kablas Kuar was described as Mahpal Singh's widow, and in a *wajib-ul-arz* which was in evidence before their Lordships it appeared that she had made an admission that the regular settlement had been made with her in virtue of the ancestral right of her husband. A primogeniture *sanad* was granted to the lady and it was proved that before this *sanad* was given, Kablas Kuar had presented a petition asking for the grant to her of a *sanad* for life. This petition, and the letter of the Deputy Commissionor, to which it was an answer, were strongly relied upon for the purpose of showing that the grant to Kablas Kuar was intended to be a grant to her and the heirs of her husband. In spite of the prayer contained in Kablas's petition the Government issued a primogeniture *sanad* to her without even mentioning her status as a widow either in the operative part or by way of describing her. Their Lordships were of opinion that if the Deputy Commissioner's letter and Kablas's petition for a *sanad* for her life could properly be taken into consideration for the purpose of ascertaining what the Government intended to grant by the *sanad*, they would operate more against than in favour of the claims of the parties who were setting up the case that the grant was one to Kablas Kuar and the heirs of her husband. Dealing with the nature of the estate which Kablas Kuar took under the *sanad* their Lordships said they entertained no doubt. They held that the *sanad* conferred and was intended to confer a full proprietary

and transferable right in the estate upon Kablas Kuar and her male heirs according to the law of primogeniture, and not merely to confer upon her an estate for life with full power of alienation and with remainder to the male heirs of her husband in the event of her dying intestate without having alienated it in her lifetime. They were further of opinion that Lord Canning's proclamation had the effect of absolutely destroying both the interests of the widow and that of the reversionary heirs and that the Government, having by the confiscation acquired the right of disposing of the property in such manner as it thought fit, granted to Kablas Kuar and her heirs male according to the law of primogeniture the full proprietary right and title to the estate. After this interpretation of the terms of the *sanad* their Lordships went on to observe that the lady's title did not depend entirely upon the *sanad* but was also established by the provisions of Act I of 1869. When this Act was passed, the name of Kablas Kuar was entered in the first of the lists prepared under section 8. By reason of the provisions of section 10 the entry of her name in that list was conclusive evidence of the fact that she was a Taluqdar within the meaning of the Act, and consequently by virtue of section 3 of the Act Kablas Kuar was to be deemed to have acquired by the *sanad* a permanent, heritable and transferable right in the estate in dispute. It was argued before their Lordships that a trust had been created and that Kablas Kuar took the estate upon trust for those who would have been entitled to it if it had not been confiscated. Dealing with this argument their Lordships observed that to hold that such a trust arose would reduce to a nullity the confiscation and the disposal by the Government of the property confiscated. The power of alienation by sale, mortgage, gift or bequest was wholly inconsistent with an intention on the part of Government to create a trust for the benefit of the reversionary heirs of her husband. Their Lordships were of opinion that no trust was created by the *sanad* or by the Act of 1869 and there was no evidence before them to prove that a trust was created in any other manner.

These are material portions of the judgment of their Lordships to which it is necessary for us to refer, and it seems to us after a careful perusal of the report that there is not a single argument raised here for the plaintiff-appellant which was not advanced before their Lordships. We find there, as here, the argument as to the interpretation of the *sanad* to the effect that it conferred upon Kablas Kuar the ordinary estate of a Hindu widow with a power of alienation, failing the exercise of which the estate would go to the husband's heirs. Their Lordships held that the *sanad* was not susceptible of this construction. Then again it was argued there that the *sanad* was intended to operate as a grant of property to the widow in trust for the reversionary heirs of her husband. As to this their Lordships observed that no trust had been created either by the *sanad* or by Act I of 1869 and there was no evidence before them to show that a trust had been created in any other manner. Here, of course, we have been referred to certain evidence outside the *sanad* for the purpose of establishing the position of Dariao Kuar as a trustee. But that evidence, as we have said, has failed to convince us that Dariao Kuar in any way made herself a trustee for her husband's heirs.

The argument that the widow took the estate "in the right of her husband" was, we think, also put before their Lordships in the case reported, although it has been seriously contended here that the point was not taken, or that at any rate, if it was, the argument was not repelled on the ground that it was a matter of indifference whether she took the estate in her husband's right or her own. The learned Counsel has referred to what was said by Lord Macnaghten in the case of *Thakur Tirbhuwan Bahadur Singh* v. *Raja Rameshar Bakhsh Singh* (1), where his Lordship remarked that it was admitted that Dariao Kuar became Taluqdar "in her own right" implying, it is argued, that if she had become Taluqdar in right of her husband the result of the case would have been different.

There is no doubt in our minds that it was argued in *Janki Koer's case* (2) that Thakurain Kablas Kuar, when the estate was conferred upon her, took it in her quality of widow and it was in support of this

argument that reliance was placed in particular upon the letter which Kablas Kuar wrote in reply to Col. Macandrew and in which she prayed that a *sanad* for life might be granted to her. It was this request of Kablas Kuar which was strongly relied upon before their Lordships for the purpose of showing that what Kablas Kuar took under the grant was only the life-estate of a Hindu widow. But it seems to us that their Lordships treated that fact as being of no avail, when it was evident that in spite of the request so made the Government by the *sanad* conferred the estate upon her and her heirs male "without even mentioning her status as a widow either in the operative words or in describing her."

The case was in this respect a stronger one than the case now before us, for it cannot be pretended that Dariao Kuar, although she generally described herself as Basant Singh's widow and referred to the property as having descended in her husband's family, ever asked for the grant of a *sanad* for her life only. If it was possible to hold, as it was held in Kablas Kuar's case, that the widow received a full estate notwithstanding her prayer for the grant of a limited estate only, it seems to follow *a fortiori* that it should be so held when, as here, there never was any such request on the part of Dariao Kuar.

As we have already said, the question is not what the lady took but what the Government conferred and intended to confer by the declaration contained in the letter of the 10th of October 1859. The grant made by that letter was, as their Lordships observed in the *Chillaree case* (3), "an act of grace," and the nature of the interest which came to Dariao Kuar by the exercise of this act must be determined by ascertaining, not what Dariao Kuar wished or did not wish to receive, but what the Government thought fit to bestow upon her. This question is to be answered by interpreting the language of the letter of the 10th of October 1859 and of the *sanad* which followed it; and, as observed by their Lordships in *Janki Koer's case* (2), there is nothing in either document to suggest that Government was in any way influenced by the fact that Dariao Kuar was a Hindu widow to whom her husband's estate had descended under the ordinary Hindu Law before the date of confiscation. As in the case of Kablas Kuar so here the *sanad* neither in its operative part nor by way of description refers to Dariao Kuar's status as a widow, and we think we are right in holding that this particular fact was treated by their Lordships of the Privy Council in the reported case as being decisive of the matter.

To sum up, the decision in *Janki Koer's case* (2) appears to us to be conclusive as regards the nature of the interest acquired by Dariao Kuar. The only ground upon which it is possible to suggest that there is any distinction between the cases is that certain evidence has been put forward here for the purpose of showing that Dariao Kuar acquired the property in circumstances which made her a trustee for the heirs of her husband. The evidence, as we have said, fails to establish this position and we find accordingly that by reason both of the letter of the 10th of October 1859 and of the *sanads* which followed thereupon, and by reason of the provisions of the Oudh Estates Act, Dariao Kuar was the full owner of the Samarpaha Taluqa. This being so, succession to the estate was governed by the terms of section 22 of Act I of 1869, and the defendant Rameshar Bakhsh Singh took as her heir. The plaintiff has no claim whatever to this property. To say that the property was the lady's *stridhan* does not in our opinion advance the plaintiff's case in any way, for whether it is *stridhan* or not it is clear from the decision in *Janki Koer's case* (2) that succession to it is governed by the rules laid down in section 22 of the Oudh Estates Act and Rameshar Bakhsh Singh is the lady's heir under the provisions of clause 6 of that section.

LIMITATION.

The next matter for determination is the question of limitation. The decision of the Court below is that the claim was barred by Article 141 of the First Schedule to the Limitation Act. This Article, which is to be read along with Article 140, lays down a period of limitation governing a suit brought by a Hindu or Muhammadan entitled to the possession of immoveable property on the death of a Hindu or Muhammadan female. Article 140 relates to suits brought by a remainderman, a reversioner (other than a landlord), or a devisee, for possession of im-

moveable property. Article 141 lays down that the suits to which it relates must be "like suits" to those provided for by Article 140.

We have had occasion in a case decided some time ago to discuss the meaning and scope of Article 141 and our judgment in this case is reported as *Ghisa Singh* v. *Gajraj Singh* (15). In that case it was held on a review of the history of the Article in question that it did not apply to cases in which the Hindu or Muhammadan female had been in possession of a full estate, but only to cases where the title of the person bringing the suit is independent of the title of the female who was in possession of the intermediate estate. In other words, Article 141 lays down a rule of limitation for those suits in which it is sought to recover estates which, having once been estates in expectancy, have become vested in the heir of the last male owner on the determination of a limited estate held by a Hindu or Muhammadan female. It was held in the case just referred to that where the Hindu or Muhammadan female had a full estate and where the title of the plaintiff is derived through the female, the proper article to be applied is Article 144. We adhere to this view of law, the correctness of which has been admitted by the learned Counsel for the appellant, who relied upon this decision. We may add that its correctness has not been seriously challenged by the learned Counsel for the respondent. The plaintiff has found himself in difficulties with regard to this question of limitation, for it appears to us that if he contends that the estate which was held by Thakurain Dariao Kuar was a full estate which was vested absolutely in her he is out of Court on the question of title; for, as we have pointed out, if Dariao Kuar was the full owner the defendant is her heir and has the right to the property. The plaintiff has no standing whatever as an heir of Dariao Kuar. On the other hand, if it is the plaintiff's case that Dariao Kuar held only an intermediate estate, which was to revert after her death to the heirs of her deceased husband, the case is clearly governed by the provisions of Article 141.

(15) 33 Ind. Cas. 371; 18 O. C. 289; 3 O. L. J. 45.

In the third paragraph of the plaint the allegation was that after the death of Basant Singh in November 1857 Dariao Kuar as his widow came into possession and enjoyment of the Talaqa. That *prima facie* amounts to an allegation that Dariao Kuar was in possession with the limited estate of a Hindu widow. Then again in the 7th paragraph of the plaint it was alleged that for various reasons therein specified the grant to Dariao Kuar was the grant of an estate which was to descend after her death to the nearest reversioner of Thakur Basant Singh. So far, therefore, it appears that the case set out in the plaint was that Dariao Kuar was in possession of a limited estate only; and if the question of limitation is to be decided by the statements put forward in the plaint, the opinion of the Subordinate Judge to the effect that the suit is barred by Article 141 appears to us to be perfectly correct. In the argument which took place in the Court below before the issues were settled the plaintiff's Counsel admitted that Dariao Kuar, by reason of the Summary Settlement and the *sanad*, had acquired a permanent, heritable and transferable right in the estate in suit; but this statement was qualified by a plea to the effect that her right in the property was subject to all the conditions attached to her status as a Hindu widow under the Hindu Law, although she had full proprietary rights in the property. It is somewhat difficult to ascertain what the meaning of these statements is, but we take it that they amount to a plea that in spite of the language of the *sanad* Dariao Kuar was in reality in possession not of a full but of a limited estate only. On this statement of the plaintiff's case, therefore, it appears to us that the appellant is not in a position to contend that the law of limitation has been misapplied by the Court below. It has indeed been argued here, as it was before the Subordinate Judge, that Dariao Kuar did not occupy the position of a tenant for life inasmuch as she had an absolute power of disposal, and it has further been argued that Article 141 could not apply by reason of the fact that Dariao Kuar was in possession of the property till the time of her death. But if the intention of this argument is that Dariao Kuar in spite of having an absolute power of disposal was in possession of anything short of the full estate, we hold that Article 141 would apply

so as to bar the claim. Nor do we think that the Article would cease to apply in a case where the Hindu or Muhammadan female was in possession till the time of her death. The language of the Article itself does not suggest any such distinction. Limitation under this Article begins to run from the time when the female dies, because it is from the date of her death that the right to sue accrues and it seems to us that the right accrues only on her death and irrespective of the question whether she is in possession or not. On the merits, of course, we are bound by what we have just decided to hold that Article 141 would not apply to the facts as proved, for we have expressed our opinion, that Dariao Kuar was the absolute owner of the property. However, that was not the case with which the plaintiff came to Court and dealing with the matter on the footing of the allegations contained in the plaint, we agree with the Court below that the suit was barred by Article 141 of the First Schedule to the Limitation Act.

RES JUDICATA.

We have now to deal with the question of *res judicata* which was raised in the lower Court and which was decided adversely to the plaintiff. The learned Subordinate Judge was of opinion that the present suit was barred under the provisions of section 11 of the Code of Civil Procedure by reason of what was decided in a previous suit between the same parties. In order to elucidate the argument on this point we have to refer to the pleadings and the judgment in the previous suit. This previous suit was brought on the 30th of May 1911 by Raja Rameshar Bakhsh Singh against the present plaintiff Bisheshar Bakhsh Singh. The purpose of the suit was to recover actual proprietary possession of a village called Shayastabad *alias* Bharkaspur which, at the time the suit was brought, was in the possession of the defendant. The case for Rameshar Bakhsh was that the title to this village was with him and the title which he pleaded was the title which had been recognised in the litigation between himself and Sher Bahadur Singh, which terminated in the year 1906 with a decree in his favour given by their Lordships of the Privy Council. We have in an earlier part of this judgment referred to those proceedings. Rameshar Bakhsh Singh asserted that at the time he took out execution of the decree the village was in possession of *Musammat* Gajraj Kuar, who was the mother of Sher Bahadur Singh. He alleged that this lady was in possession as a *kham thekadar*, her right being the right merely of collecting the rents and of reserving for her own use whatever she could collect in excess of a sum of Rs. 1,126 3-6 which was payable annually to the plaintiff. It was said that when Gajraj Kuar died in the month of December 1906 the defendant wrongfully took possession of the village. The defence which Bisheshar Bakhsh Singh set up is described in his written statement, a certified copy of which is Exhibit No. A 80. In the first paragraph of the written statement Bisheshar Bakhsh Singh admitted that Rameshar Bakhsh Singh had obtained a decree for the whole Taluqa of Samarpaha. He put forward the case, however, that he had a title to this village of Bharkaspur as an under-proprietor. In the 13th paragraph of his written statement it was set out that he and his ancestors had all along been in possession of this particular village in subordination to the Taluqa of Samarpaha and that this tenure had been in existence ever since before the time of the British occupation of Oudh. The allegation was that the defendant and his predecessors had only been liable to pay the land revenue assessed upon this village. In the 14th paragraph of the written statement it was asserted that Dariao Kuar had never denied the under-proprietary rights of Bisheshar Bakhsh Singh and his predecessors, and in the 15th paragraph it was distinctly stated that an under-proprietary right in the village had in any case been acquired by adverse possession. In the 18th paragraph Bisheshar Bakhsh Singh raised a plea of estoppel against the plaintiff, saying that as he had been realising revenue from him (Bisheshar Bakhsh Singh) he could not be permitted to deny that the defendant Bisheshar Bakhsh Singh was in possession as an under-proprietor. In his replication to this written statement Rameshar Bakhsh Singh denied altogether that the defendant, or any of his predecessors, had any under-proprietary right in this village. He denied that either Gajraj Kuar or Bisheshar Bakhsh Singh had even paid him the revenue of the village. On the contrary he said that

both of them had been in the habit of sending the Government Revenue direct to the Tahsil and that the money had been refunded to him from the Tahsil as superior proprietor. The result of this litigation was that Rameshar Bakhsh Singh's claim for possession of Bharkaspur was decreed with costs. The issue raising the question of the defendant's title was issue No. 2 and was framed in the following language: "Whether the defendant is an under-proprietor of Shayastabad and did he remain in possession as such for more than twelve years?" The Subordinate Judge came to the conclusion that the defence set up by Bisheshar Bakhsh Singh was a false defence and his decision was that there was no satisfactory evidence to show that Bisheshar Bakhsh Singh, or any of his predecessors, had ever held this village in under-proprietary right. In fact the Subordinate Judge decided that this village had been given by Dariao Kuar to Sher Bahadur Singh by way of maintenance and that the interest so created in Sher Bahadur Singh's favour had come to an end with the latter's death.

It will be observed, and it has been freely admitted, that in the litigation just described Bisheshar Bakhsh Singh did not set up the title which he is asserting as plaintiff in the present suit. He did not claim to be the true owner by right of inheritance of the Samarpaha Taluqa, which includes this village of Bharkaspur. The point, therefore, is whether by reason of his omission to set up this title by way of defence in the previous suit he is precluded by the rule of *res judicata* from maintaining the present suit, either wholly or in part. According to the view of the law taken by the Subordinate Judge the omission of Bisheshar Bakhsh Singh to plead the present title in the earlier suit is a complete bar to the entertainment of this suit, which relates not only to Bharkaspur but to all the other villages comprised in the Taluqa. The question we have to decide is admittedly to be dealt with in the light of the provisions of section 11 of the Code of Civil Procedure and with particular reference to the language of Explanation IV, which lays down that any matter which might and ought to have been made a ground of defence or attack in the former suit shall be deemed to have been a matter directly and substantially in issue in such suit; and first we have to examine the question as to whether Bisheshar Bakhsh Singh "might" have raised by way of defence the title which he is now asserting to the whole of the Samarpaha Taluqa. There seems to be no doubt from the plaintiff's own statement in the witness-box during the trial of the present case that when he was called upon to defend this previous suit relating to Bharkaspur he was aware of the facts upon which he now relies for the purpose of showing that he is the rightful owner of the Samarpaha estate. He admitted that his father had a claim to the estate after the death of Dariao Kuar, a claim which he was prevented from putting forward because, it is said, Sher Bahadur Singh kept him under restraint. In fact Bisheshar Bakhsh Singh deposed that his father, Sheodat, used to assert his right to this estate even while Dariao Kuar was still alive. He deposed that Sher Bahadur Singh had kept his father under restraint because he knew that he (Sheodat) had a title to the property. We may take it, therefore, on this statement of facts that Bisheshar Bakhsh Singh might in the previous proceedings have pleaded this title to the village of Bharkaspur. He had on his own showing both the opportunity and the necessary knowledge which would have enabled him to do so. This being so, we proceed to consider whether he "ought" to have raised this defence. The question as to whether a particular defence ought or ought not to be raised is one of some difficulty. It does not appear to be possible to lay down any rule of universal application and we have the authority of the judgment of Lord Morris in the case of *Kameswar Pershad* v. *Rajkumari Ruttan Koer* (16) for the proposition that the question as to whether a particular ground of defence should be raised is one to be determined with reference to the facts of each case. His Lordship observes as follows:—

"That it 'might' have been made a ground of attack is clear. That it 'ought' to have been appears to their Lordships

(16) 20 C. 79; 19 I. A. 234; 6 Sar. P. C. J. 241; 10 Ind. Dec. (N. S.) 53.

to depend upon the particular facts of each case. Where matters are so dissimilar that their union might lead to confusion the construction of the word 'ought' would become important. In this case the matters were the same."

Further his Lordship observes, "that the principle is that persons should not be harassed by continuous litigation about the same subject-matter." There is, however, judicial authority which lays down a general standard of duty which is to be observed by defendants, namely, the dictum of Lord Westbury in *Srimut Rajah Moottoo Vijaya Reganadha Bodha Gooroo Sawmy Periya Odaya Taver* v. *Katama Natchiar* (17), a dictum which has been frequently cited and followed. His Lordship in the judgment referred to says: "When a plaintiff claims an estate and the defendant, being in possession, resists that claim, he is bound to resist it upon all the grounds that it is possible for him, according to his knowledge, then to bring forward." The reason of this rule consists in the necessity of putting some term to litigation between the parties. It is expedient and proper that a period should be put upon the contentions of parties and it has been observed that there can be no more fit and proper period than that which affords a full and fair opportunity for the examination and decision of the parties' claims, and so the rule is that the plaintiff must support all the issues which are necessary to maintain his cause of action. The defendant, on the other hand, is bound to bring forward all the defences which he has to the cause of action asserted in the plaintiff's pleadings at the time they were filed.

It being ascertained that the facts constituting the title which the plaintiff is advancing in the present suit might have been put forward by way of defence in the earlier suit relating to Bharkaspur, we think with reference to the dictum of Lord Westbury, which has just been cited, it was for him to justify his omission to raise this ground of defence. Bisheshar Bakhsh Singh himself has given no explanation of his failure to do so. He does not seem to have been examined or cross-examined touching this matter. It has been left to his Counsel to adduce reasons for the failure to defend the earlier suit on the title now set up. It has been argued, in the first place, that Bisheshar Bakhsh Singh could not legally have taken this plea in view of his defence that he was the under-proprietor of Bharkaspur and because he was urging in defence that Rameshar Bakhsh Singh was estopped from denying his (Bisheshar Bakhsh Singh's) status as under-proprietor because he had accepted rent from him in that character. Section 116 of the Evidence Act has been appealed to in this connection, a section which lays down a well-known rule that no tenant of immoveable property or person claiming through such tenant shall during the continuance of the tenancy be permitted to deny that his landlord had at the beginning of the tenancy a title to such immoveable property. The argument is that Bisheshar Bakhsh Singh, having pleaded attornment to Rameshar Bakhsh Singh by payment of rent for Bharkaspur, could not possibly deny Rameshar Bakhsh Singh's title so long as he retained possession and that it would only have been permissible for him to do so by walking out of possession. The fact appears to be, however, that no such plea of attornment was really raised. Bisheshar Bakhsh Singh's case was that he and his predecessors had been in adverse possession as under-proprietors for many years upon payment of the revenue and cesses due in respect of this village. We cannot allow that for the purposes of section 116 there is any analogy between the position of a tenant and the position which Bisheshar Bakhsh Singh was taking up by way of defence. The title he was asserting was not a title derived from the superior proprietor but an adverse, though it may be subordinate, title. So much is clear from the allegations contained in paragraph 13 of his written statement, to which we have already called attention. It seems to us that there was absolutely nothing in this defence to show that the title upon which Bisheshar Bakhsh Singh relied was derivative and not adverse, and so we consider that section 116 of the Evidence Act does not apply to the case, for we think it is not correct to say that Bisheshar Bakhsh Singh was setting up

(17) 11 M. I. A. 50; 10 W. R. P. C. 1; 2 Sar. P. C. J. 212; 20 E. R. 20.

any title in the nature of a tenancy. In the next place, it is argued that as Bisheshar Bakhsh Singh was pleading an under-proprietary title to this property, he could not at the same time have asserted a full proprietary title inasmuch as these rights are so dissimilar that they could not be pleaded together for, it is said to have done so would have led to confusion and have tended to embarrass and delay the fair trial of the suit. We have been referred in support of this argument to the terms of Order VI, rule 16, of the Code of Civil Procedure, a rule which allows the *Court* at any stage of the proceedings to strike out matter in pleadings which may tend to embarrass or delay the fair trial of the suit. We think we may take it on the language of this rule that it is for the Court, and not for the parties, to determine what are the matters which may produce the confusion referred to in the rule. It cannot, in our opinion, be argued that a defendant is to be at liberty to put forward just as much as he chooses of his case for the defence and to reserve the rest, merely because he entertains the opinion that the raising of the other pleas which he has reserved might cause difficulty to the Court. To allow this argument would be to ignore the fundamental principle referred to by Lord Morris that persons should not be harassed by continuous litigation about the same subject-matter. The omission of Bisheshar Bakhsh Singh to put forward the present title by way of defence in an earlier suit is not to be justified on this ground. Nor again are we prepared to allow, if the point is to be argued at all, that Bisheshar Bakhsh Singh is necessarily excused on the ground that proprietary and under-proprietary titles are inconsistent. Assuming for the moment that they are so, there is no provision of law against the setting up of alternative titles by way of defence. The rules of pleading do not prohibit a party from alleging two or more inconsistent sets of material facts and from claiming thereunder in the alternative. It was held in *Berdan* v. *Greenwood* (18) that "a defendant may by his written statement raise as many distinct and separate, and, therefore, inconsistent defences as he may think proper, subject only to the provisions contained in rule 1, Order XXVII." This latter rule corresponds to Order VI, rule 16, of the Code of Civil Procedure which authorises the Court to exculde pleas which may lead to embarrassment. It was also held in *Morgan, In re*; *Owen* v. *Morgan* (19) that a pleading is not embarrassing merely because it puts forward inconsistent sets of facts. In short, the law appears to be that a party to a suit cannot constitute himself the arbiter of what is likely to be embarrassing or confusing to the trial; that is a matter for the Court and must be left to the Court. A defendant cannot, we think, on this ground be excused from doing what is his duty, namely, to put forward all the defences he has. It seems to us, therefore, that there is no reason why Bisheshar Bakhsh Singh should not in the suit relating to Bharkaspur have raised by way of defence the title which he now asserts to Bharkaspur and the other villages comprised in the Taluqa.

The question then remains as to what should be the effect in law of Bisheshar Bakhsh Singh having omitted to raise this ground of defence in the previous suit. Is it to be held that he is barred from setting up his title in the present suit to the entire Taluqa or should we hold that the only penalty resulting from his omission is that he can no longer lay any claim to this particular village of Bharkaspur? It has been conceded by the learned Counsel for the appellant that if we hold that Bisheshar Bakhsh Singh both might and ought to have pleaded title as proprietor of Bharkaspur he cannot now be permitted to set up title to this village, it having been finally determined by the judgment in the earlier suit that he has no title to this property. On the other hand the learned Advocate for the respondent supports the view taken by the Court below that not only is the present claim to Bharkaspur barred but the claim to the entire Taluqa is shut out on the ground of *res judicata*. After careful consideration of the arguments addressed to us and after referring

(18) (1878) 3 Ex. D. 251; 47 L. J. Ex. 628; 39 L. T. 223; 26 W. R. 902.

(19) (1887) 35 Ch. D. 492; 56 L. J. Ch. 603; 56 L. T. 503; 35 W. R. 705.

to the numerous authorities which were quoted for our information, our decision is that the judgment in the previous case cannot be set up for the purpose of showing that the plaintiff's claim to the entire Taluqa is barred by the rule of *res judicata*. It is quite clear that the judgment in the earlier suit does not profess to decide anything more than the title to the Bharkaspur property. It is clear on all grounds that in the present suit the plaintiff cannot be allowed to put forward any case which would have the result of withdrawing this particular subject matter (that is, the title to Bharkaspur) from the operation of the previous decree; but there having been no decision in the former case between the parties as to the title to the other villages comprised in the Taluqa we are unable to hold that the previous judgment constitutes a complete bar to the entertainment of the present suit. While the decision in the previous suit of the issue relating to the title to Bharkaspur concludes the plaintiff from re-agitating that particular matter, it cannot, we think, be held that the case is one in which the former judgment is a complete bar to the present suit. This second action between the same parties is upon a different claim altogether, and it appears to us that the judgment in the prior action can only be treated as an estoppel with respect to the matters in issue or the points controverted in the earlier case upon the determination of which the finding was rendered. The doctrine of 'might' and 'ought' cannot, in our opinion, be pushed to the extent of holding on the facts before us that Bisheshar Bakhsh Singh's failure to put forward by way of defence the present title which he is alleging, raises an estoppel which precludes him from maintaining this suit in so far as it relates to proprety other than the village of Bharkaspur. The doctrine must be kept within limits and the extent of those limits is indicated by the principle to which Lord Morris refers, namely, that parties are not to be continually harassed by litigation in respect of the *same subject matter*. As was said by Wigram, V. C., in *Henderson* v. *Henderson* (20), "the plea of *res judicata* applies, except in special cases, not only to points on which the Court was actually required by the parties to form an opinion,...but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time." Applying this principle here it seems to us that it cannot be maintained that the title to the entire Samarpaha Taluqa was a point which "properly belonged" to the subject of the previous litigation; and while we are prepared to hold that the present title relied upon by the plaintiff was, *qua* the property then in dispute, a matter properly belonging to the subject of that litigation, we are satisfied that the title regarding the other villages in the Taluqa was not a matter which could properly be debated in the previous proceedings. This, we think, is equally clear if we refer to Lord Westbury's dictum above quoted: "When a plaintiff claims an estate and the defendant, being in possession, resists that claim, he is bound to resist it upon all the grounds that it is possible for him according to his knowledge, then to bring forward." Bisheshar Bakhsh Singh was in possession at that time of the village of Bharkaspur and he was, therefore, under the duty which is described in these words; but he was not in possession of the other villages appertaining to the Taluqa, nor was he resisting any claim relating to those other villages; and so we hold that he was not under an obligation then to put forward the whole title which he is now asserting. In short, we think that the rule laid down in Explanation IV to section 11 of the Code of Civil Procedure can only properly be applied to cases where the subject of the two suits is the same.

It has been pointed out to us by the learned Advocate for the respondent that in this previous suit Bisheshar Bakhsh Singh actually admitted the title which Rameshar Bakhsh Singh had got under the decree of the Privy Council, and so it has been argued with reference to the provisions of Explanation III to section 11 that the title to the whole Taluqa was a matter directly and substantially in issue in the previous case. This result may indeed follow from the language of Explanation III, but can it be said that because it was for this reason a matter directly and substantially in issue it

(20) (1843) 67 E. R. 313 at p. 319; 3 Hare 100, 64 R. R. 213.

was also heard and decided? It can only be deemed to have been heard and decided if we apply the doctrine of constructive decision implied in Explanation IV. It seems to us that there can be no decision by necessary implication except in respect of those matters which might and ought to have been made a ground of attack or defence and in this view, we are for the reasons already given, unable to hold that Bisheshar Bakhsh Singh was under an obligation in the earlier case to call for a decision of the Court upon the question of his title to the entire Taluqa. The result, therefore, is that we are unable to agree with the view of this question which was taken by the lower Court. We hold that the present suit for recovery of possession of the Samarpaha Taluqa was not barred by *res judicata*, except in so far as it relates to the village of Bharkaspur.

ESTATE.

We have only one other matter to notice with respect to the pleas which were raised and argued in the lower Court on behalf of the plaintiff-appellant. In the course of the preliminary arguments before the Subordinate Judge the plaintiff's Counsel sought to argue that the Samarpaha Taluqa was not an "estate" within the meaning of Act I of 1869, for the following reasons:—

(1) because Dariao Kuar executed no *kabuliyat* for the villages which were settled with her at the Second Summary Settlement;

(2) because there is no list naming the villages and lands comprised in the Taluqa; and

(3) because the villages were not decreed to Dariao Kuar in the manner laid down by section 1 of Act I of 1869.

The learned Advocate for the appellant here, while informing us that he did not abandon this ground of attack upon the lower Court's judgment, admitted that he could not press it strongly. We may say shortly that it appears to us that there is no substance whatever in this plea. The matter has been dealt with by the learned Subordinate Judge in the earlier part of his judgment and we agree with him in holding that the Samarpaha is an "estate" within the meaning of the Oudh Estates Act.

RELATIONSHIP.

There only remains to be noticed one other matter which was raised in argument by the respondent's learned Counsel, and that is with regard to the relationship between the plaintiff and Basant Singh whose heir he claims to be. In paragraph 10 of the plaint in which a reference was made to the alleged custom prevailing among the Bais Taluqdars, it was stated that the rule of succession was that after the death of the widow the estate goes to the eldest among the nearest relations of her deceased husband descended from the common ancestor. In the 12th paragraph it was stated that the plaintiff's father at the time of Dariao Kuar's death fulfilled these conditions and on the pedigree attached to the plaint in this suit the plaintiff represented himself to be the eldest son of his father Sheodat Singh. A good deal of oral evidence was given by both the parties on this question of relationship. The defendant put the plaintiff to proof of the pedigree attached to the plaint. From some expressions in the judgment of the lower Court it would seem that in coming to its decision of this question of relationship the Court was influenced by the fact that Rameshar Bakhsh Singh, the defendant did not put in any pedigree by way of reply to that set up by the plaintiff. It seems to us that Rameshar Bakhsh Singh, not being a member of the family to which Basant Singh belonged, could not reasonably have been expected to furnish any independent pedigree in support of his own case. The most he could be expected to do was to adduce whatever evidence he could in order to meet the evidence led by the plaintiff in support of the pedigree upon which he relied. The learned Subordinate Judge came to the conclusion that on the evidence both oral and documentary the plaintiff had succeeded in showing that he was at the time when this suit was filed the eldest of all living collateral relations of Basant Singh. So far as this finding is concerned we are not disposed to differ from it. We think that although the evidence led by the plaintiff is open to a good deal of suspicion, considering the fact that it has proceeded from witnesses who admittedly are deeply interested in the result of the case and some of whom at least are under

the control or influence of the Taluqdar of Khajurgaon who, on the plaintiff's own admission, has been financing this litigation, it has been established that there is no collateral relative of Basant Singh in existence who is older than the plaintiff Bisheshar Bakhsh Singh. The Subordinate Judge, however, went further and held that Bisheshar Bakhsh is not only the eldest existing collateral relation of Basant Singh but that he is also descended in the senior line of kindred. It is upon this latter point principally that the learned Counsel for the respondent has challenged the judgment of the Court below. Before the issues were finally settled, it had been stated by the plaintiff's Counsel that as a matter of fact Bisheshar Bakhsh Singh was not only the eldest living relative of Basant Singh but was also the eldest descendant in the senior line; and when evidence came to be given on this question of relationship the witnesses who were put forward deposed to both these facts. One difficulty which lay in the way of the plaintiff was that in certain earlier cases pedigrees of the family of Basant Singh had been put forward which do not tally in all respects with the pedigree relied upon now. In particular there was put on record a pedigree which is marked Exhibit 148 and which was filed in certain litigation which took place in the year 1877. This document was put in by one Sheo Prasad and it was treated as being admissible evidence by the Subordinate Judge. In the pedigree attached to the present plaint we find that Chhatardhari Singh, who was the grandfather of the present plaintiff, had four sons. They are put down in the following order of age, namely, (1) Raghunath Singh (d. s. p.), (2) Sheodat Singh, (3) Dhaunkal Singh and (4) Udwat Singh. In the 1877 pedigree the sons of Chhatardhari Singh were put down in a different order. Dhaunkal Singh was shown as the eldest son, Udwat Singh as the second son, Sheodat Singh as the third son and Raghunath Singh as the next son. It may, of course, be that the different order in which the names of these sons appear in this latter pedigree is to some extent due to the former pedigree having been written in Hindi from left to right and not in Urdu from right to left. But even so it is apparent that the order in which Dhaunkal and Udwat are mentioned is different. Then we find that in the Bharkaspur case of which mention has frequently been made, a pedigree was put in by the present plaintiff Bisheshar Bakhsh Singh in which he was shown, not as the eldest son of his father Sheodat Singh, but as the middle son. This pedigree is Exhibit A 80 and shows the three sons of Sheodat Singh in the following order, —(1) Jagmohan Singh, (2) Bisheshar Bakhsh Singh and (3) Sheo Shankar Singh. In the pedigree now before us the order is (1) Bisheshar Bakhsh Singh, (2) Jagmohan Singh and (3) Sheo Shankar Singh. It is true that Jagmohan Singh died before the present suit was brought. His son Randhir Singh is still alive and he has a grandson Gaya Bakhsh Singh who appeared in Court as plaintiff's witness No. 15. It is a curious fact that there should be this difference in the order of naming the sons of Sheodat Singh in the two pedigrees. Five of the witnesses including the plaintiff himself, who were examined in this case in support of the pedigree set out in the plaint, were examined in the Bharkaspur case and on that occasion they all supported the pedigree which was then put forward and in which Bisheshar Bakhsh Singh was shown as the middle one of the three sons of Sheodat Singh. The depositions of these witnesses given in the earlier suit are upon the record, and it is quite clear that the statements which they then made do not tally with the statements made now regarding the respective seniority of the three sons of Sheodat Singh. It is true, as has been pointed out by the Court below, that these witnesses were not cross examined with reference to their statements. The plaintiff himself attempted to give some explanation of the discrepancy between the pedigree then put forward and that upon which he now relies,—an explanation which is altogether unsatisfactory and which could not possibly be accepted. He tries to make out now that the pedigree he gave in the earlier case must have been written wrongly by the Pleader to whom he gave the original document. The futility of this explanation is apparent when we find that in the earlier suit

Bisheshar Bakhsh Singh himself recited the whole of the pedigree in the course of his deposition and made it agree with the pedigree attached to the plaint in that suit. The other witnesses who were called in that case and who have been called in the present case did the same thing, and all we can say is that the difference between the statements then made and those which have been made now cannot be explained in any manner which satisfies us. In dealing with this part of the case the Subordinate Judge observes that the difference no doubt looks striking, but he gets over the difficulty by saying that the point of Bisheshar Bakhsh Singh's seniority was not material in the previous case and that might account for the difference. It seems to us that this cannot be treated as an adequate explanation of the discrepancy. It is not, as far as we are aware, the practice of parties who depose to pedigrees to recite the names in a promiscuous order. On the contrary our experience is that names are always given in a fixed order, and this would seem to be inevitable when it is considered how these pedigrees have to be learnt. A pedigree which does not set out the various degrees of relationship in a fixed systematic order would be of no value at all. We cannot, therefore, help feeling that for the purposes of the present case a deliberate attempt has been made to show, for some reason or other best known to the plaintiff, that he belongs to the most senior branch of the relatives of Basant Singh descended from a common ancestor. If anything in the case turned upon this question of his belonging to the senior branch we should feel ourselves bound to hold, disagreeing with the Court below, that the plaintiff had failed to establish this proposition.

We have now expressed our opinion upon the various points which were raised for consideration in this appeal and the result is that we affirm the decision of the Court below. The appeal fails and is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 370 OF 1915.

January 21, 1918.

Present:—Mr. Justice Fletcher and Justice Sir Shamsul Huda, KT.

Srimati SAIDUNNESSA PLAINTIFF—APPELLANT

versus

TEJENDRA CHANDRA DHAR AND OTHERS —DEFENDANTS—RESPONDENTS.

Court-Fees Act (VII of 1870), s. 7 (iv) (c)—Suit for declaratory decree and injunction—Court-fee payable—Civil Procedure Code (Act V of 1908), s. 149—Deficient Court-fee—Extension of time to make up deficiency—Discretion of Court.

The plaint in a case in which the plaintiff not only asks for a declaration of rights but also prays for perpetual injunction restraining the defendant from putting in execution a particular decree is chargeable with *ad valorem* Court-fee under section 7 (*iv*) (*c*) of the Court Fees Act. [p. 399, col. 1.]

Where insufficient Court-fee has been paid on a memorandum of appeal, the Court will not in its discretion under section 149 of the Civil Procedure Code allow the deficiency to be made up on the day of the hearing unless it is satisfied that some grounds exist for the exercise of its discretion, of these grounds the principal one is that a *bona fide* mistake was made. [p. 399, cols. 1 & 2.]

Appeal against the decree of the Officiating Additional Subordinate Judge, Chittagong, dated the 30th of June 1915.

FACTS appear from the judgment.

Sir *Rash Behari Ghose* (with him Babus *Dhirendra Lall Kastagir* and *Tarakeswar Nath Mitter*), for the Respondents, raised a preliminary objection to the maintainability of the appeal for insufficiency of Court-fees paid on the memo. of appeal. The memo. of appeal was filed with a Court-fee of Rs. 10, although in the plaint the plaintiff prayed for a declaratory decree with consequential relief, *viz.*, an injunction restraining the defendants from executing a decree of the Court. Article 17 (*iii*) of the Second Schedule of the Court Fees Act does not apply to suits of this nature, and so the appeal is not maintainable unless *ad valorem* Court-fee is paid.

Babu *Probodh Coomar Das*, for the Appellant, submitted that the appellant who was very poor could not pay the whole amount of Court-fee at the time of filing the memo. of appeal, but he was ready to pay the requisite Court-fee, if the Court, using its discretion under section 149 of

the Civil Procedure Code, allowed it to be paid then.

JUDGMENT.

FLETCHER, J.—A preliminary objection has been taken to the hearing of this appeal on the ground that the appellant has not paid the appropriate Court-fee. The Court-fee paid on the memo. of appeal was a Court-fee of Rs. 10 only and it was paid with a distinct statement on the memo. of appeal which the learned Vakil for the appellant tells us was added subsequently—although the memo. does not show on what date that addition was made—that the fee payable was under Article 17 (*iii*) of Schedule II to the Court Fees Act. Now, Article 17 (*iii*) of Schedule II to the Court Fees Act states that on a plaint or memo. of appeal to obtain a declaratory decree where no consequential relief is prayed the fee payable is Rs. 10. The plaint in this case as amended in the Court below shows that that was not the nature of the present suit. Not only three declarations were asked for, but the plaintiff prayed for a perpetual injunction. It is quite clear that that is not a suit for declaratory decree where no consequential relief is prayed. Consequential relief was prayed in this case and it was the main relief, namely, an injunction restraining the defendants from putting in execution a particular decree of the Court. It seems to me quite clear, both on the authorities of this Court and on the wording of the Article of the Court-Fees Act, that the memo. of appeal in the present case was chargeable with an *ad valorem* fee. The question is whether any ground has been shown on which we ought to permit the deficit Court-fee to be paid now under the provisions of section 149, Code of Civil Procedure. It is quite clear that the appellant has not got the right to pay it now because the words used in the section are that "the Court may in its discretion;" and, before the Court exercises its discretion, the appellant has got to satisfy us that some grounds exist on which the Court ought to exercise its discretion. Amongst those I take it that the principal ground is that a *bona fide* mistake was made. We have heard the statement of the learned Vakil who appears for the appellant and we are not satisfied that a *bona fide* mistake was made. That being so, we are not prepared to exercise the discretion that section 149, Code of Civil Procedure, confers on us, to permit the payment of the deficit Court-fee now. In that view, the appeal is incompetent and must be dismissed with costs.

SHAMSUL HUDA, J.—I agree.

Appeal rejected.

PATNA HIGH COURT.

FIRST CIVIL APPEALS NOS. 141 AND 163 OF 1916.

February 14, 1918.

Present:—Mr. Justice Roe and Mr. Justice Jwala Prasad.

IN No. 141 OF 1916

Musammat RAMDEI AND OTHERS—APPELLANTS

versus

CHANDRABALI BIBI AND OTHERS—RESPONDENTS.

IN No. 163 OF 1916

RAM KISHUN JOSHI AND OTHERS—APPELLANTS

versus

Musammat RAMDEI AND OTHERS—RESPONDENTS.

Registration Act (XVI of 1908) s. 28—Place of registration—Jurisdiction of Registrar—Transferor not entitled to property—Transfer ostensible—Burden of proof.

In the absence of fraud on the part of the transferee and collusion between him and the transferor, the mere fact that the transferor has no title to that portion of the property which is situated within the jurisdiction of the Registrar is not a bar to the Registrar's jurisdiction to register the document. [p 401, col 2.]

Where a party alleges that a document to which he put his signature in token of resigning an interest does not contain a correct statement of the facts and of the intention of the parties, the burden of proving his allegation lies on such party. [p. 400, col. 2.]

Appeals from a decision of the Subordinate Judge, First Court, Mozafferpore.

Messrs. *Pugh*, *P. R Dass*, *Chandra Sekhar Bannerjee* and Rai *Tribhuan Nath Sahai*, for the Appellants in No. 141 of 1916.

Messrs Syed *Hasan Imam*, *Mohammed Mustafa Khan* and *Bunwari Lal*, for the Respondents in No. 141 of 1916.

Messrs. Syed *Hasan Imam*, *Mohammed Mustafa Khan Murari Prasad* and Syed *Mohamad Husain*, for the Appellants in No. 163 of 1916.

Messrs. *Pugh*, *P. R. Dass*, *Chandra Sekhar Bannerjee* and Rai *Tribhuan Nath Sahai*, for the Respondents in No. 163 of 1916.

JUDGMENT.—The facts of these cases have been fully and clearly stated in the judgment of the learned Subordinate Judge. It is sufficient for the purposes of the appeals to reproduce only a part of the narrative given in his judgment. The appellants in Appeal No. 141 are *Musammat* Ram Dei and her lessees, proprietors of the Motipur concern. The respondent is Chandra Bali Bibi, who derives her interest from a deed of sale executed in her favour by Jeona Bahu. Ram Kishen Joshi and others are the appellants in Appeal No. 163. *Musammat* Ram Dei is the widow of Radha Kishen. Radha Kishen was the son of Bal Kishen. On the death of Bal Kishen there was a dispute regarding the succession, and this, so far as *Musammat* Jeona Bahu the widow and Radha Kishen the son were concerned, was settled in 1889 by an agreement by which four annas of the villages in dispute was given to her absolutely and three annas given to her as life-estate. A payment in cash was also to be made by Radha Kishen. Before this payment in cash was made Radha Kishen died. A new agreement was then executed in 1890 between Ram Dei and Jeona Bahu, whereby the payment which was to have been made by Radha Kishen was abandoned and the widows took to themselves each an absolute interest in four annas of the property in dispute. On the death of Jeona Bahu, Ram Dei claimed to be the heir-at-law under the Mayukha School. The Joshis claimed to be her heirs under a Will executed by her. Under the former claim Ram Dei executed a *mokarrari patta* of the eight annas of the villages in dispute in favour of the Motipur concern. Chandra Bali's *kabala* is limited to a four-annas share of the villages in dispute. The remaining four annas is claimed by the Joshis. The whole eight annas is in the possession of the Motipur concern. Chandra Bali and the Joshis, therefore, instituted separate suits each in respect of the four-annas share alleged to be theirs.

The issues framed in the Court below were eleven in number. The contest in this Court centres round two issues only. *Firstly*, whether the *ekrarnama* or agreement made between Ram Dei and Jeona Bahu was intended to be an operative transaction or was a mere device to defeat the claim of third parties and not intended to be operative. *Secondly*, whether by reason of a substantial flaw in registration the deed of sale executed by Jeona Bahu in favour of Chandra Bali is void as against the party in actual possession. The learned Subordinate Judge decided that the agreement made in Ram Dei's favour was intended to be operative and conveyed a title in four annas of the property. He also decided that there was no flaw in the registration of the deed in favour of Chandra Bali. He, therefore, declared her entitled to the remaining four annas of the property. Ram Dei and the Motipur concern, therefore, appeal against that part of the decree which maintains Chandra Bali's title, and the Joshis appeal against that part of the decree which maintains Ram Dei's title.

On the first point the burden of proof in cases such as this is on the litigant who alleges that a document to which he put his signature in token of resigning an interest does not contain a correct statement of the facts and of the intentions of the parties. The same rule applies to a representative-in-interest of a signatory to such a document. The first link in the chain of evidence on such a question of fact is a set of circumstances showing that the transferor had a motive for making an ostensible abandonment of a part of his rights without consideration. The next link is a relationship between the parties to the document, and the probability that a fictitious transfer should be made in favour of the ostensible transferee. It is certain that the quarrel between Radha Kishen and Jeona Bahu was a real quarrel. There is no reasonable probability that a wholly fictitious agreement was made between Radha Kishen and Jeona Bahu It is not reasonable to suppose that the widow of Radha Kishen would on his death have abandoned all benefits that might be derived by her from this agreement. Nor is it reasonably probable that Jeona Bahu would have put into the hands of the widow of one who had formerly been her enemy, who herself might at any time again be her enemy, a weapon which could be used against her. There could be no reason for any deliberate cloud upon the title of Jeona Bahu to the property affected by the agreement, for at that time Jeona was undoubtedly in possession of the whole of that property and her title has never since been contested. On the outstanding probabilities of the case it is

unlikely that this agreement was fictitious. There is, moreover, a very considerable body of evidence to show that Jeona Bahu intended it to be operative. As the learned Subordinate Judge has pointed out, there is no reason to doubt that Jeona Bahu herself both in 1901 and in 1902, eleven and twelve years after the agreement, made statements on oath admitting Ram Dei's title in this property. She also wrote letters which he believed to be genuine, to Ram Dei again admitting her title in 1904 and 1905. The arguments adduced on behalf of the Joshis to support the theory that the agreement was not a genuine agreement have in them little substance when weighed against the general probabilities and these direct admissions. We are of opinion that Suit No. 278 was rightly dismissed and dismiss Appeal No. 163 with costs.

The ground upon which it is urged that there was a flaw in the proceedings in the registration of Chandra Bali's document is that it was registered at Benares, and contains in the schedule of properties conveyed a garden in Benares which was not at the time of the execution of the document the property of the transferor. The learned Subordinate Judge does not seem to us to have considered the issue whether as a fact this garden house was in Jeona Bahu's possession at the time of the registration He finds only that the existence of the garden has been clearly proved and that it was at one time in Jeona Bahu's possession. He considers this finding to be sufficient to ensure the jurisdiction of the office at Benares to register the document We agree with the finding that the garden was in existence at the time of the registration. We agree also that it was at one time a part of the property of Jeona Bahu, but from the evidence of the witness called by Chandra Bali to prove specifically the possession of Jeona Bahu at the time of registration there can be no doubt that before that registration the properties had passed out of the possession of Jeona Bahu. Damodar Bhardoaji, witness No. 12 for the plaintiffs says that all Bal Kishen's properties in Benares were sold off before he attained discretion. His age is now 42.

We do not understand the decision in *Barendra Lal Roy Chowdhuri* v. *Hari Dasi Debi* (1) to be authority for the proposition that a flaw in the vendor's title in the only part of the property in the jurisdiction of the Benares office would be a bar to its registration there. The decision was based on the finding that the only property purporting to give the Registrar jurisdiction had no existence at all. The decision in *Broja Gopal Mukherjee* v. *Abinash Chandra Biswas* (2) is direct authority for the proposition that in the absence of fraud on the part of the transferee, and collusion between transferor and transferee, the mere fact that the transferor had no title would not be a bar to the Registrar's jurisdiction. With this decision we are in agreement. There is nothing to indicate any fraud on the part of Chandra Bali, or collusion between her and Jeona Bahu to deceive the Registrar. We therefore, hold that Suit No. 276 was rightly decreed and that Appeal No. 141 should be dismissed with costs.

Appeals dismissed.

(1) 23 Ind. Cas. 637; 19 C. L. J. 484; 18 C. W. N. 817; 1 L. W. 1050; 16 Bom. L. R. 400; 12 A. L. J. 774; (1914) M. W. N. 462; 16 M. L. T. 6; 27 M. L. J. 80; 41 C. 972 (P. C.).

(2) 5 Ind. Cas. 127; 14 C. W. N. 532.

BOMBAY HIGH COURT.

ORIGINAL SIDE JURISDICTION.

February 21, 1918.

Present:—Mr. Justice Kajiji.

RAMCHANDRA JAGANNATH —PLAINTIFF

versus

THE GREAT INDIAN PENINSULA RAILWAY CO.—DEFENDANTS.

Railways Act (IX of 1890), s. 75—"Value", "loss," meanings of—Carrier, duty of—Misdelivery, effect of—Damages, suit for.

The term "value of the articles" in sections 75 of the Railways Act means intrinsic or market value, *i.e.*, the price for which they would reasonably sell at the time in the market as well as the value in the market, independent of any circumstances peculiar to the plaintiff [p 404, col 2.]

The loss for which a Railway Company is protected from liability by section 75 of the Railways Act must be loss to the Railway Company itself and it must be loss which occurs while the goods are in the custody of the Company in their capacity as carriers, and cannot apply to a loss to the owner. Negligent misdelivery of goods to a person other than the owner is not such a loss as is contemplated by section 75 of the Railways Act. [p. 405, col. 1.]

Whether the goods are to be delivered to the consignee at his house or at the termination of the journey

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depends on agreement and on the usual course of business. If the goods are delivered at the house to which they are addressed, the carrier has done all he contracted to do and the mere fact that he delivers to some other person than the consignee at that house is no proof of breach of duty on his part. But if he delivers at any other place to any person other than the consignee, he does so at his peril. But where the carrier is not bound to deliver at the house of the consignee, his liability as carrier ceases when he has brought the goods to the station of destination and has tendered or delivered them within a reasonable time to the consignee or has allowed the consignee reasonable time in which to remove the goods. [p. 405, col. 2.]

Plaintiff delivered 24 account books to the defendant Railway Company for carriage to Nagpur. The books arrived safely at Nagpur but were negligently delivered to some person other than the consignee. The intrinsic value of the books was below Rs. 100. The plaintiff sued the defendant Company for 25,000 as damages for the loss of the books:

Held, that the defendant's liability was not saved by section 75 of the Railways Act, inasmuch as (*a*) the intrinsic value of the books was below Rs. 100, and (*b*) the loss occurred not while the books were in the custody of the defendant Company as carriers, but after their arrival at their destination. [p. 404, col. 2; p. 405, col. 2.]

FACTS.—This was a suit filed by the plaintiff against the defendant Company claiming from them Rs. 25,000 as damages on account of the loss of a parcel containing 24 account books caused to the plaintiff by its wrongful delivery by the Railway Company to another person (*i. e.*, the person other than the consignee). The plaintiff was a resident of Nagpur and was doing the agency business of the Bombay. Dyeing and Manufacturing Company at Nagpur. On the 16th of September 1916 he consigned a parcel of 24 account books relating to the agency business from Victoria Terminus to be delivered to his firm at Nagpur. The parcel arrived at Nagpur Station on the 18th of September. The parcel was, however, through the mistake of one of the railway clerks there wrongly delivered to the Superintendent of the Central Jail at Nagpur. The mistake was not discovered till the 22nd of September, when it was ascertained that the books of account had been destroyed by the Jail Authorities. The misdelivery of the plaintiff's parcel to the Superintendent of the Central Jail at Nagpur arose under the following circumstances. The Jail Authorities expected a parcel of old forms from Khandwa for the purpose of being destroyed. The railway receipt in respect of the plaintiff's parcel bore the same number as the receipt in respect of the Khandwa parcel, so that when a peon of the Nagpur Central Jail went to take delivery of the Khandwa parcel, the railway clerk who was in charge of the parcel department looked at the receipt and without reading the address on any of the parcels pointed out the plaintiff's parcel to the peon and told him to take the same.

The plaintiff alleged that the books were the only account books they had containing the dealings of his firm and they were the only source from which he could ascertain the debtors of the firm. He charged the defendants with negligence and sued to recover Rs. 25,000 from them by way of damages in respect thereof.

The defendants *inter alia* contended that they were not liable to the plaintiff by reason of the provision of section 75 of the Indian Railways Act. That section provided that when any articles mentioned in the Second Schedule of the Act were contained in any parcel or package delivered to a railway administration for carriage by railway, and the value of such articles in the parcel or package exceeded Rs. 100, the railway administration was not to be responsible for the loss, destruction or deterioration of the parcel or package unless the person sending or delivering the parcel caused its value and contents to be declared at the time of his delivery to the railway. The articles mentioned in the Second Schedule clause (*i*), included maps, writings, and title-deeds. The books of account fell within the meaning of the word "writing" and as the plaintiff had failed to declare the value of the parcel at the time of its delivery and as it was of the value of more than Rs. 100, the railway company was protected from liability to the plaintiff by reason of section 75 of the Act.

The suit was accordingly placed on board for trial of the preliminary issue, whether under the above circumstances the railway company was protected from liability by reason of section 75 of the Act.

Mr. *C. H. Setalvad* (with him the Hon'ble Mr. *M. A. Jinnah*), for the Plaintiff, contended that the "value of the goods" in section 75 meant the market value or its intrinsic value. He admitted it was a "writing" within the meaning of that word in the Second Schedule. But the value of the books *qua* books was less than Rs. 100 and, therefore, the

plaintiff was not bound to declare their value at the time of their delivery. The account books when bought were of the approximate value of Rs. 70 or so. After being written on their saleable value in the market became considerably diminished. They could only be sold as so much waste paper. The loss consequential to plaintiff by reason of the destruction of the books was a different matter. But that did not in any way enhance its value. An autograph letter of a great personage, *e.g.*, of Lord Nelson was no doubt a " writing " and the value of it would certainly be more than Rs. 100. That was because of its intrinsic value. It could be sold in the market and its market value would certainly be more than Rs. 100.

Counsel further contended that even if it be held that the value of the books as such was more than Rs. 100, his submission was that the section only applied to goods in transit. In the present case the goods had reached their destination, *viz.*, the station, and from that moment the goods in the hands of the Company remained with them as bailees. The whole object of the Act seemed to be to protect railway companies against undue responsibility and risks as public carriers while they were doing duty as public carriers. The protection only extended to them while the goods were being carried on their lines. After the parcel had reached its destination, they were on no better footing than ordinary bailees. Counsel then cited various authorities in support of his above contentions.

Mr. *H. Campbell* (with him the Hon'ble Mr. *T. J. Strangman*), for the Defendant company, urged that the section covered goods which were articles of special value. The company was protected against all liabilities in case of loss of goods of the value of more than Rs. 100, the value being on the basis of their real value to the consignor. The use of the words " map ", " title-deeds " supported that argument. The value of the books of account in the present case was considerably over Rs. 100. The words "value" and " contents " in the same section also supported his contention. As to the point that the exemption of the Company only applied to goods while they were being carried on the line, or in transit, that contention could not prevail. It would be reading in the section the words " in transit " after each of the words " loss, destruction or deterioration. " The Railways Act was a special enactment and where there was a special enactment, it excluded the common law of carriers as prevailing in England. The goods, moreover, were carried not only for the purpose of being consigned to the station but were also to be delivered and in delivering the railway company were still carriers. There were cases which showed from what time the commencement of the liability of the railway company arose and that the liability continued till delivery of the goods. The test was, when did the risk commence and when did it end. Then again it was not a case of loss but a case of destruction and no wilful destruction was alleged.

JUDGMENT.—The plaintiff in this suit claims from the defendant Railway Company Rs. 25,000 as damages. It appears that on 16th September 1916 the plaintiff delivered to the defendant Railway Company at the Victoria Terminus Station a parcel containing 24 account books consigned to the plaintiff's firm at Nagpur for carriage from the Victoria Terminus Station to Nagpur. It appears that on or about the 21st September 1916 the plaintiff's agent presented the Railway receipt and claimed delivery of the parcel in question, but he was informed by the defendant Company's agent that the parcel belonging to the plaintiff had been received at Nagpur but the same had by mistake been delivered to a representative of the Superintendent of the Central Jail at Nagpur and it was afterwards ascertained that the Jail Authorities had practically all the account books contained in that parcel.

The defendants say that the account books were writings within the meaning of the Second Schedule to the Indian Railways Act, 1890, and that as the plaintiff claims more than Rs. 100 in this suit and that as neither the plaintiff nor the person sending or delivering the parcel to the defendant Company caused its value or contents to be declared or declared them at the time of the delivery as required by section 75 of the Indian Railways Act, they by virtue of the provisions of the said section are not responsible for the loss or destruction of the parcel or the account books. Hence the present suit.

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Pursuant to the consent chamber order, dated 20th December 1917, this suit appeared before me for the trial of the preliminary issue, *viz.*, "whether the defendants are protected from liability to the plaintiff under section 75 of the Indian Railways Act, 1890."

The material portion of section 75 runs as follows:—"When any articles mentioned in the Second Schedule are contained in any parcel or package delivered to a railway administration for carriage by railway, and the value of such articles in the parcel or package exceeds one hundred rupees, the railway administration shall not be responsible for the loss, destruction or deterioration of the parcel or package unless the person sending or delivering the parcel or package to the administration caused its value and contents to be declared or declared them at the time of the delivery of the parcel or package for carriage by railway and if so required by the administration, paid or engaged to pay a percentage on the value so declared by way of compensation for increased risk."

It is conceded by Mr. Setalvad for the plaintiff that the account books are included in the term "writings" mentioned in item (I) of the Second Schedule to the Indian Railways Act, 1890 Mr. Setalvad for the plaintiff states that the value of the account books in question does not exceed Rs. 100, therefore, section 75 of the Indian Railways Act, 1890, has no application to the present case and further contends that even if the value exceeds Rs. 100, section 75 does not exempt the Railway Company from liability for the loss of the account books that has occurred by delivery of the parcel to a wrong person. The first question, therefore, to determine is, "does the value of the articles in the parcel, *viz.*, the 24 account books exceed Rs. 100? From the evidence recorded it appears that these books of accounts when purchased cost the plaintiff between Rs. 60 and 70 and that if these had been sold either when they were delivered at the Victoria Terminus Station or when they reached Nagpur would have fetched only a few rupees as waste paper. It is contended by the Counsel for the plaintiff that the term "value" in section 75 means intrinsic value or the market value of the articles, and not a fancy value which a person sending or delivering a parcel or package puts on the articles in it. The word "value" is unfortunately not defined in the Act. It is clear to my mind that the term "value of the articles" does not mean cost of the articles, for if the Legislature intended that term "value" meant "cost" it could have easily used the word cost instead of the word value. It seems to me, however, that we get some indication as to what the Legislature intended the word "value" to mean, if we look to the nature of the articles mentioned in the Second Schedule to the Act. The articles are gold, silver, plated articles, pearls, precious stones, jewels, watches, Government securities, *hundis*, bills of exchange, paintings, silks, etc., and if we bear in mind the object of section 75, which is that the railway administration receiving the expected article, may be apprised of its nature in order that it may give a proportionate degree of protection and that as it incurs an additional danger and risk, it should have an increased compensation, it is clear that articles with which the Legislature is dealing are valuable articles whose intrinsic value is appreciable in the market. I, therefore, hold that value of the articles in section 75 means intrinsic value of the articles, *i. e.*, market value, *i. e.*, the price for which they would reasonably sell at the time in the market as well as the value in the market independently of any circumstances peculiar to the plaintiff. I am fortified in this opinion by the cases of *Stoessiger* v. *South Eastern Railway Co.* (1) and *Blankensee* v. *London and North Western Railway Co.* (2). The result is that the preliminary issue must be found in the negative and against the defendants. But assuming that the interpretation I have put upon the term "value" is erroneous and that the value of the account books in question exceeds Rs. 100 by adding something for the written portion contained in them and that the person sending or delivering the parcel was bound to declare

(1) (1854) 23 L. J. Q. B. 293; 3 El. & Bl. 549; 2 C. L. R. 1595; 18 Jur. 605; 2 W. R. 375; 118 E. R. 1248; 23 L. T. (o. s.) 65; 97 R. R. 644.

(2) (1882) 45 L. T. 761.

its value and contents and did not do so and the loss occurred, then the question for determination is: "Does section 75 of the Indian Railways Act, 1890, give absolute protection to the Railway Company for loss under every circumstance?" Mr. Setalvad for the plaintiff has contended that section 75 does not apply to a case of loss by misdelivery and that the application of the section must be limited to the loss which occurs in their capacity as carriers, and that once the goods reach its destination safely, the capacity of the Railway Company as carriers ceases and that thereafter they hold them as bailees, and that loss under section 75 means loss to the Railway Company and not loss to the owner. In my opinion loss, on the true construction of section 75, is a loss by the carrier such as by abstraction by a stranger or by his own servants or by losing them from vehicles in the course of carriage or by mislaying them so as not to know where to find them and the like. It includes temporary as well as permanent loss. I, therefore, hold that on the true construction of section 75 of the Indian Railways Act, 1890, loss for which a Railway Company is protected from liability must be loss to the Railway Company itself, and it must be loss which occurs while the goods are in their custody as carriers and cannot apply to a loss to the owner, and this is clear from *Hearn* v. *London and South Western Railway Co.* (3), where it was held that the loss or injury to goods against which a career is protected by 11 Geo. IV and I Will 4, C. 68 (which is practically in the same terms as section 75) is a loss by the carrier of the articles committed to him or injury to them whilst in his care, and not a loss sustained by the owner in consequence of non delivery of the articles in due time or altogether, or the loss of the use of the articles by him. I think the interpretation put on the word "loss" by Chatterji, J., in *Changa Mal* v. *Bengal N. W. Railway Co.* (4) is correct, where he held that negligent misdelivery of goods to a person other than the owner is not such a loss of goods within the meaning of section 75. The following authorities were cited at the Bar: *Heugh* v. *London and N. W. Railway Co.* (5), *M'Kean* v. *McIver* (6), *Stephenson* v. *Hart* (7), *Millen* v. *Brasch* (8), *Morritt* v. *North Eastern Railway Co.* (9). After giving the best consideration to them, the principles deducible from these authorities are that whether the goods are to be delivered to the consignee at his house or at the termination of the journey depends on agreement and on the usual course of business. If the goods are delivered at the house to which they are addressed, the carrier has done all he contracted to do and the mere fact that he delivers to some other person than the consignee at that house is no proof of breach of duty on his part. But if he delivers at any other place to any person other than the consignee, he does so at his peril. But where the carrier is not bound to deliver at the house of the consignee, his liability as carrier ceases when he has brought the goods to the station of destination and has tendered or delivered them within a reasonable time to the consignee or has allowed the consignee reasonable time in which to remove the goods. What that time is must depend upon the circumstances of each particular case.

In this case the parcel arrived at Nagpur safely and was delivered by the agent of the Railway Company to a person other than the consignee and as the loss occurred after delivery to the wrong person, I hold that section 75 of the Indian Railways Act offers no protection to the defendant Company and, therefore, the preliminary issue must be found against the defendants and in the negative. Costs of the hearing of the preliminary issue will be costs in the cause.

Order accordingly.

(3) (1875) 10 Ex. 793; 3 C. L. R. 597; 44 L. J. Ex. 80; 1 Jur. (N. S.) 236.

(4) 6 P. R. 1897.

(5) (1870) 5 Ex. 51; 39 L. J. Ex. 48; 21 L. T. 676.

(6) (1871) 6 Ex. 36; 40 L. J. Ex. 30; 24 L. T. 559.

(7) (1828) 4 Bing. 476; 1 Moo. & P. 357; 6 L. J. C. P. (o. s.) 97; 130 E. R. 851; 29 R. R. 602.

(8) (1883) 10 Q. B. D. 142; 52 L. J. Q. B. 127; 47 L. T. 685; 31 W. R. 190; 47 J. P. 180.

(9) (1876) 1 Q. B. D. 302; 45 L. J. Q. B. 289; 34 L. T. 940; 24 W. R 386.

BISHESWAR AHIR v. BRIJRA MISSER.

PATNA HIGH COURT.
CIVIL REVISION No. 192 OF 1917.
January 31, 1918.
Present:—Mr. Justice Roe and
Mr. Justice Jwala Prasad.
BISHESWAR AHIR AND OTHERS—
DEFENDANTS—APPLICANTS
versus
BRIJRA MISSER AND OTHERS—
PLAINTIFFS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115, O. XXIII, r. 1—Withdrawal of suit with liberty to bring fresh suit—Formal defect—Revision—High Court, whether can interfere with order allowing withdrawal.

The High Court has power to interfere in revision with an order of a lower Court allowing the plaintiff to withdraw his suit with permission to bring a fresh suit. [p. 407, col. 2.]

Where the defendant sets up a plea that there is a formal defect in the plaint, the Court has jurisdiction to pass an order under Order XXIII, rule 1, of the Civil Procedure Code. [p. 407, col. 2.]

Civil revision from an order of the District Judge, Shahabad, dated the 24th March 1917.

FACTS.—The plaintiff brought a suit for redemption of two mortgages in favour of defendent No. 1. It was alleged that the mortgagee had wrongfully and fraudulently caused the entry of the name of defendants Nos. 2 and 3 in the *khatian* as tenants of the lands hypothecated in the two mortgages, that defendants Nos. 2 and 3 were never the tenants of the lands and that the lands were *zirat* of the plaintiffs. The plaintiff, therefore, prayed for *khas* possession of the lands after redemption. The defendants Nos. 2 and 3 pleaded that the lands were not *zirat* but were their occupancy holdings hence they could not be ejected. They further pleaded that the suit was bad for misjoinder of parties and causes of action. The first Court decreed the suit as against the mortgagee defendant but dismissed the suit as against defendants Nos. 2 and 3. Against this decision the plaintiffs appealed to the District Judge and the mortgagee defendant filed a cross-appeal. On the date of hearing the plaintiffs applied to the Appellate Court to withdraw the suit with liberty to institute a fresh suit on the grounds (1) that there was a formal defect in the suit, (2) that the plaintiffs wanted to produce some documentary evidence by which they hoped to successfully establish their case as against defendants Nos. 2 and 3 and which they could not produce before. The Appellate Court allowed the plaintiffs to withdraw the suit with liberty to bring fresh suit as against defendants Nos. 2 and 3 on condition of their paying costs to those defendants.

Against the aforesaid order defendants Nos. 2 and 3 applied to the High Court in revision.

Mr. *Parmeshwor Dayal*, for the Opposite Party, raised a preliminary objection and submitted that the applicants were not entitled to get the order of the Court below set aside in revision. This Court could interfere under section 115, Civil Procedure Code, in a matter where the Court below had decided the case between the parties. Allowing a party to withdraw a suit with liberty to bring a fresh suit is no decision of the dispute between the parties.

He relied on *Bansi Singh* v. *Kishun Lall Thakur* (1) and further cited *Mohammad Ayub* v. *Mohammad Mahmood* (2), *His Highness The Nizam of Hyderabad, In re* (3) which he submitted supported his contention in principle.

Mr. *Jagar Nath Prasad*, for the Applicants, contended that the application for leave made by the opposite party disclosed no valid ground for granting permission to withdraw. The plaintiff wanted to withdraw so that he might find an opportunity to produce fresh evidence which he did not produce before. There was no sufficient ground within the meaning of Order XXIII, rule 1, to enable the plaintiffs to withdraw with permission to bring another suit. Discovery of new evidence without any allegation and proof that it could not be discovered previously on diligent search was legally no ground for permission to withdraw with liberty to sue again. Moreover, the Court below having assigned no reason for granting the leave, the order was illegal.

Mr. *Parmeshwor Dayal* contended that in this case there was a defect of misjoinder of parties and causes of action. The suit was a suit for redemption against the mortgagee, the plaintiffs could not implead in this suit defendants Nos. 2 and 3 who were mere tenants and eject them. The defendants Nos. 2 and 3,

(1) 26 Ind. Cas. 203; 41 C. 632.
(2) 6 Ind. Cas. 831; 32 A. 623; 7 A. L. J. 741.
(3) 9 M. 256; 3 Ind. Dec. (N. S.) 575.

had nothing to do so with the mortgage. The prayer for redemption as against defendant No. 1 and that for ejectment against defendants Nos. 2 and 3 were two distinct reliefs based on two distinct causes of action. The Court below was justified in allowing the plaintiff to withdraw his suit with liberty to bring a fresh suit within limitation.

Misjoinder of parties and causes of action is a formal defect which is sufficient ground for withdrawal under Order XXIII, rule 1 of the Civil Procedure Code. The defendants had taken the plea of defect of misjoinder of parties in the written statement, it is on account of that plea that the case was withdrawn. It is not open to them now in this Court to say that there was no formal defect in the suit. It is for this formal defect that the Court below granted the plaintiff leave to withdraw the suit. The Court was not bound to give its reasons for its order under Order XXIII, rule 1.

Mr. *Jagar Nath Prasad* replied.

JUDGMENT.—The facts of this case are that the opposite party before us were plaintiffs in an action framed so as to include relief sought against mortgagees from whom redemption was claimed by the plaintiffs and also against tenants who, it was alleged, had been inducted on to the lands by the mortgagees. The Cout of first instance found that the tenant defendants were in fact ancient cultivators who did not derive their tenancies from the mortgagees. He dismissed the suit against the tenant defendants and made a decree as against the mortgagees giving a right to redeem on certain terms; he also awarded costs against the mortgagees.

From this decree the opposite party appealed to the District Court. The mortgagee defendants put in a cross-objection to the costs allowed in the Court below. The tenant defendants put in a cross-appeal on the ground that the whole action should have been dismissed for misjoinder of causes. Upon this the opposite party filed an application to withdraw his suit on the ground that there were "some formal defects." We must admit that we gather generally from the petition for leave to withdraw from the suit that it was made rather on the ground that there had been an omission to put upon the record in the Court of first instance certain important documents which were in his possession than on the ground that the suit must fail by reason of a formal defect in the plaint. Leave was given to withdraw with permission to bring a fresh suit upon the same cause of action subject to payment of the full costs of the suit and of the appeal to the tenant defendants before the institution of the fresh suit.

By the opposite party before us it is contended that we have no power to revise the order made, on the ground that leave given to withdraw the suit is not a case within the meaning of that section. A solitary decision, *Bansi Singh* v. *Kishun Lall Thakur* (1), is quoted in support of this contention. With great respect to the learned Judges who decided that case we are of opinion that it is not in accordance with the established practice of every Court in India including the Calcutta High Court itself. There are innumerable cases in which the High Court has interfered in cases precisely similar to the one before us. It is sufficient to quote in this connection *Kharda Co. Ld.* v. *Durga Charan Chandra* (4) and the cases referred to therein.

On the merits, however, we are of opinion that the application has failed. It is not for us to say whether the Court below did really give leave to withdraw because the case had not been proved in the lower Court, or whether at the back of its mind there was a feeling that there had been a formal defect in the suit. From the moment that the defendants Nos. 2 and 3 alleged in their cross-appeal that the suit must fail in appeal owing to a formal defect in the pleadings, the Court had jurisdiction to pass any order it pleased under Order XXIII, rule 1. We, therefore, dismiss this application with costs, hearing fee two gold *mohurs*.

Appeal dismissed.

(4) 5 Ind. Cas. 187; 11 C. L. J. 45.

AMRIT NARAYAN SINGH *v.* GAYA SINGH.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

November 22, 1917.

Present:—Lord Parker of Waddington, Lord Wrenbury, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.

AMRIT NARAYAN SINGH—
PLAINTIFF—APPELLANT

versus

GAYA SINGH, SINCE DECEASED, AND OTHERS —DEFENDANTS—RESPONDENTS.

Hindu Law—Reversioner, right of, nature of—Guardian of minor reversioner, whether can bind his interest.

A Hindu reversioner has no right or interest *in præsenti* in the property which a female owner holds for her life, until it vests in him on her death, should he survive her. Till that time he has nothing to assign or to relinquish or even to transmit to his heirs His right becomes concrete only on her demise; until then it is a mere *spes successionis*. His guardian, if he happens to be a minor, cannot bargain with it on his behalf or bind him by any contractual engagement in respect thereto. [p. 410, col. 2; p. 411, col. 1.]

A Hindu died leaving a widow *R.*, a daughter *K.* and a daughter's son *A.* Mutation of his estate was effected in the name of his widow and on the latter's death in the name of his daughter *K.* His collaterals disputed *K.'s* right to succeed to his estate and the matter was referred to arbitration. *K.'s* husband represented *K.* and her son *A.*, who was a minor, in the arbitration proceedings. Finally a compromise was arrived at and the arbitrators gave an award in the terms of the compromise. On *K.'s* death *A.* sued for the possession of the estate:

Held, that he was not bound by the award, inasmuch as his right at the time of the arbitration was a mere *spes successionis* which could not be dealt with on his behalf by his father. [p. 411, col. 1.]

Appeal from a judgment and decree of the Calcutta High Court, dated the 16th July 1913, reversing a decree of the Subordinate Judge, Patna, dated the 20th January 1909.

FACTS.—One Jhamman Singh died leaving a widow Radha Koer, a daughter Kar Koer and Amrit Narayan, the daughter's son, then a minor. The widow applied for mutation, but her application was opposed by the defendants, who were collateral relations of the deceased. Radha Koer's name was registered but she died in 1853. Disputes as to succession again arose, and Kar Koer and her husband Rajander Singh, father and guardian of the minor Amrit Narayan Singh, on the one side, and the defendants on the other executed an agreement to refer the matter to arbitration. But before the arbitrators could decide anything the parties entered into a compromise, which was placed before the arbitrators, and they were invited to make and did in fact make an award in accordance with the compromise. Under the compromise the properties in suit were awarded to the defendants. On the death of Kar Koer in 1905 the appellant Amrit Narayan brought the present suit to recover possession of these properties from the defendants. The Subordinate Judge found all the material issues in his favour and decreed the suit. He found that the plaintiff was not a party to the arbitration proceedings, that his father was not appointed his guardian under the provisions of Act XL of 1858, that the compromise and award were nullities and that the judgments of the District Judge and the High Court by which the award was made a decree of Court were not binding on the appellant. The defendants appealed to the High Court, which allowed the appeal and dismissed the suit.

Mr. *De Gruyther*, *K. C.*, (with him Mr. *B. Dube*), for the Appellant.—Jhamman Singh was admittedly separate and the appellant was, therefore, entitled to inherit his estate. The suit was well within time under Article 141 of the Limitation Act, 1877. Article 95 of that Act does not apply. Plaintiff's claim was not barred by the proceedings in arbitration taken by his mother and father. There was really no arbitration. The award was based on the compromise which Kar Koer and Rajander Singh made. The appellant was not a party to the compromise and the same was made against his interest. The plaintiff did not possess any interest whatever in Jhamman Singh's estate during the lifetime of his mother. His right was merely *spes successionis* and was not transferable. In any case the Civil Courts which dealt with the award did not adjudicate upon the reversionary right of the plaintiff and the award was made a decree of Court against Kar Koer alone. Further section 3 of Act XL of 1858 was intended for the protection of minors, but Rajender Singh was not appointed guardian of the minor. Reference was made to the following:—

AMRIT NARAYAN SINGH v. GAYA SINGH.

Sham Sundar Lal v. *Achhan Kunwar* (1), *Musammat Bibi Walian* v. *Banke Behari Pershad Singh* (2), *Nogendro Chundro Mittro* v. *Sreemutty Kishen Soondery Dossee* (3).

Mr. *A. M. Dunne*, *K. C.*, for the Respondents.—The plaintiff's mother represented the whole estate and the proceedings by which she sought to set aside the award were properly heard and decided and she failed. It was, therefore, a good judgment and was binding on the reversioners who succeeded the widow. *Katama Natchiar* v. *Rajah of Shivagunga* (4).

Further, the arbitrators decided the dispute by holding that the plaintiff and his mother had no interest according to the religious customs and usage of the parties. The minor was a party to the arbitration and the award was binding on him.

No reply was called for.

JUDGMENT.

MR. AMEER ALI.—This is a suit by a Hindu reversioner to recover possession of certain properties that originally belonged to his maternal grandfather, Jhamman Singh. He alleges that the defendants, respondents before this Board, wrongfully possessed themselves of these properties under colour of certain arbitration proceedings whilst the estate was held by his mother, Kar Koer, as a female owner under the Hindu Law. Kar Koer died in 1905, and this action was brought in 1908. The suit is, therefore, clearly within time. The sole question for determination in this appeal is whether the arbitration proceedings and the decree on the award which gave to the predecessors of the respondents possession of these properties are binding on the appellant.

On Jhamman's death Radha Koer, his widow, applied for the registration of her name in place of her deceased husband in the Collector's records. Her application was opposed by some of Jhamman's agnatic male relations, whom the respondents now represent; they claimed the property both under the general Hindu Law as also under some undefined family custom. Their objections were overruled by the Revenue Courts, and Radha Koer's name was duly entered in the Collector's register. Radha died shortly after in 1864, and was succeeded in the possession of the estate by her daughter, Kar Koer, the mother of the appellant. The agnates raised a fresh contest as to her right to hold the property. In the disputes that followed, and which were eventually referred to the arbitration of a number of caste-men, she seems to have been represented by her husband, Rajander Singh. There is nothing, however, on the record to show if he had any authority to act for her as her agent. Before the arbitrators had taken any action in the matter, a compromise was arrived at, in which also Rajander purported to act both for her and her infant son, the appellant. Under this compromise, Kar Koer abandoned, in favour of the agnates, all right to the immoveable property of her father, receiving on her part, besides some moveable property, two small fractional shares in certain lands which stood in her and in her mother's names. The effect of the arrangement was to extinguish completely the reversionary interest of the appellant in his grandfather's estate.

The compromise was placed before the arbitrators and they were invited to make an award in accordance therewith, which they did. It is to be noted that there is nothing on the record to show that the proceedings before the arbitrators ever came to the knowledge of Kar Koer or that she knew of the compromise and its effect. In fact, it appears that Kar Koer did not acquiesce in the award, and the opposite party had to apply to the Civil Court under the provisions of section 327 of Act X of 1859 (the law that regulated at the time the procedure of the Civil Courts in India) for a decree on the award. The Court of first instance held that all the proceedings in connection with the compromise and the award had been without Kar Koer's knowledge It accordingly dismissed the application of the agnates under section 327.

(1) 25 I. A. 183; 21 A. 71; 2 C. W. N. 729; 7 Sar. P. C. J. 417; 9 Ind. Dec. (N. S.) 755 (P. C.).

(2) 30 I. A. 182; 7 C. W. N. 774; 30 C. 1021; 5 Bom. L. R. 822; 8 Sar. P. C. J. 512 (P C.).

(3) 19 W. R. 133.

(4) 9 M. I. A. 539 at p. 604; 2 W. R. P. C. 31; 1 Suth. P. C. J. 520; 2 Sar. P. C. J. 25; 19 E. R. 843.

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They appealed to the District Judge, who apparently considered that as Rajander, her husband, was a party to the compromise, her denial could not be believed. He accordingly made a decree "to have the award filed and enforced under section 327." From this decision Kar Koer preferred a "special appeal" to the High Court of Calcutta, which was dismissed. She then applied for a review of judgment, in which she was equally unsuccessful. The result of these decisions was to put her out of possession of the properties covered by the compromise, and which form the subject-matter of the present action. Although the respondents or their predecessors appear to have obtained possession of these properties after the proceedings in the High Court, which terminated in 1865, their names were not registered in the Collectorate in substitution of Radha Koer until 1877.

It is to be noticed that neither in the judgment of the District Judge nor in that of the High Court is there any reference to the right of Kar Koer's infant son or to the effect of the compromise which culminated in the award on his reversionary interest. Had the question been presented in any shape to the Courts that were dealing with the matter, it is hardly likely their judgments would not have contained some expression as to whether the compromise and the award based thereon were or were not for the benefit of the reversioner.

In this action the plaintiff charged that the arbitration proceedings, together with the compromise and award, were fraudulent and taken and entered into without the knowledge or authority of Kar Koer; that in any event he was not bound by them. The defendants, on the other hand, among other pleas, urge that the award and decree precluded the plaintiff from maintaining the action. The Subordinate Judge of Patna, before whom the suit came for trial in the first instance, framed a number of issues on the several allegations of the parties, most of which have become immaterial in view of the shape the case took on appeal to the High Court. The Trial Judge, in a well-reasoned and exhaustive judgment, held in substance that Jhamman at the time of his death was separated from his agnates; that the defendants had failed to prove the custom they alleged relating to the exclusion of widows and daughters; and that the plaintiff was not properly represented in the arbitration proceedings or in the proceedings before the Civil Courts, and was not bound by the award or the decree based thereon. He accordingly decreed the plaintiff's claim.

From this decree the defendants appealed to the High Court of Calcutta, where the case proceeded on the assumption that Jhamman was separate from his agnates, and that assumption has not been challenged before this Board. The contest in the High Court turned solely on the binding effect of the award and the decree enforcing it on the rights of the infant reversioner.

The learned Judges state thus the questions they had to determine, *viz*:—

"(1) Whether Rajander Singh had power to refer the matter on behalf of his minor son to arbitration; (2) whether the plaintiff was properly represented in the proceedings in the Civil Court under section 327 of Act VIII of 1859; and (3) and if he was, whether he can now treat the decree, which was based on the award, as a nullity, *and* claim possession of these properties at this distance of time."

After answering the first two questions in the affirmative, the learned Judges decided the third against the plaintiff, and reversing the decree of the Subordinate Judge, dismissed the plaintiff's suit.

Their Lordships are unable to concur in the propositions on which the learned Judges of the High Court have based their judgment. With respect, in proceeding to consider, whether Rajander Singh, the plaintiff's father, had power to refer the matter on behalf of his minor son to arbitration, they seem to have misconceived the legal position of the infant under the Hindu Law. Evidently they thought he had a right which could form the subject of bargain. This is an obvious mistake; a Hindu reversioner has no right or interest *in præsenti* in the property which the female owner holds for her life. Until it vests in him on her death, should he survive her, he has nothing to assign or to relinquish, or even to transmit to his heirs. His right becomes concrete only on her demise; until

then it is mere *spes successionis*. His guardian, if he happens to be a minor, cannot bargain with it on his behalf or bind him by any contractual engagement in respect thereto. Rajander's action, therefore, in referring to arbitration any matter connected with his son's reversionary interest was null and void.

The learned Judges seem also to have lost sight of the fact that the award actually made was based on the compromise; it gave effect to the agreement at which the parties had arrived. Even had the minor an existing right, the father would have no power to enter into an arrangement which wiped out all his interest without any consideration, for the little property that was left to Kar Koer was taken by her under the compromise, and not by virtue of her right to her father's estate. It is difficult to see how the learned Judges came to the conclusion that the compromise was to the benefit of the minor.

Apart from the question whether Rajander could represent his son under the proceedings under section 327 of Act VIII of 1859 without a certificate under section 3 of Act XL of 1858 on which their Lordships desire to express no opinion, it is abundantly clear that the Civil Courts did not purport in any shape or character to deal with or adjudicate upon the reversionary right of the infant. The decree enforcing the award was based on the finding that Kar Koer had acquiesced by her husband in the reference to arbitration, and that she had similarly consented to the compromise, and was, therefore, bound by the award. Beyond that the order of the District Judge, which was affirmed by the High Court, did not go; it affected her interest, and her interest only.

It may be noted here that on the appeal to the High Court the minor was not a party.

In the present appeal it has been attempted on behalf of the respondents to sustain the decree of the High Court on the basis of the *dictum* of the Judicial Committee in the well-known *Shivagunga case* [*Katama Natchiar* v. *Rajah of Shivagunga* (4)] where, dealing with the question under what circumstances a decree against the widow may bind the reversioners, the Board expressed itself thus:—

"That unless it could be shown that there had not been a fair trial of the right in that suit, or, in other words, unless that decree could have been successfully impeached on some special ground, it would have been an effectual bar to any new suit by any person claiming in succession to Angamootoo. For assuming her to be entitled to the *zemindari* at all, the whole estate would for the time be vested in her, absolutely for some purposes, though in some respects for a qualified interest; and until her death it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the Courts of this country as to tenants in tail representing the inheritance would seem to apply to the case of a Hindu widow; and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow."

In the present case their Lordships think it enough to say that the proceedings culminating in the decree by which the plaintiff is sought to be bound are entirely devoid of the conditions on which and which alone a reversioner can be shut out from the assertion of his right, which comes to him altogether independently of the female owner.

Their Lordships are of opinion that the judgment and decree of the High Court should be reversed and the decree of the Subordinate Judge restored. And they will humbly advise His Majesty accordingly. The appellant will have his costs in the High Court and in this appeal.

Appeal allowed.

Solicitors for the Appellant:—Messrs. *Watkins & Hunter.*

Solicitors for the Respondents:—Messrs. *Barrow, Rogers & Nevill.*

CHATTARPATT SINGH *v.* SURENDRA NATH SINGH.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER NO. 289 OF 1916.

July 16, 1917.

Present:—Mr. Justice Chapman and Mr. Justice Jwala Prasad.

Babu CHATTARPATT SINGH—JUDGMENT-DEBTOR—APPELLANT

versus

Babu SURENDRA NATH SINGH—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 54, 90—Execution—Attachment—Sale proclamation, irregular—Under-valuation, effect of—Application to set aside sale—Conspicuous part of property, what is.

Where an under-valuation of the property to be sold made in the sale-proclamation is obviously a gross misrepresentation, the sale will be set aside. [p. 412, col. 2.]

Where a right of fishing which extended over 138 villages and the annual income realised from which was over Rs 1,000 was described in the sale proclamation merely by a *tauzi* number and a name, the value of the estate being given at Rs. 2,500, and it was sold for that sum:

Held, that the sale proclamation was materially irregular both in the description of the property and in the valuation put upon it and that for that reason alone the sale should be set aside. [p. 413, col. 2.]

Where the property to be sold consists of a right of fishing over a length of stream extending over several miles, it is not possible to say that any particular spot on the stream is a conspicuous part of the property within the meaning of rule 54 of Order XXI of the Code of Civil Procedure. In such circumstances the principle of the rule must be applied and a copy of the order must be conspicuously displayed at various portions of the estate In addition the sale should be advertised either in the local newspapers or in the Gazette. [p. 413, col. 1.]

Appeal against the order of the Subordinate Judge, Purneah, dated the 30th June 1916.

Messrs. *Mritunjoy Lal* and *Krishna Sahay*, for the Appellant.

Messrs. *Baikuntha Nath Mitra* and *Naresh Chandra Sinha*, for the Respondent.

JUDGMENT.

CHAPMAN, J.—This is an appeal by the judgment-debtor. He applied to have an execution sale set aside upon the ground of material irregularity in publishing and conducting the sale. His application was refused by the Subordinate Judge and hence his appeal to this Court.

The property which has been sold is a right of fishing in a river which is partly silted up. This river flows through the *thanas* of Auraria and Kasba Amore in the District of Purnea. The evidence is that in Auraria *thana* the river is for the most part silted up, but there still remains in *thana* Kasba Amore a sufficient length of the river to cover a distance approximately of 20 miles as the crow flies and considerably more than that following the line of the river, which is a very winding one.

The actual collections received from this large estate amounted to Rs. 900 out of a rental of Rs. 1,200 odd. In addition to that there was a rental received from certain *se-patanidars* of Rs. 739. The rental payable for the estate which was a *patni* estate was Rs. 601. The actual realised income annually, therefore, from the property was over Rs. 1,000. It was sold for Rs. 2,500, a price which was obviously grossly inadequate, both having regard to the vast extent and promise of the property and having regard to the actual realisations from it.

In the sale proclamation there is no indication that the estate is of this magnitude. The estate is described merely by a *tauzi* number and a name, in fact the estate ran through as many as 138 villages. There is nothing to indicate this in the notification and the valuation stated in the sale proclamation is Rs. 2,500. It is inconceivable that the decree-holder could have thought such a valuation reasonable in the case of an estate of such magnitude, even though he may not have been aware what the actual income realised from the estate was. The Privy Council have held in the case of *Saadatmand Khan* v. *Phul Kuar* (1) that where an under-valuation of the property made in the sale proclamation is obviously a gross misrepresentation the sale will be set aside.

The learned Subordinate Judge in dismissing the application does not appear to have applied his mind to this question. It appeared to him to be necessary only to consider whether the property had been actually proclaimed for sale or not. To so decide the matter was to act in contravention of the principle laid down by the Privy Council in the case to which I have above referred. I am of opinion that the sale proclamation was materially irregular, both in the description of the property and in the valuation put on it, and for that reason alone we should be justified in

(1) 20 A. 412; 2 C. W. N. 550; 25 I. A. 146; 7 Sar. P. C. J. 380; 9 Ind. Dec. (N. S.) 624 (P. C.).

setting the sale aside. I am confirmed in this view when I come to consider the manner in which the sale was proclaimed. In this long stretch of country 20 miles or more in length, there is one village containing some 30 or 40 houses called Basbeli in which there is a pool of 100 yards long and 150 yards broad. The evidence is that either upon the edge of the water here or upon the land by the side of the pool a notification proclaiming the sale was posted. I am not prepared to differ from the learned Subordinate Judge as to the question of fact whether this notification was actually posted there or not: but it is certainly on the evidence quite impossible to say whether the notification was actually posted on the estate, that is to say, in the water or not. It also seems impossible to say upon the evidence that there was any beating of drum in any village other than the village of Basbeli. It would be difficult to hold that this was a proper compliance with the law in an estate of this magnitude. The rule which is applied is that laid down upon the subject of attachment in rule 54 of Order XXI of the First Schedule of the Code of Civil Procedure, which requires "that the order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode and a copy of the order shall be affixed at some conspicuous part of the property." When the property consists of a right of fishing over a length of stream which may quite reasonably extend to some 30 or 40 miles it is not of course possible to say that any particular spot on that stream is a conspicuous part of the property. In such circumstances the principle of the rule must be applied and a copy of the order must be conspicuously displayed at various portions of the estate. I am of opinion that the principle of this rule has not been applied in the present case when a copy of the order was affixed in only one out of 138 villages. In addition, we think that it would have been certainly desirable in such a case to have adopted some other method of advertising the sale either in the local newspapers or in the Gazette. The result of the inadequate description of the property in the sale proclamation, the gross under-valuation and this perfunctory method of proclaiming the property was that nobody appeared at the sale to make any bid. The decree-holder was the sole bidder and purchased the property himself at Rs. 100 over the valuation which he had stated in the sale-proclamation. All that is required of us to find, in justifying the setting aside of the sale, is that on the facts we are of opinion that substantial injury has resulted; and on the facts even in this case I am entirely satisfied that there has been substantial injury. I am not deterred in setting aside the sale by the fact that on the day of sale the judgment-debtor tried to stay the sale by raising certain objections of want of jurisdiction, that the decree had been otherwise satisfied, without expressly raising any objection to the valuation of the property. I am also not deterred from decreeing this appeal by the fact that the other decree-holders were at the time applying for a rateable distribution and that they might have joined in the bidding. Finding as I do that the property was not sufficiently described, that it was grossly undervalued and that it was not properly proclaimed, I would allow the appeal and set aside the sale. The judgment-debtor is entitled to his costs.

JWALA PRASAD, J.—I agree.

Appeal allowed.

CALCUTTA HIGH COURT.

RULE No. 686 OF 1917.

January 25, 1918.

Present:—Mr. Justice Teunon and Mr. Justice Newbould.

THE CORPORATION OF CALCUTTA—PLAINTIFF—PETITIONER

versus

Sreemati HEMANGINI DASSI WIDOW OF BROJA NATH BOSE AND OTHERS DEFENDANTS—OPPOSITE PARTIES.

Calcutta Municipal Act (III B. C. of 1899), *ss.* 299, 593—*Notice, service of, on one of several co-owners of premises, validity of.*

The service of a notice under section 299 of the Calcutta Municipal Act upon one of the co-owners of the property in the manner provided in section 593 is effectual against the other co-owners. [p. 414, col. 2.]

Rule against the order of the Small Cause Court Judge, Sealdah, in Suit No. 1202 of 1917.

FACTS of the case appear from the judgment.

Dr. *Dwarkanath Mitter*, for the Petitioner.—The learned Small Cause Court Judge fell into an error in reducing the Corporation's claim to the extent of one-half on the ground that there had been no proper service of notice on one of the two co-owners of the premises in question. The notice issued under section 299 of the Calcutta Municipal Act has been served in the manner provided in section 593 of the Act. The sections are quite clear that when there are several owners of the same premises notice may be served upon one of them. Reads sections 299, 593, 597.

Mr. *S. N. Banerjee* (with him Babu *Probodh Kumar Das*), for the Opposite Party.—The requisite notice had not been served in the manner provided in section 593 of the Act. Furthermore, the Chairman can issue the notice after obtaining sanction from the General Committee of the Corporation, but there is nothing on the record to show that such sanction or approval of the General Committee had been obtained by the Chairman prior to the issue of the notice. The notice, therefore, was bad in law.

Then, again, the Chairman can demand the costs of the work done by the Corporation if the owner himself was bound to do that work; the owner can be compelled to make connection with the Municipal drain only where such drain is situated within 100 feet from the premises. In this case as the Corporation has not shown the existence of such a drain within the requisite distance the defendant is not liable to pay the amount claimed.

Dr. *Dwarkanath Mitter*, in reply.

JUDGMENT.—In this case the petitioner is the Chairman of the Calcutta Corporation. He sued in the Small Cause Court at Sealdah to recover the sum of Rs. 325, being the cost of certain work done by him upon premises No. 45, Karaya Bazar Road, under the provisions of section 597 (2) of the Calcutta Municipal Act. The defendants in the suit were the two co-owners who hold, it appears, equal undivided shares in the property in question. One of those did not appear. The second appeared and pleaded that there had been no service upon her of the notice issued under the provisions of section 299 of the Act. The learned Small Cause Court Judge gave effect to this contention and dismissed the suit as against her and decreed the suit against defendant No. 1, upon whom notice had been admittedly served, to the extent of half the claim. Thereupon at the instance of the Chairman of the Corporation this Rule was issued upon both the defendants calling upon them to show cause why the claim of the plaintiff should not be decreed in full against both. As in the Court below, the first defendant does not appear. The second defendant appears and contends, first, that it has not been shown that there is a Municipal drain situated at a distance not exceeding 100 feet from the property, secondly, that it has not been shown that to the issue of this notice the Chairman had obtained the approval of the General Committee and lastly, that no attempt had been made to serve the prescribed notice upon her in the manner provided in section 593.

It is not contested that the work has not been done and it is not suggested that the claim made is unreasonable. With regard to the first two contentions, apart from any presumption that might possibly arise from the failure on the part of the owners to prefer any objection under the provisions of section 598 of the Act, it does not appear that these matters were in fact specifically pleaded in the written statement, and it is clear from the manner in which the case was conducted in the Trial Court that they were not put in issue in that Court. It is too late for the defendant to raise those questions now. With regard to the service of notice we find that as a matter of fact the notice addressed to the owner of the premises has been served upon the co-owner defendant No. 1 by delivery to a male member of her family. The provisions of the section to which we have just referred make it necessary for the Corporation in any such notice to name the owner, and the section further provides that when there are more owners than one, service may be effected upon any one of them. It would rather appear that the learned Small Cause Court Judge had overlooked the provisions of this section, and service upon one being effectual against the other it is clear that against both the defendants there should be a decree in full.

We accordingly make this Rule absolute and allow the plaintiff's claim in full against

both the defendants with costs of the first Court against both, and also the costs of this Rule against No. 2. We assess the hearing fee at three gold *mohurs*.

Rule made absolute.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND RENT APPEAL No. 55 OF 1916.

February 12, 1917.

Present:—Mr. Lindsay, J. C.

DORI LAL—PLAINTIFF—APPELLANT

versus

Seth RAM CHARAN LAL—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 164—Profits, suit for, against lambardar—*Interest, when allowable—Accounts, falsification of, effect of*—Lambardar, *liability of.*

In a suit by a co-sharer against the *lambardar* for his share of the profits, the *lambardar* is liable to pay interest on the amount of profits awarded to the co-sharer, where it is found that the *lambardar* has falsified the accounts. [p. 416, col. 1.]

Appeal from the decree of the District Judge, Sitapur, dated the 25th July 1916, modifying the order of the Deputy Collector, First Class, Kheri, dated the 25th April 1916.

Babu *Ramapat Ram*, for the Appellant.

Mr. *P. C. Gupta*, for the Respondent.

JUDGMENT.—This is a second appeal arising out of a rent suit brought by the appellant against the respondent for the recovey of profits alleged to be due for the years 1320 to 1322 *Fasli*. The suit was decreed in part in the Court of first instance. The defendant appealed to the learned District Judge who reduced the amount which the first Court had allowed. The plaintiff now comes in second appeal to this Court and there are three points to be considered.

The first point is with regard to the plaintiff's claim in respect of what is called the *sawai* income of the village. The point taken in this respect is that the amount allowed to the appellant has been miscalculated by the lower Appellate Court. I have had some difficulty in following the judgment of the learned District Judge in this matter. In the statement of account filed along with the plaint the plaintiff had put down the *sawai* income of this village at Rs. 100 a year. The learned Judge in his judgment referring to the evidence of a *kanungo*, which is on the record, states that the *sawai* profits were estimated at Rs. 104-14-0 exclusive of *nazrana* and *farighkhata*. He also refers to a previous suit between the parties in which a Rent Court had held that the recurring *sawai* income was only Rs. 75 a year. He goes on to say that in the present case it was not shown that there was any special occasion during the years in suit on which *nazrana* was paid or that there was any *farighkhata* income. The Judge thought that no allowance in respect of these two items should be made and he then records his opinion that the amount of Rs. 104-14-0 is a fair estimate of the *sawai* income "of the three years." This is a matter in which I cannot follow the learned Judge of the Court below. He seems from what is said in an earlier part of his judgment to have accepted the *kanungo's* evidence and that evidence was to the effect that the income was Rs. 104 odd per annum, not Rs. 104 odd, for the whole three years. It seems to me therefore that there has been some mistake made in the calculation of the learned District Judge. If we take it that the *sawai* income was Rs. 104 odd a year and if we bear in mind that the plaintiff claimed Rs. 100 a year in this respect the proper amount allowable to him for three years was a sum of Rs. 50, that being the one-sixth share of this income to which he was entitled.

The next point made against the judgment of the learned Judge is that he has made a mistake in connection with the pay of a *sipahi* which was allowed to the defendant-respondent. This mistake is admitted by the learned Counsel for the respondent here. The Judge has deducted a sum of Rs. 48 from the amount allowed to the plaintiff. It appears that the plaintiff's share of expenses on this account only comes to Rs. 24 and not to Rs. 48.

The third point taken is that interest should have been allowed by the learned Judge. The learned Judge refused the claim for interest on the ground that there

was no proof that any demand had been made from the defendant who is a *lambardar*, and that it had been decided that in such circumstances interest was not payable. I am not disposed to agree with him in this. Presumably the case which the learned Judge had in his mind was one reported as *Mirza Sadik Husain Khan* v *Hafiz-ul-Rahman* (1). There it was held by Mr. Spankie that interest should not be allowed against a *lambardar*, unless it was shown that he had wilfully withheld his accounts or had done any act which might make him equitably liable to pay interest. In the present case it seems to me quite clear from the evidence on the record which both Courts have accepted that the *lambardar* has falsified the accounts. He put his agent in the witness-box to swear that there was no *sawai* income in the village. There is abundant evidence on the record to show that this statement was a false statement and as I have said the learned Judge himself accepted the evidence of a *kanungo* in this respect. In these circumstances I do not think the *lambardar* can be heard to say that he is not liable to pay interest to the plaintiff. I make the account therefore out as follows:—

Rs. 176-5-6 due to the plaintiff on account of collections made by the *lambardar*. Rs. 50 as his share of the *sawai* income. Total Rs. 226-5-6. From this must be deducted Rs. 24 the plaintiff's share of the cost of entertaining a *sipahi*. Balance Rs. 202-5-6.

Interest will run upon this at the rate allowed by the first Court and at six per cent. from the date of this Court's decree. I may mention here that the learned Counsel for the appellant raised a new point in argument and asked that a larger sum than Rs. 176-5-6 should be allowed to the plaintiff. This was on the basis of a statement made by one of the *patwaris* examined in the case. This point was not explicitly taken in the memorandum of appeal and I do not think it can be entertained at the present stage.

The result, therefore, is that the appeal is allowed to the extent above indicated and the appellant is entitled to have his costs both here and in the Courts below from the respondent.

Appeal allowed

(1) 6 O. C. 89 at p. 92.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 107 OF 1916.

January 18, 1918.

Present:—Mr. Justice Richardson and Mr. Justice Beachcroft.

Srimati BASEEMATI DEBI—DEFENDANT—APPELLANT

versus

Srimati TARIT BASANI DASSI—PLAINTIFF and CHEDI DOSADH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908) O. XLI, rr. 23, 25, O. XLIII, r. 1 (u)—Appeal—Pleadings and proof, variance between—Appellate Court, whether can raise new point—Remand for taking evidence and decision on new point—Appeal, whether lies.

It is an elementary rule that the determination of causes depends on the allegations made in the pleadings and the proof. [p. 418, col. 1.]

An Appellate Court is not entitled to raise new points involving fresh evidence in appeal and to remand the case for the trial of questions which never occurred to the parties previously. [p. 418, col. 1.]

In a suit brought by the plaintiff to establish her right of way over certain lands belonging to the defendant, the claim was based either on prescription under section 26 of the Limitation Act or on necessity. The Trial Court dismissed the suit on the ground that the plaintiff had failed to prove her case. On appeal the Subordinate Judge, although he concurred with the Trial Court in holding that on the evidence on the record the plaintiff had failed to prove that she was entitled to a right of way either on the basis of prescription or on the basis of necessity, went on to discuss the question whether plaintiff had a right founded either on custom or grant or some right to use the way as a village road or as a public road, and remanded the case to the Court of first instance to be re-heard not only on the evidence already on the record but on such further evidence as the parties might desire to adduce:

Held, (1) that the order of remand must be set aside and the suit remitted to the Court of Appeal in order that the appeal to that Court might be finally disposed of with reference to the pleadings and the proof; [p 418, col. 2.]

(2) that although this was not a case in which it was, strictly speaking, open to the Court of Appeal to make an order under rule 23,

of Order XLI, Civil Procedure Code, yet as the order appeared to be in form and substance an order under that rule and not under rule 25, an appeal lay against it. [p. 418, cols. 1 & 2.]

Appeal against the order of the Sub Judge, Hoogly, dated the 10th March 1916, reversing that of the Munsif, Hoogly, dated the 22nd December 1913.

FACTS appear from the judgment.

Dr. *Jadunath Kanjilal*, for the Respondent, raised a preliminary objection that the appeal was not maintainable as the order of remand complained of was not made under Order XLI, rule 23, but was an order under rule 25 of the same Order from which no appeal would lie.

Mr. *S. N. Banerjee* (with him Babu *Tarakeswar Pal Choudhry*), for the Appellant, submitted that although the Court of Appeal below could not make an order under rule 23, still the order was in form and substance made under that rule.

The Trial Court decided the suit on the pleadings and evidence adduced by the parties, but on appeal the lower Appellate Court remanded the case to the Trial Court for deciding the suit on issues which did not and which could not arise out of the pleadings in the case. The Court of Appeal below was not justified in sending back the case for a decision on questions which did not occur to the parties or to the Court at the trial. The question was whether the plaintiff was entitled to a right of way over the defendant's land either on the basis of prescription or on the basis of necessity. The plaintiff having failed to prove his case the Trial Court dismissed the suit. The lower Appellate Court, while agreeing with the conclusion arrived at by the first Court, should have dismissed the appeal without entering into questions not taken by either party at the trial.

Dr. *Jadunath Kanjilal*, for the Respondent.—Plaintiff's case was based not merely on prescription or necessity but also upon grant or some other right to use the way as a village road or as a public pathway. The issue No. 5 referred to in the judgment of the learned Subordinate Judge was not clearly decided by the Trial Court, so the case was sent back for a decision on that issue in the light of the judgment of the lower Appellate Court. It could not, therefore, be said that the Court of Appeal below sent the case back for deciding a question not raised before the first Court. The evidence on the record was not sufficient for deciding that issue, and, therefore, the Court below was perfectly justified in remanding the case for deciding the issue No. 5 after taking proper evidence.

Mr. *S. N. Banerjee* replied.

JUDGMENT.

RICHARDSON, J.—This is an appeal from an order of the Subordinate Judge of Hoogly, dated the 10th March 1916. The order is an order of remand made in a suit brought by the plaintiff to establish her right of way over certain plots of land belonging to the defendant Srimati Baseemati Debi, the appellant before us. In the trial cases the suit was treated by the learned Munsif and by the parties as a suit to establish an easement over the land in the nature of a right of way acquired by prescription under the provisions of section 26 of the Indian Limitation Act or in the nature of a right of way of necessity. In the Trial Court the plaintiff failed and the suit was dismissed. When the case came before the Court below, the learned Subordinate Judge concurred with the Munsif in holding that on the evidence on the record the plaintiff had failed to prove that she was entitled to a right of way either on the basis of prescription or on the basis of necessity. Looking at the pleadings and the issues I should have thought that when he came to that conclusion, the learned Subordinate Judge would have at once dismissed the appeal and confirmed the decree of the Munsif. Instead of doing this, however, he went on to discuss other questions which do not appear to have occurred to the parties on their legal advisers or to the Court at the trial. He suggested that even if there was no easement made out under the provisions of section 26 or even if the claim in so far as it was dependent on that section was barred by limitation, not having been brought within two years of the time when the right of way was obstructed, nevertheless the plaintiff might have some title founded either on custom or grant or some right to use this way as a village road or even as a public road. If the plaint be read as a whole with reference to the statement of facts to be found there, it is quite clear that the plaintiff based her case either on section 26 or on necessity and on no other ground. The Subordinate Judge refers to paragraph 7

of the plaint, which asserts generally that the plaintiff has acquired an indefeasible right of user to pass and re pass over the plots in dispute and that no one has a right to prevent her by putting up fences or in any other manner. That assertion, however, is merely a summary of the claim as it is put forward in the preceding paragraphs of the plaint. It is quite clear, as I have said, from the preceding paragraphs that the plaintiff's claim is founded either on prescription under the act or on necessity. The learned Judge further refers to issue No. 5 as that issue was framed by the Munsif. The issue runs as follows:—"Has the plaintiff a right of easement of way or of necessity over the disputed land." It may be that reading the issue apart from the pleadings and apart from the allegations of facts on which the plaintiff founded her claim, it would be wide enough to cover questions of grant or custom or dedication. But it is an elementary rule that the determination of causes depends on the allegations and the proof. In one part of his judgment dealing with issue No. 5 the learned Munsif says: "On the whole, the plaintiff's witnesses speak about the public user of the pathway which is not the plaintiff's case." It is plain that the path was not claimed by the plaintiff as a village path or as a public path and the learned Subordinate Judge was not entitled to raise new points involving fresh evidence in appeal and to remand the case for the trial of questions which had never occurred to the parties previously.

It has been suggested by the learned Pleader who has appeared for the respondent that this order of remand made by the learned Subordinate Judge was not an order under rule 23 of Order XLI from which an appeal would lie, but under rule 25 of the same Order from which no appeal would lie. In form, however, the order is an order under rule 23. The suit has been remitted to the Trial Court to be re-heard not only on the evidence already recorded but on such further evidence as the parties may desire to adduce. It may be that regard being had to the terms of rule 23, this is not a case in which it was, strictly speaking, open to the learned Subordinate Judge to make an order under that rule. But whether the order was regularly made or irregularly made it appears to me to be in form and substance an order under that rule. That being so, the order must be treated as an order under rule 23 from which an appeal lies. On this point I am unable to accept the contention of the learned Pleader for the respondent.

The result is that, in my opinion, the order of remand must be set aside and the suit remitted to the Court of the Subordinate Judge in order that the appeal to that Court may be finally disposed of with reference to the observation I have made. In setting aside that part of the judgment of the Subordinate Judge which remands the suit we leave untouched his findings on the rest of the case. It may, therefore, be unnecessary in that Court to do more than to make a decree but, as I have said, it will be for the Subordinate Judge to dispose of the appeal. The appellant is entitled to the costs of this appeal. We assess the hearing-fee at three gold *mohurs*.

BEACHCROFT, J.—I agree.

Order set aside.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 1358 OF 1916.

August 15, 1916.

Present:—Mr. Justice Roe.

RAM NARAIN LAL—DEFENDANT—APPELLANT

versus

HARI KISHEN PRASAD NARAIN SAHI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 100, O. XLI, r. 1—Appeal, second—Two decrees in Appellate Court in one case—Appeal, single, whether lies—Court-fee payable.

Where two appellate decrees are passed in one judgment in two cross-appeals arising out of the same case and the appellant in second appeal wants to challenge both of them, he must file two appeals.

FACTS.—In one suit there were filed two appeals in the Court of the District Judge, one by the plaintiff and the other by the defendant. The District Judge decided both the appeals in favour of the plaintiff by one judgment. The defendant preferred an appeal to the High Court and filed only one

appeal as against both the decrees in the Court below. The Stamp Reporter submitted that there should have been two appeals, one against each of the decrees in the Court below. He said that an appeal lay from a decree, not from a judgment. Section 100 of the Code of Civil Procedure provided that an appeal lay from every decree. In Order XLI, rule 4, he submitted, the Code required an appeal to be preferred in the form of a memo.. of appeal accompanied by a copy of the decree. It would follow from these provisions in the Code that if there were two or more appellate decrees in a case and if the appellant wanted to challenge all of them in second appeal, he would have to file as many appeals as there were decrees. If the appellant was allowed to challenge two decrees by one memo. of appeal the express provisions of the Code would be infringed. Besides there would be a direct loss to the state in the shape of Court-fees, etc. He relied on *Chathu* v. *Kunhamed* (1) and *Zaharia* v. *Debi* (2).

The Taxing Officer placed the matter before the Taxing Judge for orders.

Mr. *Rajendra Prasad*, for the Appellant.

ORDER.—Having seen the Stamp Reporter's note I am of opinion that two appeals should be filed. Let the Vakil be informed.

Order accordingly.

(1) 11 M. 280; 4 Ind. Dec. (N. S) 195.

(2) 7 Ind. Cas. 156; 7 A. L. J. 861 at p. 870; 33 A. 51.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1803 OF 1915.

September 4, 1917.

Present:—Mr. Justice Spencer and Mr. Justice Krishnan.

SUBRAMANIAN CHETTY—PLAINTIFF—APPELLANT

versus

VIJIA RAGHUNATHA PILLAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Fishery, right of—Ownership of tank, whether carries with it right to fish—Prescriptive right, claim of, by villagers—Burden of proof—Lost grant, doctrine of, applicability of—Presumption—Unreasonableness of right claimed—Pleadings—Finding on point not covered by issue—Evidence taken—Remand.

Plaintiff, the lessee of a Zemindari village, claimed the exclusive right of fishing in a tank situated therein and sued defendants, the *ryots*, for an injunction restraining them from obstructing him in the enjoyment of such right. Defendants pleaded that they had acquired a prescriptive right to fish in the tank on payment of *'pasivari'* cess to the Zemindar. The plea was upheld by the Court, though no specific issue was framed on the point:

Held, (1) that the plaintiff must prove both his title and possession within 12 years before suit; [p. 420, col. 1.]

(2) that proof of plaintiff's ownership of the tank did not relieve plaintiff from establishing that the ownership of the tank carried with it the exclusive right of fishing therein, especially after evidence had been let in by defendants to prove the prescriptive right which they claimed; [p. 420, col. 2.]

(3) that on proof of a prescriptive title by defendants, it was competent to the Court to presume a legal origin for it on the principle of a lost grant; [p. 420, col. 2; p. 421, cols. 1 & 2.]

(4) that defendants' right by prescription could not be negatived on the ground of its being unlimited, unreasonable or without stint; [p. 420, col. 2; p. 422,.col. 1.]

(5) that as evidence was let in by the lower Courts on the question of prescription, it was not necessary to remit the case back for raising an issue and recording a fresh finding. [p. 420, col. 2.]

Second appeal against the decree of the Court of the Principal Subordinate Judge, Sivaganga, in Appeal Suit No. 27 of 1913, preferred against that of the Court of the District Munsif, Paramakudi, in Original Suit No. 295 of 1911.

Mr. *A. Krishnaswami Ayyar*, for the Appellant.

Messrs. *K. V. Krishnaswami Ayyar* and *K. V. Sesha Ayyangar*, for the Respondents.

JUDGMENT.

SPENCER, J.—In substance the case set up by the plaintiff in this suit was that, instead of exercising his admitted right to collect rent at a fixed rate from the *royts* of Manjoori village for fishing in the village tank, he had a right to catch the fish himself to the exclusion of those *royts* who had hitherto been enjoying this privilege, or to lease out the fishery to strangers. In the plaint, after setting out his title, which is based on a seventy years' lease of the village of Manjoori from the Rajah of Ramnad (*vide* Exhibits A and B), he proceeded to allege that the defendants had obstructed him in the enjoyment of his alleged fishery rights, and to ask for a declaration of his title

and for an injunction restraining defendants from interfering with his enjoyment, and for damages.

The District Munsif dismissed the plaintiff's suit, finding on the first issue that the plaintiff was not the exclusive owner of the fishery in the plaint tank. This finding would have been enough for the dismissal of the suit. There were also other issues. The sixth issue raised the question whether the plaintiff or his predecessor-in-title had exclusive possession of the fishery within 12 years before suit. The District Munsif found this issue also against the plaintiff and added that the *ryots* had, by long enjoyment, acquired a prescriptive right to the fishery, which was a finding that did not arise out of the issue as framed.

On appeal the Subordinate Judge found that the plaintiff had failed to establish either title or enjoyment within the statutory period and he dismissed the appeal on both grounds.

It is now argued that the lower Courts were in error in requiring the plaintiff to prove possession within 12 years of suit under Article 142 of the Limitation Act, and that the Article of Limitation applicable to this suit being Article 144, the burden of proving adverse possession for over 12 years should have been cast on the defendants.

It is true that the District Munsif has found a prescriptive title to exist in the defendants without an issue being raised on the question and that the Subordinate Judge has not found it at all.

I am of opinion that Article 142 was not appropriate to this suit for a declaration of title and an injunction, and that, if the Courts found that present possession was not with the plaintiff, the proper procedure was to refuse to give a declaration of title under the proviso to section 42 of the Specific Relief Act, for the reason that the plaintiff was neither in possession nor had asked for possession to be given him.

But on the allegations of fact in the plaint, no question of limitation arose, and the defendants' claim in their statement to have acquired a title by prescription was not put in issue at the trial.

The finding of both Courts on the first point, that of title, was enough to justify the dismissal of the suit, and that being a finding of fact, we cannot interfere with it in second appeal.

I do not think that the mere fact that the plaintiff had taken a lease of the village including the tank and had spent money in repairing the tank, relieved him from the necessity of proving his further assertion that the ownership of the tank carried with it the exclusive right of fishing in the tank, especially after evidence had been let in on the other side to prove that actual enjoyment of the fishery for a long series of years was with the *ryots*.

I agree with the Subordinate Judge's observation that, even if the plaintiff be the owner of the tank, that position is fully consistent with the *ryots* having the right of fishery over the same.

The Subordinate Judge, having found "beyond any shadow of doubt that from the earliest period the fishery right in the suit tank is being enjoyed by the *ryots* subject to the payment of a fixed rent", might very well have found a title to exist in the defendants on the principle of a lost grant; as was done by the Privy Council in *Bhola Nath Nundi* v. *Midnapore Zemindary Co.* (1) in respect of a right of pasturage enjoyed by a corporate body of villagers from time immemorial. But I do not consider it necessary to call for a finding on the point, nor do I consider in the circumstances of this case that any question of "reasonableness" arises.

The second appeal fails and must be dismissed with costs.

KRISHNAN, J.—The point at issue between the parties in this second appeal is whether plaintiff is entitled to take the fish from the Manjoori tank and channel in the Zemindari of Ramnad, excluding the defendants from exercising any right of fishery in them. Plaintiff claimed the exclusive right as the lessee of the Zemindar and brought this suit on the footing that he was in possession and enjoyment of this right and that the defendants, who are the *ryots* of the Manjoori village, were trying to obstruct him. The main plea of

(1) 31 C. 503; 31 I. A. 75; 8 C. W. N. 425; 14 M. L. J. 152; 8 Sar. P. C. J. 611 (P. C.).

the defendants was that they and their ancestors had been exclusively enjoying this fish "in pursuance of a long established custom" on payment of a settled "*pasivari*" or fishery cess to the Zemindar, which was included in their *pattas*. They also pleaded limitation. The lower Appellate Court held that plaintiff had failed to prove his title to the fishery and enjoyment of it within the statutory period of 12 years, applying Article 142 of Schedule I of the Limitation Act to the case, and dismissed the suit on the merits as well as on the bar of limitation.

Plaintiff has appealed to us and has contended that, on the question of title, defendants should have been called upon to prove the right they asserted as the tank in question being within the ambit of the Zemindari, its ownership and possession should have been taken to be *prima facie* in the Zemindar or his assignee, the plaintiff, and the right to fishery which is only an incident of the right of ownership should also be similarly taken to be *prima facie* in them. This argument, so far as it goes, is, in my opinion, well founded. But the Subordinate Judge has found that defendants have established on evidence the continued exclusive enjoyment they pleaded. That Judge says in paragraph 2 of his judgment that "ancient documents produced on the defendants' side show beyond any shadow of doubt that, from the earliest period, the fishery right in the suit tank is being enjoyed by the *ryots* subject to the payment of the fixed rent." In fact it is clear on the evidence that the Zemindar never tried to interfere with the *ryots* in the matter of fishing and it is only after the plaintiff-lessee came on the scene that attempts were made to so interfere; but all such attempts were frustrated by the opposition of the *ryots*. On these facts it seems to me there is a clear presumption in defendants' favour of a legal origin of their title. Lord Loreburn, Lord Chancellor, has stated in the case of *Harris* v. *Chesterfield* (*Earl*) (2), cited for the appellants on another point, the law on the question thus: "When long and continuous enjoyment is established, a lawful origin will be presumed if it is reasonably possible. This doctrine has been repeatedly affirmed and in no case better illustrated than in that of *Goodman* v. *Saltash Corporation* (3)." The doctrine was applied by the Privy Council in a case of pasturage rights over waste lands claimed by the tenants of a village against their Zemindar. See *Bhola Nath Nundi* v. *Midnapore Zemindary Co.* (1).

Although the lower Court has not expressly referred to this doctrine, it has considered the evidence of long enjoyment and thrown the burden on the plaintiff to establish his title in defeasance of the defendants' claim arising from it and I think it is right in the circumstances in doing so, as there is a clear presumption in favour of the legal origin of the defendants' claim. It may well have been the result of a lost grant by a Zemindar or a lost agreement by him with *ryots* allowing them to take the fish permanently on payment of '*pasivari*'.

It was pressed upon us that as the question of presumption of a legal origin was not pointedly raised in the lower Courts, we should send the case back for trial on the point and finding thereon. I do not think it necessary to do so, as the facts required for it were stated by the defendants and evidence all taken and the Courts have given their opinion on that evidence. Issue No. 1 was wide enough to cover the question. It is not stated that there are any new facts to be considered with reference to this point. In similar circumstances their Lordships of the Privy Council disapproved of the course of sending the case for a finding. See the case in *Bhola Nath Nundi* v. *Midnapore Zemindary Co.* (1) already cited.

It was next urged that from the very nature of the right claimed here it should be held to be one unknown to law and for which no legal origin could be presumed, and reliance was placed on the case in *Harris* v. *Chesterfield* (*Earl*) (2) above cited. That was a case where "a right by prescription in *a que estate for a profit a prendre in alieno solo*", *viz.*, the right to take fish in the river Wye at a place where the bed of

(2) (1911) A. C. 623; 80 L. J. Ch. 626; 105 L. T. 453; 55 S. J. 686; 27 T. L. R. 548.

(3) (1882) 7 A. C. 633; 52 L. J. Q. B. 193; 48 L. T. 239; 31 W. R. 293; 47 J. P. 276.

the river was in the possession of Lord Chesterfield and his co-plaintiff, the river being non-tidal: there, was claimed by certain villagers as appurtenant to their tenements and the right claimed was expressly stated to be *without stint* and for commercial purposes, namely, to sell the fish in the market. Their Lordships by a majority of one held that such a right was unknown to law and should not be recognised, as the exercise of such an unlimited right tended to the entire destruction of the subject-matter of the right. The reasoning is clearly put in the judgment of Cozens-Hardy, M. R.; see the report of the case of *Chesterfield (Earl)* v. *Harris* (4) in the Appeal Court, particularly the observations on page 410. That reasoning was adopted by the majority of their Lordships.

Now such a question as this has not been raised in the present case; and consequently the facts necessary for it have not been investigated. In the first place, it is not clear whether the right claimed here is not a right in gross vested in the *ryots* of Manjoori village as a body, in which case it may well be that no question of unreasonableness will arise. See the observations of Buckley, L. J., in the same case on appeal in the middle of the page 421. In the next place, assuming the right claimed is one appurtenant to the holdings of the *ryots* in the village, it does not seem to be an unlimited one, and *without stint* as in the English case. What the *ryots* claim is the right to take fish in the manner they have been taking for all these years. Such an exercise of the right has not hitherto led to the destruction of the fish in the tank nor apparently even to its diminution in numbers. There is no reason to assume a different result in the future. If there is excessive fishing the Zemindar may have a right to restrain it, but that is not the question here. I hold that the claim of the *ryots* cannot be rejected in second appeal on the ground of unreasonableness, as argued. I may observe that, though the rights of fishery in other people's waters are very common in India, particularly in the northern parts, no case has been cited to us from any of the Indian Reports where such a right has been negatived on the ground put forward above. I am therefore of opinion that on the finding of the lower Courts that plaintiff has failed to prove his title, which is a finding of fact on the evidence in the case and which we must accept in second appeal, his claim to disturb the long established practice in the village regarding the fishing in the tank was rightly rejected and his suit was rightly dismissed. It is not necessary to express any opinion on the question of limitation or on any other question raised in the case.

I agree that the second appeal fails and should be dismissed with costs.

Appeal dismissed.

M. C. P.

(4) (1908) 2 Ch. 397; 77 L. J. Ch. 688; 99 L. T. 558; 24 T. L. R. 763.

PATNA HIGH COURT.

LETTERS PATENT APPEALS NOS. 72 TO 76 OF 1917.

February 8, 1918.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Mullick.

CHARITTER RAI AND OTHERS—APPELLANTS

versus

KAILASH BEHARI AND OTHERS—RESPONDENTS.

Evidence Act (I of 1872), ss. 32, 34, 90—Document more than 30 years old—Presumption—Genuineness—Admissibility of document—Objection not taken in trial Court, whether can be taken in appeal—Zemindari *papers, value of—Enhancement of rent—Proof.*

Where a party producing a document is unable to say who prepared or signed it or where the document itself does not purport to show who prepared or signed it, the mere fact of the document being more than 30 years old does not make it admissible without proof under section 90 of the Evidence Act. [p. 424, col. 1.]

Where a document is admitted in evidence without objection in the trial Court, no objection as to its formal proof can be taken in appeal. [p. 424, col. 1.]

A *jamabandi* which cannot be admitted as corroborative evidence without independent evidence of the fact of collection of rent at a certain rate under section 34 of the Evidence Act, can be used as independent evidence if it is relevant under section 32 of the Act. But although it would not, as a matter of law, require corroboration, yet the Court is not bound to act upon it without corroboration. [p. 424, cols. 1 & 2.]

CHARITTER RAI *v.* KAILASH BEHARI.

Zemindari papers, such as *jamabandis*, being *ex parte* papers, ought to be carefully scrutinized before they are held sufficient to make the tenant liable for the rent shown in them. Every case in which a Zemindar seeks to obtain enhancement on the strength of his papers must depend upon its own facts. [p. 427, col. 2.]

Letters Patent Appeal from a decision of Mr. Justice Chapman.

Messrs. *Lakshmi Narain Singh* and *Parmeshwar Dayal*, for the Appellants.

Messrs. *Sushil Madhub Mullick* and *U. C. Laha*, for the Respondents.

JUDGMENT.

MULLICK, J.—These five appeals arise out of five second appeals heard by Mr. Justice Chapman sitting alone as a Judge of this Court. The litigation commenced with some applications made by the plaintiff landlords under section 105 of the Bengal Tenancy Act against the *raiyats* of certain villages for assessment of fair and equitable rent. The tenants or some of them set up the defence that they were *raiyats* either at fixed rents or fixed rates of rent and that, therefore, the landlords were not competent to make any enhancements as regards their holdings and they contended that the entry in the Record of Rights published under section 103 (B) of the Bengal Tenancy Act shewing them to be settled *raiyats* was wrong. The Assistant Settlement Officer found, so far as the tenants before us are concerned, that the entry in the Record of Rights was correct and that they were not *raiyats* at fixed rents or rates of rent but settled *raiyats* whose rents were liable to enhancement. He accordingly assessed rent upon these *raiyats* allowing an enhancement on account of the rise in the price of food crops and for other grounds. The tenants thereupon appealed to the Special Judge and we are concerned with the four appeals which in the Court of this latter officer were numbered 155, 160, 186 and 187 of 1912. It is necessary to observe that Appeal No. 186 of 1912 covered the cases of two sets of *raiyats*, the judgment in regard to one set being delivered by Mr. Monahan as Special Judge and the judgment in regard to the other set being delivered by Mr. Macpherson as Special Judge. This in effect makes a total of five appeals before the Special Judge. The tenants succeeded before the Special Judge, who held on grounds which will be considered presently that the entry in the settlement record was incorrect. The landlords then preferred five second appeals to the Calcutta High Court, which were transferred to this Court for hearing.

These second appeals were heard, as I have already observed, by Mr. Justice Chapman who came to the conclusion that the learned Special Judge was wrong and that the landlords had succeeded in rebutting whatever presumption as to fixity was raised by the evidence of the tenants; he, therefore, decreed the appeals before him and restored the judgment of the Assistant Settlement Officer. The present appeals are preferred against the judgment and decree of Mr. Justice Chapman by some of the *raiyats* who had succeeded before the learned Special Judge.

Before dealing with each appeal separately it is desirable to take up one point which is common to all. Before Mr. Justice Chapman the landlords contended that the learned Special Judge was wrong in deciding that the collection and other papers produced by the landlords before the Assistant Settlement Officer were inadmissible in evidence. Mr. Justice Chapman came to the conclusion that this contention was well founded. In this Court the *raiyat* appellants attack the judgment of Mr. Justice Chapman on the ground that he has taken an erroneous view of the law. These Zemindari papers are papers produced from the office of the landlords dating from 1202 *F. S.*, that is, two years after the Permanent Settlement. The papers previous to 1861 appear to be unsigned and the plaintiffs are unable to say by what officer or officers they were prepared. The papers subsequent to 1861 appear to bear the signature of certain officers who are or were in the plaintiffs' employ or in the employ of their predecessors.

Let us first examine the contention that the unsigned papers are admissible under section 90 of the Indian Evidence Act. Now section 90 merely allows a party to ask the Court to presume that a document which is more than 30 years old and purports to have been prepared or signed by a particular person was in fact prepared or signed by such person. Further than

that the section does not go. It certainly does not contemplate that where a party producing a document is unable to say who prepared or signed it or where the document itself does not purport to shew who prepared or signed it, the mere fact of the document being more than 30 years old makes it admissible without proof. If that was the law, it would be impossible to test the value of such evidence and in cases between landlord and tenant no tenant would be safe. Section 90 of the Evidence Act will not, therefore, assist the landlord.

But the documents both signed and unsigned would be admissible not only as corroborative evidence but as independent evidence, if the landlords complied with the requirements of section 32 of the Evidence Act. It was no doubt necessary for the landlords to establish the antecedent condition that the persons who prepared these papers were dead or could not be found, but the tenants appear to have taken this for granted and the papers were accepted by the trial Court with an endorsement to the effect that they were admitted without objection. In these circumstances it is too late for the *raiyats* to take the objection that the documents required formal proof. This principle has been affirmed by their Lordships of the Privy Council in *Shahzadi Begam* v. *Secretary of State for India* (1), where at page 1074 their Lordships observed as follows:—

"Their Lordships are, however, of opinion that it is now too late for the respondent to take an objection to the admissibility of a document which was received without objection at the trial."

The learned Judge of this Court was, therefore, clearly right in holding that the documents are legal evidence. In *Aktowli* v. *Turak Nath Ghose* (2) the question of the relevancy and weight to be attached to similar papers was very fully discussed by their Lordships of the Calcutta High Court and the conclusion arrived at was that although the papers could not be admitted under section 34 of the Indian Evidence Act as corroborative evidence without independent evidence of the fact of collection at certain rates, they could be used as independent evidence if they were relevant under section 32, clause (2). To like effect is the judgment of their Lordships of the Bombay High Court in *Rampyarabai* v. *Balaji Shridhar* (3). Their Lordships, however, added a caution in the concluding portion of their judgment as follows:—

"At the same time we wish it to be distinctly understood that though the accounts, which are relevant under section 32 (2), do not, as a matter of law, require corroboration, the Judge is not bound to act on them without corroboration; that is a matter on which he must exercise his own judicial discretion as a Judge of fact. In what I have said I have in no way limited the discretion of the Judge as a Judge of fact in determining whether or not he will act on the accounts without corroboration, the only point being that the law does not require corroboration."

It is necessary, therefore, to consider what weight the learned Special Judge would have attached to the papers if he had held them to be legally admissible. I will proceed, therefore, to deal with each Letters Patent Appeal separately.

Letters Patent Appeal No. 72 of 1917 corresponds to Second Appeal No 1298 of 1915, which corresponds to Appeal No. 186 of 1912 before the Special Judge. When Appeal No. 186 was first preferred in the Court of the Special Judge three holdings were concerned. Mr. Monahan the Special Judge dealt with the case of one of these holdings which was in the possession of the appellant Tirbeni (defendant No. 10 in the Court of the Assistant Settlement Officer), and came to the conclusion that Tirbeni had established the presumption required by section 50 of the Bengal Tenancy Act and that the papers of the landlord had not fully rebutted that presumption. With regard to the tenants who were in possession of the other two holdings, namely, defendants Nos. 4 and 13 in the Court of the Assistant Settlement Officer, Mr Monahan decreed the landlord's claim in the absence of the

(1) 34 C. 1059; 9 Bom. L. R. 1192; 6 C. L. J. 678; 2 M. L. T. 489; 34 I. A. 194 (P. C.).

(2) 17 Ind. Cas. 266; 16 C. L. J. 328; 17 C. W. N. 774.

(3) 28 B. 294; 6 Bom. L. R. 50.

tenants. These tenants thereupon filed an application for review, which came up for hearing before Mr. Macpherson who was the successor of Mr. Monahan as Special Judge. Mr. Macpherson saw good grounds for admitting the review and finally disposed of these two cases by agreeing with Mr. Monahan (though for an additional reason) and holding that the landlord's papers were thoroughly unreliable and that the presumption raised had not been rebutted. The result of this was that out of Special Appeal No. 183 there have arisen two second appeals, namely, Nos. 1298 and 4183.

Letters Patent Appeal No. 72 deals with Second Appeal No. 1298. In this case the *raiyats* are, as I have observed, defendants Nos. 4 and 13 before the Assistant Settlement Officer. The learned Vakil, for the appellants, urges that although the landlord has succeeded in Mr. Justice Chapman's Court in establishing that the collection and other papers produced by the landlord are admissible in evidence, still as there is a definite finding by Mr. Macpherson that the landlord's papers are thoroughly unreliable the appeal before Mr. Justice Chapman was concluded by a finding of fact and should have been dismissed. This would, no doubt, have been so if the matter had rested there. No doubt the finding of Mr. Macpherson that the landlord's papers were utterly unworthy of credit would altogether do away with the necessity of determining whether or not the papers were admissible under the provisions of the Indian Evidence Act and, therefore, Mr. Justice Chapman's decision that the papers were admissible would not in any way affect the competency of the appeals before him. But the learned Vakil for the landlord before us meets this argument on behalf of the appellants by contending that defendants Nos. 4 and 13 have at the outset failed to establish that there was any presumption under section 50 of the Bengal Tenancy Act in their favour and he shows this in the following way. These two tenants have no rent receipts by which they can establish payment at a fixed rent for 20 years. It is not their case that they have paid at any fixed rate of rent. What they have done is this; they have asked us to look at the landlord's *jamabandi* of 1277 *F. S.* and to hold that the rental recorded in the survey and settlement record is identical with the rent recorded in the *jomabandi* of 1277 *F. S.* Now this does not appear to be a fact. What appears to be the real fact is that the *jamabandi* of 1277 shows not only the rent now recorded in the survey and settlement record but an additional sum on account of Company's *batta*. If, therefore, the tenants contend that their holdings were created at the time of or previous to the Permanent Settlement, then the landlord had *prima facie* a right to demand Company's *batta* when *sicca* rupees were finally converted into Company's rupees. The tenants cannot say that the entry on account of *batta* is to be disregarded and the amount represented in Company's rupees only is to be taken as the true rent in 1277. If they contend that the amount entered on account of *batta* is an *abwab*, then they are in the dilemma that they must admit that their holding was created sometime subsequent to 1836 when the *sicca* rupee was finally declared not to be legal tender. The conclusion at which I have arrived is that the *jamabandi* of 1277 must be taken as a whole and the entry there must be taken to mean that the rentals payable by these tenants were not identical with the rents recorded in the survey and settlement record published in or about 1911. If that is so, then the basis upon which the tenants claim to be entered as *raiyats* at fixed rents or rates of rent completely disappears; and this is admitted by the learned Vakil for the appellants who says that if he is not entitled to pick out that part of the entry which relates to Company's rupees in the *jamabandi* of 1277 then he is unable to raise the presumption in favour of his clients. Therefore, the decision of the Assistant Settlement Officer in regard to these two tenants was correct and the decision of the learned Special Judge cannot be sustained, irrespective of the fact whether or not the landlord's collection papers were admissible in evidence. If the landlord's papers are not admissible the tenants are unable to shew the payment in 1277 at the rate which they claim to have paid. If the landlord's papers are admissible then the entry must be taken as a whole, and it does not support the case that in

1277 the rent recorded in 1911 was the rent of the holding. It is to be observed that the Special Judge Mr. Macpherson was of opinion that although Company's *batta* may have been entered in the *jama-bandi* of 1277 still in the absence of direct evidence to shew that Company's *batta* was in fact realised the tenant is competent to maintain that his real rent in that year was exclusive of Company's *batta*. The reply to this is that the rate of rent is not dependent upon the quantity collected. The landlord may be unable to collect his full rent but if his papers are complete and if they do in fact shew that the full rent was inclusive of *batta*, then it is immaterial whether or not the *batta* was collected. The full rent, therefore, in the case of defendants Nos. 4 and 13 was the rent inclusive of *batta* and does not, therefore, agree with the rent shown in the survey and settlement record. That being so, Letters Patent Appeal No. 72 must be dismissed with costs. Mr. Justice Chapman's judgment restoring the judgment of the Assistant Settlement Officer in regard to these two tenants must be affirmed. The tenants have failed to raise any presumption and the question of the admissibility of the papers does not arise.

Letters Patent Appeal No. 75, which corresponds to Second Appeal No. 4183, relates to the *raiyat* Tirbeni (defendant No. 10) who was the other tenant concerned in Appeal No. 186 of 1912 before the Special Judge. His case is also identical so far as concerns the question of presumption with that of the tenants in Letters Patent Appeal No. 72. In this case also the tenant had recourse to the *jamabandi* of 1277 for the purpose of establishing a uniform payment of rent at the rate of Rs. 210. Now the *jamabandi* shews that the rent in 1277 was Rs. 210-15-0, with Company's *batta* Rs. 14-13-0. The Record of Rights shews the rent to be Rs. 210-15-0. In my opinion the rental in 1277 *F. S.* must be taken to be Rs. 210-15-0, *plus* Rs. 14-13-0, which is greatly in excess of the amount shown in the Record of Rights and, therefore, I must hold that Tirbeni has failed to establish a statutory presumption under section 50 of the Bengal Tenancy Act. Letters Patent Appeal No. 75 must, therefore, be dismissed with costs.

As regards the costs the respondents having succeeded and the appellants having failed upon the merits as well as on the ground of admissibility the landlords will be entitled to their costs.

Letters Patent Appeal No. 74 arises out of Second Appeal No. 2845 of 1913, which corresponds to Appeal No. 160 of 1912 before the Special Judge Mr. Monahan. In this appeal the judgment of Mr. Justice Chapman as regards the admissibility of the Zemindar's papers must be upheld and, therefore, the only question is whether the appeals must be remanded or whether there was any finding by the Special Judge which concluded the second appeal before Mr. Justice Chapman. Now in this case there is a finding by Mr. Monahan to the following effect:—"Thus the above *jama-bandis* of 1235 and 1237 taken in conjunction with the *sharahwar jamabandis* would be sufficient, in my opinion, to rebut the presumption in favour of fixity of rent provided that these *jama-bandis* can be accepted as evidence." Mr. Monahan decided that the papers were not admissible at all, but he was of opinion that if they were legally admissible then they were sufficient to rebut the presumption raised by the *raiyats*. There is no question that a *prima facie* presumption was legally raised. The only question is whether landlords had by their evidence rebutted that presumption. In view of the very deliberate finding recorded by Mr. Monahan it is impossible for us to accept the contention of the learned Vakil for the *raiyats* appellants before us that Mr. Monahan did not take into consideration the collection papers at all or at any rate that he did not take into consideration all the collection papers and that he recorded his finding only upon the evidence which was in his opinion admissible. I cannot give his judgment this construction. I think it was his intention to provide for the contingency of the Appeal Court holding that he was wrong upon the question of the admissibility of the documents and he, therefore, took the precaution of recording what would be his finding if the Appeal Court came to the conclusion that the *jambandis* and other papers were admissible. Therefore, Mr. Justice Chapman having decided that

the *jamabandis* were admissible, it was competent for him to decree the appeal forthwith and to order enhancement according to the rates found by the Special Judge. This he has directed to be done in the concluding portion of his judgment, which is as follows:—" I would, therefore, reverse his (Special Judge's) judgment in appeal and direct that the decree be drawn up in accordance with the rents, which it is apparent from the learned Special Judge's judgment he would have settled if he had admitted the *jamabandi* papers as evidence." Our order, therefore, will be that the judgment and decree of Mr. Justice Chapman be affirmed and the appeal of the tenants before us be dismissed with costs.

Letters Patent Appeal No. 73 corresponds to Second Appeal No. 482, which corresponds to Appeal No. 155 of 1912 before Mr. Monahan. In this case the question of the admissibility of the Zemindars' papers having been decided in his favour, the only question is whether Mr. Monahan's finding disposed of the matter in dispute in second appeal. It appears that Mr. Monahan, after holding that the papers were not admissible, does not come to any clear finding as to whether they would have established the Zemindars' case if his finding on the point of law had been otherwise. His judgment is not altogether satisfactory and I am not certain that he had a clear conception in his mind as to the nature of the proof which it was necessary for the Zemindars to adduce in order to rebut the presumption created by the production of 20 years' receipts by the *raiyats* shewing payment of a uniform rental. In my opinion. the proper course will be to remand this case to the Special Judge in order that it may be dealt with according to law after consideration of the Zemindars' papers which, agreeing with Mr. Justice Chapman, we hold to be admissible in evidence. The Assistant Settlement Officer assumed that these papers were genuine. There appears to have been some argument before him as to whether they were forgeries but he did not accede to the argument of the tenants on this point. Mr. Monahan the learned Special Judge appears also to have taken for granted that the papers were genuine, The only question which was argued before him was whether they were admissible in evidence according to law. It will not be open, therefore, when the case goes back on remand, for the tenants to argue that the papers are not genuine. The only question which will be open will be as to what these papers prove and whether they do in fact entitle the landlords to say that they have rebutted the presumption which the tenants have raised. That is to say, the learned Special Judge will have to consider what credit is to be attached to these papers. He may be of opinion that these papers are not of any value whatever but that is a matter entirely for him. It is needless to refer to the caution which is given in *Gopal Mundul* v. *Nobbo Kishen Mookerjee* (4), to the effect that Zemindari papers being *ex parte* ought to be very carefully scrutinised before they are held sufficient to make the tenant liable for the rent shown in them. Every case in which the Zemindar seeks to obtain enhancement upon the strength of his papers must depend upon its own facts. The learned Assistant Settlement Officer appears to have applied himself only to a consideration of the rates of rent disclosed in the papers of the Zemindars. As has been observed by Mr. Monahan, a change in the rates would not necessarily shew a change in the gross rental paid by a tenant who pleads uniform payment for 20 years, and it would be quite possible for a Zemindar to re arrange the rates from year to year without affecting the gross rental paid. The learned Vakil for the Zemindars, respondents before us, however, asserts that he will be able to shew from his papers that there is not a single tenant in the village here in question who was a tenant at the time of the Permanent Settlement who has not at some subsequent time paid a different rent for the same area in two successive years. If he can shew this, that will throw back the onus upon the tenant to establish that although his rental has changed that rental still includes a part of the rental paid upon the original area held at the time of the Perma-

(4) 5 W. R. Act X Rulings, 83.

nent Settlement. It is impossible for us to dispose of the matter finally, although it is eminently desirable that this litigation should be ended as quickly as possible. I think, therefore, although in my opinion, the course is extremely unsatisfactory, that the only order we can make is that the appeal should be allowed and that the case should be sent back to the Special Judge in order that he may come to a finding upon the question of fact, namely, whether or not the presumption raised by the *raiyats* has been rebutted by the landlords, after giving due weight to the evidence adduced by both parties and to the observations made in this judgment. Neither party will be permitted to adduce additional evidence.

As regards costs although the tenants succeed in obtaining a remand, it is to be observed that they might have obtained the same result in the Court of Mr. Justice Chapman if they had brought to his notice the judgment of Mr. Monahan in this case. The fact appears to be that they brought to Mr. Justice Chapman's notice only one judgment, namely, the judgment in the Appeal No. 180 of 1912. The other judgments were apparently completely ignored and I am quite certain that if the judgment of Mr. Monahan in Appeal No. 160 of 1912 had been brought to the notice of Mr. Justice Chapman, he would not have restored the judgment of the Assistant Settlement Officer but would have remanded the case to the Court of the Special Judge for a decision upon the merits, in other words, he would have taken the very course which we have now taken. In these circumstances the appellants will not be entitled to any costs in this Court.

Letters Patent Appeal No. 76, which corresponds to Second Appeal No. 3440 of 1913, which corresponds to Appeal No. 187 of 1912 before Mr. Monahan. In this case also there is no conclusive finding by Mr. Monahan in favour of either party. The same remarks apply to this appeal as to Letters Patent Appeal No. 74. For the same reasons this appeal must be decreed and the case remanded to the Special Judge for disposal in accordance with law after due regard to the judgment of this Court. No additional evidence will be allowed. The appellants having failed to bring to Mr. Justice Chapman's notice the judgment of Mr. Monahan in Appeal No. 187 of 1912 before him they will not be entitled to any costs.

In each of the Appeals Nos. 72, 74 and 75 the costs awarded to the respondent landlords will be assessed at 3 gold *mohurs*.

MILLER, C. J.—I agree.

Appeals Nos. 72, 74, 75 *dismissed*;
Appeals Nos. 73, 75 *allowed*;
Cases remanded.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 278 OF 1916.
August 24, 1917.
Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Phillips.

VELLAYAPPA MOOTHAN—PLAINTIFF—APPELLANT
versus
KRISHNA MOOTHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), *Sch. I, Arts.* 57, 61, 62, 115, 120—*Hindu Law—Joint family—Partnership of some members, claim by, against family for moneys advanced—Limitation—Cause of action, when arises—Barred debt, whether can be recovered—Set-off, claim by way of, whether allowable—Civil Procedure Code (Act V of* 1908), *O. VIII, r.* 6, *O. XXX, r.* 9—*Party, whether can be both plaintiff and defendant.*

A suit by some of the members of a joint Hindu family who constitute a partnership against the family for advances made to it out of the partnership funds is governed by Article 120 of the Limitation Act. [p. 431, col. 1.]

The claim cannot be enforced in an action for partition after it has become barred either by way of equitable set-off or as an item in the account of dealings between the family and the partnership or by treating the liability of the family as assets or property to be brought into hotchpot at the time of division [p. 432, col. 1.]

Rustomji v. *Sheth Purshotamdas*, 25 B. 606; 3 Bom. L. R. 227, *Kashinath Kedari* v. *Ganesh*, 26 B. 739; 4 Bom. L. R. 525: *Aghore Nath Mukhopadhya* v. *Grish Chunder Mukhopadhya*, 20 C. 18; 10 Ind. Dec. (N. S.) 13; *Tirupatiraju* v. *Rajagopala Kristnama Razu*, 8 M. L. J. 271; *Ramdhari Singh* v. *Parmanund Singh*, 21 Ind Cas. 716; 19 C W. N. 1183; *Kanerrav* v. *Gurrav*, 5 B. 589; 3 Ind. Dec. (N. S.) 388; *Ramanna* v. *Venkata*, 11 M. 246: 12 Ind. Jur. 177; 4 Ind. Dec N. S.) 171 and *Damodardas Maneklal* v. *Uttamram Maneklal*, 17 B. 271; 9 Ind. Dec. (N. S.) 177, explained and distinguished.

VELLAYAPPA MOOTHAN *v.* KRISHNA MOOTHAN.

Where the members of the partnership who sue are themselves the managing members of the family, Article 107 of the Limitation Act would apply. [p. 431, col. 1.]

The rule of procedure observed by the common law Courts in England that the same individual, even in different capacities, cannot be both a plaintiff and a defendant is not applicable to India as Order XXX, rule 9, really contemplates suits between the same individuals in different capacities. [p. 430, col. 2; p. 431, col. 1.].

A suit lies by one firm against another firm notwithstanding that the firms have common partners The proper prayer in such a suit ought to be for the taking of the accounts of both partnerships, if necessary for adjusting the rights of the partners, and for the grant of just and equitable reliefs which arise on the facts. [p. 430, col. 2.]

Per *Sadasiva Aiyar, J.*—A Hindu joint family cannot be treated as of the nature of a partnership firm and a claim of some of the members who are members of a separate partnership firm against the joint family cannot be treated as the claim of one partnership against another partnership firm The partnership, by lending to the joint family possesses an immediate cause of action against the latter and it can sue the other members of the family alone as defendants praying for proper equitable reliefs. [p. 430, col. 2; p. 431, col. 1.]

Per *Phillips, J.*—Relief by way of set-off is, strictly speaking, confined to a defendant and a plaintiff who invokes the aid of the Court against a defendant is not entitled to any equity as against him. [p. 433, col. 1].

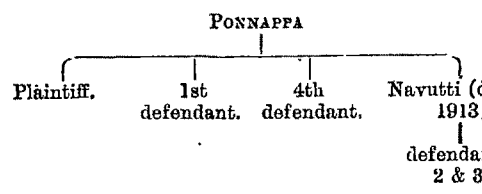
Second appeal against the decree of the Court of the District Judge, South Malabar, in Appeal Suit No. 965 of 1914, preferred against that of the Court of the Subordinate Judge, South Malabar, at Palghat in Original Suit No. 41 of 1913.

Mr. *P. S. Narayanasami Ayyar* for Mr. *C. V. Ananthakrishna Ayyar*, for the Appellant.

Mr. *C. Madhavan Nair*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—The plaintiff is the appellant here and the suit was a suit for partition. The genealogical tree is as follows:—



There was a prior suit (Original Suit No. 27 of 1906) brought by the 4th defendant which was decreed, but that decree was not executed as, by a private engagement, his claims were satisfied. Hence the plaintiff sues for $\frac{1}{3}$rd share in the properties left (after so satisfying the 4th defendant's claim), the 1st defendant being entitled to another $\frac{1}{3}$rd share and defendants Nos. 2 and 3 being entitled to the remaining $\frac{1}{3}$rd share. The litigation was, however, complicated by the plaintiff claiming (among others) one further relief which arises out of the following facts:—The plaintiff, the 1st defendant, and the 2nd and 3rd defendants alone carried on a partnership trade for their separate benefit. This trade was carried on even during the lifetime of the plaintiff's father Ponnappa and of 2nd and 3rd defendants' father Navutti. Ponnappa died about August 1906. For his funeral expenses, the partnership consisting of the plaintiff, the 1st defendant and the defendants Nos. 2 and 3 spent monies belonging separately to the partnership. When the partnership dissolved in 1911, the amount alleged on the above account to be due to the partnership by the joint family estate fell to the share of the plaintiff among the partners. The plaintiff claims in this suit to recover, from the 1st defendant and the defendants Nos. 2 and 3, 2/3rds of this amount which forms item No. 1 of the D schedule to the plaint, the remaining 1/3rd being due *to himself* (as the assignee from the firm) *by himself* (as one of the three sharers of the joint family). The value of this relief, that is for the recovery of the 2/3rds of the debt due by the joint family to the partnership business, is Rs. 567-12-7. The lower Courts disallowed the plaintiff's claim for this relief as also for a minor relief valued at Rs. 68-5-4 relating to items Nos. 2 to 4 of B1 schedule. This second appeal relates to these two matters, but there is nothing in the appeal so far as it relates to items Nos 2 to 4 of B1 schedule. The second appeal is, therefore, at once dismissed so far as it relates to that matter.

The ground on which the lower Courts disallowed the plaintiff's claim to recover 2/3rds of the amounts spent out of the partnership funds for the necessities of the joint family is that the amount was spent so long ago as in 1906, and the claim for

its recovery was barred by limitation, the suit having been brought in 1913.

Mr. Narayanasami Ayyar for the appellant before us contended (*a*) that the claim was not barred by limitation because the cause of action arose only at the dissolution of the partnership in 1911, (*b*) that, though his claim to recover the shares of the 1st defendant and of the 2nd and 3rd defendants in the money spent may be barred, the plaintiff was entitled, in effecting a partition of the joint family properties, to have allotted to him properties exceeding the value of the shares allotted to the other 1/3rd share by the amount due to the partnership by such sharers.

As regards contention (*a*), I do not see how the date of the dissolution of the partnership can give a cause of action against the joint family which cause did not exist before. The right of the members of the partnership firm in the monies taken out of the firm had nothing to do with the rights and liabilities of the joint Hindu family, of which the members did not solely consist of the partners of the firm but included others. Mr. Narayanasami Ayyar argued on the basis of the two decisions in *Rustomji* v. *Sheth Purshotamdas* (1) and *Kashinath Kedari* v. *Ganesh* (2) that the partnership, consisting of the plaintiff, the 1st defendant and the defendants Nos. 2 and 3 (four in number), could not have brought a suit against the joint family consisting of the plaintiff, the 1st defendant, the father of the defendants Nos. 2 and 3, the defendants Nos. 2 and 3 and the 4th defendant (six in number), because the plaintiffs' four names would also have to appear as the names of four of the six defendants in such a suit and that, therefore, the only course for the members of the partnership was to have treated the loan as an item to be taken into account in their favour against the other co-parceners of the joint family when the joint family members separated from one another.

In the first place, these two decisions were given in 1901 and 1902 under the old Civil Procedure Code. Jenkins, C. J., says at page 612 [*Rustomji* v. *Sheth Purshotamdas* (1)]: "This is in accordance with the doctrine that where an individual is a common partner in two houses of trade, no action can be brought by one house against the other house upon any transaction between them while such an individual is a common partner. In illustration of this, we may refer to *Bosanquet* v. *Wray* (3)." This doctrine is founded on the elementary rule of procedure too often disregarded in this country that the same individual, even in different capacities, cannot be both a plaintiff and a defendant to one and the same action. But the learned Judge proceeded to say: "While, however, at Common Law this rule led to the result we have indicated, the Courts of Equity surmounted this difficulty. Though they observed strictly the rule that a man cannot be both plaintiff and defendant, they did not allow it to stand in the way of doing justice between the parties *for provided all interested were before the Court either as plaintiffs or as defendants, they adjusted and determined their rights.* This is aptly exemplified in *Luke* v. *South Kensington Hotel Co.* (4)." I think that the reasoning in the above decision does not lead to the result that no suit at all could be brought in which a decision could be arrived at as regards the claim by a firm consisting of *A* and *B* as partners against a firm consisting of *A* and *C* as partners even under the old Procedure Code. All that seems to have been decided was a matter of procedure that *A* should not figure both as plaintiff and defendant and that the suit should be so framed as regards parties that this irregularity does not occur, while further taking care that all the three partners *A*, *B* and *C* in both firms are made parties to the suit. The proper prayer in such a suit ought to be for the taking of the accounts of both the partnerships, if necessary for adjusting the rights of the partners, and for the grant of just and equitable reliefs which arise on the facts. Further I do not think it is allowable to treat a Hindu joint family as of the nature of a partnership firm (the shares and the numbers of the members interested in the family properties not depending upon contractual relations but upon the rules of Hindu Law) or to treat

(1) 25 B. 606; 3 Bom. L. R. 227.
(2) 26 B. 739; 4 Bom. L. R. 525.
(3) (1815) 128 E. R. 1167; 6 Taunt. 597; 2 Marsh. 319; 16 R. R. 677.
(4) (1879) 11 Ch. 121; 48 L. J. Ch. 361; 40 L. T. 638; 27 W. R. 514.

the claim of a few of the members (who are members of a separate partnership firm) against the joint family as the claim of one partnership against another partnership firm. Even if this could be done, a partnership by lending to the joint family does possess an immediate cause of action and though the former rule of procedure might not have enabled it to bring a suit in the form of an ordinary suit for the recovery of the entire amount of the loan (with the members of the firm ranged as plaintiffs and the same members and the other members of the joint family as defendants), there was nothing to prevent the members of the partnership firm from utilising that cause of action to bring a suit ranging the other members of the family alone as defendants and praying for proper equitable reliefs. Even if any of the Articles 57, 61, 62 and 115 of the 1st Schedule of the Limitation Act does not apply to such a suit, the residuary Article 120 would apply to it and the firm should have brought the suit within 6 years. No such suit within 6 years of 1906 was brought and hence the claim based on the loan of 1906 seems to have been clearly barred in 1913.

Again if all three members of the firm are treated as managing members of the family, Article 107 of the Limitation Act would apply. That Article is as follows:—"By the manager of a joint estate of an undivided family for contribution in respect of a payment made by him on account of the estate." This shows that a managing member is entitled to sue for contribution in respect of a payment made by him and is not bound to sue for or wait till partition to get his claim against the joint family adjusted. In the cases in *Aghore Nath Mukhopadhya* v *Grish Chunder Mukhopadhya* (5) and *Tirupatiraju* v. *Rajagopala Kristnama Razu* (6) the suit was brought after division in the family for contribution in respect of the moneys recovered by a creditor from the person who was joint family manager. Again, the new Civil Procedure Code of 1908 (which came into force on the 1st January 1909) by Order XXX, rule 9, allows a suit by one firm against another notwithstanding that the firms have common partners. Hence, the plaintiff could have brought his suit against the joint family even as an ordinary debt claim (and not for contribution or other equitable relief) on 1st January 1909 and this suit brought in 1913 is barred on this ground also.

Reliance was placed by Mr. Narayanasami Ayyar on the decision in *Ramdhari Singh* v. *Parmanund Singh* (7) and on a passage in Mayne's Hindu Law, section 470, for his contention that the plaintiff's claim is not barred by limitation. In the case in *Ramdhari Singh* v. *Parmanund Singh* (7) the plaintiff and the defendants were joint heirs of one R. S. Singh. The plaintiff was entitled to 1/6th share in the estate of R. S. Singh, the defendants being entitled to 5/6th share. A sum of Rs. 7,000 and odd belonging to the estate was in deposit in a Court. The plaintiff sued for the recovery of 1/6th of that amount (nearly Rs. 1,300). Defendants (among other defences) claimed to set off plaintiff's 1/6th share of the expenses incurred by the defendants on the *sradh* ceremony of one of R S. Singh's widows. The learned Judges in their judgment at page 1187* make the following observations on the defendants' claim of set-off: "There remains the second item, the expenses of *sradh*. The learned Judge in one part of his judgment seems to have held that there was no agreement on the part of the plaintiff to pay a share of such expenses, but in another place he says as follows:—'The plaintiff alleges that the amount of cash found was over Rs. 4,000 and certain amounts were allotted for *sradh* and other expenses and only the balance divided. The defendants allege that all that was found was divided and they undertook the *sradh* expenses on the plaintiff agreeing they should recoup themselves from the moneys in deposit, etc., now in suit. All these questions have to be gone into and many others.' It seems to us, therefore, that the learned Judge has not come to any positive finding upon the alleged agreement on the part of the plaintiff to pay a share of the *sradh* expenses. *Besides apart from any agreement, the plaintiff is liable to contribute his share of the* sradh *expenses.*" The amount, however, which may be found on enquiry into the above matter, cannot be called an 'ascertained sum.' But the sum need not be ascertained in an equitable

(5) 20 C. 18; 10 Ind. Dec. (N. S.) 13.

(6) 8 M. L. J. 271.

(7) 21 Ind. Cas. 716; 19 C. W. N. 1183.

*Page of 19 C. W. N.—*Ed.*

set-off. * * * We think it inequitable to give a decree to the plaintiff for his share of the assets realised, and drive the defendants to claim against the plaintiff the amount which might have been spent on account of the *sradh* under an agreement with the plaintiff, or the reasonable expenses of the *sradh* apart from any agreement, *more specially when a fresh suit may be barred by limitation*, and when the defendants have paid Court fee upon the whole amount claimed by them" So far as I could see, the learned Judges admit that the claim of the defendants for contribution if made in a suit by the defendants against plaintiff might be barred by limitation and all that they hold is that as defendants they are entitled to claim a set-off of the contribution due to them by the plaintiff in respect of the *sradh* expenses.

The passage in Mayne's Hindu Law (see page 654, 8th Edition) is as follows:—"But, of course, advances made to any member *for a special private purpose*, for which he would have no right to call upon the family purse, or to discharge his own personal debts, contracted without the authority of the other members, or alienations of the family properties made by *an individual* for his own benefit would be properly debited against him in estimating his share."

This passage does not directly relate to the question now under consideration. It relates to the converse case, where a member of a joint Hindu family as an individual member gets an advance of money *from the joint family funds* for his individual separate benefit, the case before us being one where some members have themselves made an advance to the joint family. In the former case, the money advanced might be treated as joint family funds in the hands of the person to whom the advance was given which, therefore, ought to be brought into hotchpot at division. No question of limitation would then arise as regards such property. In the converse case before us, the joint family's *liability* to an individual member or individual members cannot be treated as *assets or property* to be brought into hotchpot at division. I must further remark, as regards the passage in Mayne's Hindu Law, that the authorities quoted in support of the proposition of law laid down in that passage, *viz.*, the decisions in *Konerrav* v. *Gurrav* (8), *Ramanna* v. *Venkata* (9) and *Damodardas Maneklal* v. *Uttamram Maneklal* (10), cannot be said to fully support the said proposition laid down so broadly. I think, that, if the advance was made, say, by a father to one of his sons out of the joint family income in the father's hands without any intention to make the son liable to account for the advance at division and without any agreement to that effect between the father and the son it may be an act of partiality on the part of the father, but I do not think that, after three years, the joint family or any of the other sons can call the favoured son to account for the advance.

Mr. Narayanasami Ayyar relied also on certain passages in Freeman on Co-Tenancy, sections 505 and 512, and contended that, in suits for partition between the co-sharers, Courts of Equity have got unlimited powers to do justice between the co-sharers. I was at first impressed with this argument, but after the best consideration which I have been able to give to it, I do not think that, where a Statute Law (in this case Article 107 of the Limitation Act) expressly treats a debt due even to the manager of the joint Hindu family as one to be sued for by him just as if he was a complete stranger and, if not, to have his remedy barred, it is permissible (apart from an agreement, express or implied) to defeat the intention of the Legislature by allowing it to be treated as an item of account or as a debt to be discharged from the joint family funds when partition takes place, it may be, after several years. Of coruse, the creditor member of the family, whether a manager or a junior member, may, before his debt is barred, take it out of any family money which came to his hands before his debt is barred, but he cannot do it after his claim for recovery is barred.

In the result, the second appeal is dismissed with costs.

PHILLIPS, J.—Plaintiff and defendants Nos. 1 to 3, as partners of a trading firm, defrayed the funeral expenses of plaintiff's father, a member of their family, and after

(8) 5 B. 589; 3 Ind. Dec. (N. S.) 388.

(9) 11 M. 246; 12 Ind. Jur. 177; 4 Ind. Dec. (N. S.) 171.

(10) 17 B. 271; 9 Ind. Dec. (N. S.) 177.

dissolution of partnership, plaintiff alone became entitled to the assets of the firm. In his present suit for partition plaintiff seeks to recover the funeral expenses out of the joint family funds, although admittedly the claim, if treated as a debt, would now be time-barred. Plaintiff pleaded a separate oral agreement under which he is entitled to recover the funeral expenses, but it has been found that this agreement is not true and consequently it cannot be relied on here.

It is first contended that the firm consisting of plaintiffs and defendants Nos. 1 to 3 could not have sued the joint family of which they are members, because they would have been bringing a suit against themselves, although in a different capacity. Whatever may have been the Common Law of England on this point, the rule of procedure, that the same individual, even in different capacities, cannot be both a plaintiff and a defendant to one and the same action, has not been strictly followed by Courts of Equity, as is pointed out by Jenkins, C. J., in *Rustomji* v. *Sheth Purshotamdas* (1), and is certainly not applicable to this country as is shown by the provisions of Order XXX, rule 9, of the Code of Civil Procedure, which clearly contemplate suits between the same individuals in different capacities. The trading firm of which the plaintiff and defendants Nos. 1 to 3 were partners could, therefore, have sued the joint family of which they were also members. Rule 9 no doubt places some restriction on execution of decrees obtained in suits between firms having one or more partners in common, but we are not now concerned with that question. I hold, therefore, that plaintiffs and defendants Nos. 1 to 3 could have brought a suit for the funeral expenses against their joint family, even if it be assumed that members of a joint family are partners in a firm, and that such a suit is now time-barred. It is then contended that plaintiff can claim the funeral expenses by way of set-off in partitioning the family property, although his right to sue for them as a debt is barred by limitation. The right to set-off, strictly speaking, is confined to a defendant and if plaintiff makes a claim by way of equitable set-off, it is not very clear how the plaintiff who has invoked the aid of the Court against defendants, is entitled to any equity as against them. It is urged that he is so entitled because he has a legal right to demand partition. That is quite true, but there is no obligation on him to make such a demand and, consequently, when he moves the Court to enforce his rights to a share in the family property against the other defendants he is hardly entitled to claim something more than his share by way of equitable set-off. I, therefore, agree that the appeal should be dismissed with costs.

Appeal dismissed.

M.C.P.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1606 OF 1916.

February 7, 1918.

Present:—Mr. Justice Shadi Lal.

BHAGWAN DAS AND OTHERS—DEFENDANTS—APPELLANTS

versus

SHAMSHER SINGH—PLAINTIFF—RESPONDENT.

Appeal, second—Judgment based on conjectures and presumptions, whether liable to be set aside—Punjab Tenancy Act (XVI of 1887), s. 59—Succession to occupancy holding—Burden of proof.

A judgment based on mere conjectures and presumptions is liable to be set aside in second appeal. [p. 434, col. 2]

Where on the death of an occupancy tenant his collaterals claim to succeed to the tenancy, the onus lies on them to establish affirmatively that the common ancestor occupied the land. In such a case conjecture cannot be accepted as a substitute for proof. [p 434, col. 2.]

Second appeal from the decree of the District Judge, Hoshiarpur, dated the 16th April 1916, affirming that of the Subordinate Judge, 1st class, dated the 24th February 1915, decreeing the claim.

Bakhshi *Tek Chand*, for the Appellants.

The Hon'ble Pandit *Sheo Narain* and Lala *Rup Chand*, for the Respondent.

JUDGMENT.—The contest in this case is between the landlords on one side, and the collateral of the husband of *Musammat* Gopal Kaur, who in her capacity as widow was in possession of the land as an occupancy tenant, on the other. The pedigree-table shewing the relationship between the plaintiff and Ishar Singh, the deceased

husband of *Musammat* Gopal Kuar, is set out in the judgment of the lower Appellate Court, and the only question for determination is whether the common ancestor, Dal Singh, ever occupied the land. The onus admittedly lies on the plaintiff who claims the occupancy rights as the collateral of Ishar Singh and it is for him to establish affirmatively that Dal Singh was in occupation of the land.

I have given my careful consideration to the documents having a bearing upon the question in issue, and reached the conclusion that there is absolutely no evidence to shew that the common ancestor occupied the land. The earliest information we possess about the land is contained in a *muafi* file of 1847, which shews that Dal Singh's son Ram Singh gave the land in dispute to his brother's widow *Musammat* Man Kaur first by way of maintenance and then as *muafi* also. On *Musammat* Man Kaur's death the land reverted to Ram Singh, and then came into the possession of the latter's son, Ishar Singh, who was declared to be the occupancy tenant in 1872. On the demise of Ishar Singh his two widows *Musammat* Attar Kaur and *Musammat* Gopal Kaur possessed the land, and the dispute has now arisen upon the death of the surviving widow *Musammat* Gopal Kaur.

Now, the learned District Judge holds that it may be presumed from the history of the village and the mutation orders referred to above that Ram Singh's father Dal Singh occupied the land, and that it is for the landlords to rebut this presumption. The history of the village merely shews that Dal Singh's father Gurdit Singh came to this part of the country and acquired some sort of ruling powers, but it contains no information whatsoever with respect to the property in dispute which, it is to be observed, is the only land held by the family in this village. The documents relied upon by the learned District Judge do not contain the slightest indication that Ram Singh's father had anything to do with the land, and it is a mere conjecture that any person other than Ram Singh was originally in occupation thereof. The learned District Judge thinks that if the land had not been ancestral it would not have come back to Ram Singh on the death of *Musammat* Man Kaur; but the explanation is simple enough. Ram Singh was the donor of the property and it reverted to him on the death of the donee. If his other brother, Diwan Singh, had been a co sharer with him in the paternal estate, there is no reason why he should not have succeeded to the land equally with Ram Singh.

I asked the learned Advocate for the plaintiff-respondent whether he could draw my attention to any fact which would be incompatible with the theory that Ram Singh and not his father was the first person to occupy the land, but he expressed his inability to do so. Indeed, the theory of Dal Singh's occupation of the land rests upon a mere conjecture and it has been pointed out by their Lordships of the Privy Council that conjecture cannot be accepted as a substitute for proof, *vide Atar Singh* v. *Thakar Singh* (1).

I observe that the oral evidence has not been referred to by the learned District Judge and a perusal thereof shews that it cannot possibly be of any use with respect to an event which took place more than 70 years ago.

For the aforesaid reasons I hold that the plaintiff, upon whom the onus rested, has failed to produce any evidence to discharge that onus, and that the judgments of the lower Courts, which are based upon mere conjectures, must be set aside. Accordingly, I accept the appeal and dismiss the plaintiff's suit with costs throughout.

Appeal accepted.

(1) 6 Ind. Cas. 721; 42 P. R. 1910; 12 C. W. N. 1049; 35 C. 1039; 35 I. A. 206; 8 C. L. J. 359; 18 M. L. J. 379; 128 P. W. R. 1908; 10 Bom. L. R. 790; 4 M. L. T. 207 (P. C.).

UJIYARA *v.* TILOCHAN.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 231 OF 1916.

August 20, 1917.

Present:—Sir Henry Stanyon, KT., A. J. C.

Musammat UJIYARA—DEFENDANT—APPELLANT

versus

TILOCHAN GOND—PLAINTIFF—RESPONDENT.

C. P. Laws Act (XX of 1875), s. 5—'Hindu,' meaning of—Hindu Law, applicability of—Apostacy, effect of—Gonds, whether Hindus—'Sudra', who is—Burden of proof—Stare decisis, *doctrine of—Wrong application of law, effect of.*

Apostates from the Hindu religion cease to be Hindus and where such apostacy takes the form of conversion to a religion which in itself regulates the devolution of property, *e. g.*, the Muhammadan religion, then, except on proof of a well-established custom to the contrary and that only in regard to inheritance and succession, the convert becomes subject to the law of his adopted religion. [p. 439, col. 1]

The term 'Hindu' in section 5 of the Central Provinces Laws Act, 1875, refers to persons who profess some form of the Hindu religion, whatever be the branch, school, sect, off-shoot or denomination to which they may belong, but it does not extend to persons who have never professed any form of the Hindu religion or to those who have been converted from it to some entirely different religion. The word would apply to dissenters and non-conformists but not to apostates. Thus a Jain is a Hindu but a Brahman converted to Buddhism or Islam is not. [p. 440, col. 1.]

The Gonds in the Central Provinces are not Hindus and they are not governed by the Hindu Law except when it is adopted by any family, sect or branch among them. [p. 440, col. 2; p. 443, cols. 1 & 2.]

Every Hindu, properly so called, who does not belong to one or other of the three regenerate classes is a Sudra, and to him the Hindu Law relating to Sudras applies of its own force, but no non-Hindu can be a Sudra, any more than he can be a member of any of the regenerate classes. Since a Gond is not a Hindu at all he cannot be brought within the category of Sudras. [p. 442, col. 1.]

Although the Hindu Law is primarily a personal law, it has also become attached to localities, and, therefore, a Hindu must be presumed to be governed by the law of the locality where he resides. [p. 442, col. 1.]

A man does not become a Hindu by calling himself one, nor is the adoption by a non-Hindu of usages resembling some parts of the Hindu Law a sufficient ground for applying the whole of that law to him *en bloc*, in the same way and to the same extent as if he were a Hindu. [p. 443, col. 1.]

In the case of a family which is not originally Hindu but which has adopted Hinduism, the burden of proving that the family is governed in a particular matter by the Hindu Law is upon the person who asserts that it is so governed. [p. 445, col. 1.]

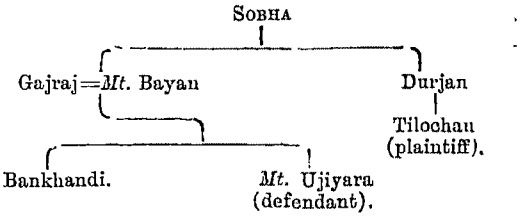
An unconscious application of wrong law cannot set up a principle of *stare decisis* merely because it has been left unchallenged for a few years owing to the ignorance of the people affected by it. [p. 443, col. 2.]

Appeal from the appeal decree of the Divisional Judge, Chhattisgarh Division, in Civil Appeal No. 3 of 1916, dated the 1st March 1916:

Mr. *M. V. Bose*, for the Appellant.

Mr. *D. T. Mangalmurti*, for the Respondent.

JUDGMENT.—The following genealogical tree will facilitate comprehension of this judgment :—



The parties are Gonds domiciled in the Bemetara Tahsil of the Drug District, but to which sub-division or sect of the Gond tribe they belong cannot be ascertained from the record. The property in dispute is an 8-annas share of the village Amlidih in the Bemetara Tahsil. It is the case of the plaintiff that the whole village once belonged to Sobha; that on the death of Sobha it devolved first on his sons, and then on his grandsons Bankhandi and Tilochan: that the grandsons effected a partition, after which each of them held an 8-annas share in severalty, that Bankhandi died about 22 years before this suit and his half share was inherited by his mother *Musammat* Bayan: and that on her demise, which took place on the 13th August 1914, the plaintiff became entitled to the share as the reversioner of Bankhandi but that the defendant had wrongfully possessed herself of the same and obtained mutation of names in her favour. On these allegations the plaintiff brought the present suit to recover the share.

It has been found that the village of Amlidih was once the property of Sobha—that Bankhandi and Tilochan partitioned it after it had devolved on them—that on Bankhandi's death his share was inherited by his mother, who held it till her death on the 13th August 1914. These facts are now beyond dispute.

But it is manifest that the plaintiff claims to apply the Hindu Law of the Mitakshara to this case. If that law applies, he is beyond doubt the present owner of the share in dispute. But the defendant has pleaded that the family are Gonds and not Hindus, and that the Mitakshara does not govern the devolution of the estate.

The first Court took it to be a matter beyond discussion that inheritance in the family of the parties is governed by the Mitakshara as interpreted by the Benares School—that being the Hindu *lex loci* in the Central Provinces. It, therefore, gave the plaintiff a decree. The lower Appellate Court considered more closely the defendant's plea as to the personal law applicable, and ruled that, *prima facie*, the Mitakshara applied, and the onus lay on the defendant to prove that it was otherwise; and that she had failed to establish any custom at variance with the law. The decree of the first Court was, therefore, confirmed. The defendant has now made this second appeal, and again it is urged that the Mitakshara does not govern inheritance in her family: that it lay on the plaintiff to prove that he is the heir in preference to the defendant to the estate which belonged to the defendant's mother; and that he has failed to discharge that burden.

It will be seen that the main issue in the case relates to the onus of proof. On the one hand, is it to be presumed, until the contrary is shown, that inheritance among the Gonds generally, or at least among Gonds of the class and locality to which the parties belong, is governed by the Hindu Law? Or, on the other hand, is it the case that Gonds are non-Hindus who must be proved to have adopted the Hindu Law as their own before it can be applied to them? If the former is the correct point of view, then this appeal must fail. If the latter is the right standpoint from which this case should be approached, then this appeal must succeed.

The decision of the question before me has been rendered difficult, (1) by uncertainty attaching to the significance of the words 'Hindu' and 'Sudra'; (2) by the conditions arising out of apostacy and dissent on the part of tribes, sects, and families of Hindu origin, whose abandonment of the Hindu orthodoxy in religion has been accompanied by the adoption of customs at variance with the personal law of Hindus; and (3) by the fact that tribes, communities, and families, non-Hindu in origin, by imitation and assimilation due to a long association with Hindus, have so far accepted the Hindu Law as their own that the British Indian Courts have habitually applied it to them in the same way as if they were Hindus.

The policy of the British Government has always been directed towards the preservation of the personal laws and customs of each and every one of the diverse races inhabiting India, and successive legislative enactments have been brought into force from time to time to maintain and give effect to that policy. The original Statute was 21 Geo. III. C. 70, the preamble whereof stated "that the inhabitants should be maintained and protected in the enjoyments of all their ancient laws, usages, rights and privileges;" while the Act provided that "inheritance and succession to lands, rents and goods and all matters of contract and dealing between party and party shall be determined in the case of Muhammadans by the laws and usages of Muhammadans, and in the case of Gentus by the laws and usages of Gentus; and when only one of the parties shall be a Muhammadan or Gentu, by the laws and usages of the Gentu." Apparently the word 'Gentu' was used to denote the non-Muhammadan inhabitants of this country much after the manner in which Gentiles were distinguished from the Jews of Palestine in ancient times. The significance of the word was discussed in *Lopes* v. *Lopes* (1), where it was referred to as "the Portugal idiom for Gentiles," and held to signify 'Hindus'—"in a large and liberal sense of that term." From this decision we learn that an even more general phrase, "India Natives," was once employed by British legislators and that a charter of 1726 "contains the earliest trace (in Royal Charters) of a reservation to the natives resident in our territories in India of their laws and customs." The above Statute (21 Geo. III, C. 70) applied only to Bengal, but the same provisions were made for Bombay and Madras by 37 Geo. III, C. 142, 40

(1) 5 B. H. C. R. O. C. J. 172 at pp. 183—186.

Geo. III, C. 79 and 4 Geo. IV, C. 71. The principle enforced by these Statutes has been embodied in subsequent enactments of the Government of India, until now every part of British India has legislative preservation of the personal laws and customs of its people.

In a very recent case, *Rani Bhagwan Kuar* v. *Bose* (2), their Lordships of the Privy Council made the following remarks:—

"A long series of legislative provisions have been enacted for the purpose of securing to the people of India the maintenance of their ancient law, amongst others in matters of inheritance and succession, and many minor enactments have been passed to facilitate the administration of the laws so preserved. The object and principle of this legislation has been throughout to enable the people of various races and creeds in India to live under the law to which they and their fathers had been accustomed, and to which they were bound by so many ties.

"The framers of the earlier Acts, regulations, and charters had a less detailed acquaintance than we have now with the diversities of creed and of religious law existing in India. They were familiar with two great classes, Muhammadans and Hindus, each with its own law bound up with its own religion. They thought no doubt that they were sufficiently providing for the case by securing to Muhammadans the Muhammadan Law, and to Hindus (or Gentus as they were sometimes called) the Hindu Law. In process of time it became more and more clearly understood that there were more forms than one of the Muhammadan Law, and more forms than one of the Hindu Law, and the Courts, acting in the spirit which prompted the legislation, have applied the law of each school to the people whose ancestral law it was. In the same way it came to be known that there were religious bodies in India which had, at various periods and under various circumstances, developed out of, or split off from, the Hindu system, but whose members have nevertheless continued to live under Hindu Law. Of these the Jainas and Sikhs are conspicuous examples. Their cases had to be considered by the Courts and in dealing with them a liberal construction was always placed upon the enactments by which Muhammadans and Hindus were secured in the enjoyment of their own laws."

The share of the Central Provinces in these legislative enactments for the preservation of personal laws is represented by the Central Provinces Laws Act, 1875 (XX of 1875). Sections 5 and 6 thereof provide as follows:—

"5. In questions regarding inheritance, special property of females, betrothal, marriage, dower, adoption, guardianship, minority, bastardy, family-relations, Wills, legacies, gifts, partitions or any religious usage or institution, the rule of decision shall be the Muhammadan Law in cases where the parties are Muhammadans, and the Hindu Law in cases where the parties are Hindus, except in so far as such law has been by legislative enactment altered or abolished, or is opposed to the provisions of this Act:

"Provided that when among any class or body of persons or among the members of any family any custom prevails which is inconsistent with the law applicable to such persons under this section, and which, if not inconsistent with such law, would have been given effect to as legally binding such custom shall notwithstanding anything herein contained be given effect to.

"6. In cases not provided for by section 5, or by any other law for the time being in force, the Courts shall act according to justice, equity and good conscience."

It will be convenient to notice here certain other British Indian enactments which have a bearing in matters of inheritance and succession in British India.

Act XXI of 1850 (which by Act XIV of 1897 was given the short title of "The Caste Disabilities Removal Act, 1850" and has sometimes been referred to as "The *Lex Loci* Act") provides as follows:—

"So much of any law or usage now in force within the territories subject to the Government of the East India Company as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance by reason of his or her renouncing or having been excluded from the com-

(2) 30 I. A. 249 at p. 253; 7 C. W. N. 895; 31 C 11; 5 Bom. L. R. 845; 13 M. L. J. 381; 84 P. R. 1903; 135 P. L. R. 1903; 8 Sar. P C. J. 543 (P. C.).

munion of any religion, or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company, and in the Courts established by Royal Charter within the said territories."

This enactment was extended to the whole of British India by the Local Laws Extent Act, 1874 (XV of 1874) and to the Scheduled Districts of the Central Provinces by Notification in the Gazette of India, 1879, Part I, page 771.

In the Indian Succession Act, 1865 (X of 1865), the following provisions are relevant:—

"2. Except as provided by this Act, or by any other law for the time being in force, the rules herein contained shall constitute the law of British India applicable to all cases of intestate or testamentary successions."

* * * * * * *

"331. The provisions of this Act shall not apply to intestate or testamentary succession to the property of any Hindu, Muhammadan, or Buddhist; * * * * * *"

"332. The Governor-General of India in Council shall from time to time have power * * * to exempt from the operation of the whole or any part of this Act, the members of any race, sect, or tribe in British India, or any part of such race, sect, or tribe, to whom he may consider it impossible or inexpedient to apply the provisions of this Act, or of the part of the Act mentioned in the order. * * *"

Under the last of the above provisions Native Christians in Coorg, Jews in Aden, and certain aboriginal races in Assam have been exempted from the operation of section 2 by Notifications issued respectively in 1868, 1886 and 1887: but no exemption of any persons in the Central Provinces outside the categories of Hindus, Muhammadans and Buddhists has so far been made by Gazette Notification.

The Parsi Intestate Succession Act (XXI of 1865), however, exempts Parsis from the law of intestate succession embodied in Act X of 1865.

Turning now to a closer consideration of sections 5 and 6 of Act XX of 1875, it seems to me that the purpose of the Legislature was to provide for (h) preservation, as far as practicable, of the ancestral domestic law of each and every class of the inhabitants of the Central Provinces by placing the entire population under three main heads which may be named (1) Muhammadans, (2) Hindus and (3) Others. The law thus set up may be summarised as below:—

For all classes.—The Statute law, so far as it applies, is the paramount authority.

For Muhammadans.—Muhammadan Law
For Hindus —Hindu Law
} subject to modifications created (1) by statutory law and (2) by valid custom.

For Others.—Personal law, if any, subject to Statute Law and valid custom; and failing any established law or custom, an application of the principles of equity, justice and good conscience as understood by the British Indian Courts.

The questions immediately before me may be stated thus:—

"(1) Are the parties to this suit Hindus within the meaning of that term in section 5, Act XX of 1875? If not

"(2) By what law or custom is the decision of this case to be governed?"

As pointed by the Judicial Committee in the case above cited the Indian Legislature has used the term 'Hindu' in a much wider sense in some enactments than in others. In some it has always been interpreted to include Jains and Sikhs; in others (*e. g.*, the Hindu Wills Act, 1870) it is used to signify Hindus other than Jains and Sikhs. Indeed the history of Indian legislation suggests a progressive reduction of the term 'Hindu' to its proper limitations. We first see the term "India Natives." Then we get "Muhammadans and Gentus" to represent the whole Indian population. Next we have it explained that Gentus do not include people of European origin such as the Portuguese, and the word is taken to be synonymous with Hindus as denoting non-Muhammadan Asiatics domiciled in India. Soon after we see Buddhists removed from this general category: and about the same time some dissenters from the orthodox Hindu religion are distinguished by special

denominations—Jains and Sikhs—from other Hindus.

This treatment of the subject introduces complexity and doubt into the interpretation of the word 'Hindu' for juristic purposes at the present day. The customary significance of the word in popular parlance is even more uncertain. In Trevalyan's Hindu Law at pages 18 and 19 the expression 'Hindus' is defined as including not only the persons who profess what is called the Hindu religion, but also such of their descendants as have not openly abjured that religion. That implies that apostates from the Hindu religion cease to be Hindus: and it seems to be accepted now, as a rule of law, that, where such apostacy takes the form of conversion to a religion which in itself regulates the devolution of property, *e. g.*, the Muhammadan religion, then, except on proof of a well-established custom to the contrary, and that only in regard to inheritance and succession the convert becomes subject to the law of his adopted religion: *Abraham* v. *Abraham* (3), *Mahomed Sidick* v. *Haji Ahmed* (4), *Raj Bahadur* v. *Bishen Dayal* (5), *Bai Machhbai* v. *Bai Hirbai* (6), *Rashid Karmali* v. *Sherbanoo* (7).

Dr. Gour in his comprehensive work on the Law of Transfer in British India, 4th Edition, Volume I, at pages 28 and 29, in dealing with the question who are Hindus, writes;

"Although the term 'Hindu' is popularly understood the comprise only such people as follow the Hindu religion, or rather its ceremonial observances, a wider class of people are subject to Hindu Law. And while it may truly be said of a Hindu, *nasciter non fit*, still it is often difficult to reconcile the juristic conception of the term with its popular notion."

It seems to me that some of this difficulty is due to a confusion of the question who is a Hindu with the question who is subject to the Hindu Law. I shall endeavour to keep these questions distinct in this judgment.

Mr. G. C. Sastri in his work on Hindu Law does not give us any express definition of a Hindu; but the whole tenor of the treatise shows that the learned author applied the name to those persons only who profess the Hindu religion.

In West and Buhler's Hindu Law, though the extent of the operation of the Hindu Law is dealt with fully, there is no express definition of the word 'Hindu'; but here also the expression seems to have been used throughout in a theological sense.

There is a certain amount of case-law in support of the view that the word Hindu is denominative of a religion and not of a race. I need only refer to the following remarks of Parsons, J., in *Dagree* v. *Pacotti San Jao* (8):

"There is no race of Hindus. It is not the inhabitants of Hindustan who are Hindus, but those only of them who profess a religion which is called the Hindu religion. Just so there is no race of Muhammadans or of Buddhists, or of Christians. An argument that a Christian, who has adopted the Muhammadan religion, is nevertheless still a Christian, is on the face of it an absurdity; but it is as good an argument as one that a Hindu, who has been converted to the Christian religion, is still a Hindu."

Where a religion is so inextricably entwined with the secular law of inheritance and succession as is the case with what is accepted in British India as the Hindu Law, it is impossible to suppose that the British Indian Legislature intended by enacting such provisions as we find in section 5, Act XX of 1875, to apply the term "Hindu" in a wider sense to the people than to the law, and, by a divorce of legal conceptions from religious doctrines, to make the Hindu Law apply of its own force to races, tribes and families who are wholly outside the extreme limits of the Hindu religion.

Upon the best consideration that I have been able to give the matter I am of opinion that the view propounded by Parsons, J.,

(3) 9 M. I. A. 195 at pp. 242, 243; 1 W. R. P. C. 1; 1 Suth. P. C. J. 501; 2 Sar. P. C. J. 10; 19 E. R. 716.

(4) 10 B. 1 at pp. 9, 10; 5 Ind. Dec. (N. S.) 383.

(5) 4 A 343 at p. 347; A. W. N. (1882) 74; 6 Ind. Jur. 659; 2 Ind. Dec. (N. S.) 968.

(6) 10 Ind. Cas 816; 35 B. 264; 12 Bom. L. R. 251.

(7) 29 B. 85; 6 Bom. L. R. 874.

(8) 19 B. 783 at pp. 787, 788; 10 Ind. Dec. (N. S.) 525.

in the above Bombay case is correct, and I, therefore, hold that the term "Hindus", in section 5 of the Central Provinces Laws Act, 1875, refers to persons who profess some form of the Hindu religion whatever be the branch, school, sect, off-shoot or denomination to which they may belong; but that it does not extend to persons who have never professed any form of the Hindu religion or to those who have been converted from it to some entirely different religion. The word will apply to dissenters and non-conformists, but not to apostates. Thus a Jain is a Hindu, but a Brahman converted to Buddhism or Islam is not.

The next question I have to consider is whether the Gonds of the Central Provinces are Hindus, within the meaning of that term in section 5, Act XX of 1875, for on the answer to that question depends the reply to the further question whether the Hindu Law applies of its own force to matters regarding inheritance and succession among them. For a proper solution of the problem some historical and ethnological research has been necessary. All the existing bibliography is not available to me, but I have consulted Hislop's Papers on the Aboriginal Tribes of the Central Provinces, 1866, which is the leading treatise on the subject, Steele's Law and Custom of Hindu Castes, 1868, Therring's Hindu Tribes and Castes (1879), Russell's Tribes and Castes of the Central Provinces (1916) and The Story of Gondwana (1916) by the Right Reverend Dr. Eyre Chatterton, Bishop of Nagpur; and from these works I have extracted the following information.

The Gonds constitute the principal tribe of the Dravidian family, and are perhaps the most important of the non-Aryan or forest tribes in India. Census operations carried out in 1910-11 revealed that there were 3,000,000 Gonds in India at that time, of whom no less than 2,300,000 were domiciled in the Central Provinces. These figures indicate the necessity for an authoritative decision by this Court on the question of the domestic law applicable to these people.

Such information concerning their ancient history as is available leaves no room for doubt that in origin they were a people entirely distinct from the Aryans, to whom we owe the existing Hindu Law and religion. At what time, or under what circumstances, the Gonds first became domiciled within the area which has been called Gondwana after them, are pre-historic facts whereof the knowledge has now been lost in the fading horizon of the ever receding and unmeasurable past. But sufficient indications remain to sustain the hypothesis that the original emigrants to Gondwana belonged to the Dravidian family then settled in the South of India; and though Russell suggests that the immigration may have taken place after the Aryan invasion which brought what is now called Hinduism into India, the better view seems to be that it preceded it. The Bishop of Nagpur at page 6 of his book writes:

"Those who know Risley's work on The People of India will remember that the earliest and most numerous of the seven reaces to which he would trace the present people of India is the Dravidian race. It is to this race, 'the ancient Britons of India' * * * that the Gond belongs."

"Where those Dravidian Koitors dwelt before they settled in the plains and uplands of the Central Provinces, is a question which cannot now be answered. * * * * The more probable view, however, is that the Gonds were an uncivilized branch of the Dravidians who in early times moved up from the Deccan into the Central Provinces, where they made their home in company with other aboriginal tribes, Kols, Korkus and Bhils. Here they lived their primitive life in the ways they loved best. * * * * Then with the coming of the Aryans into India the beginnings of a larger and more civilized life dawned for Gondwana * * *."

Further on in his interesting work the Bishop refers to a passage in the Epic of the Ramayana showing that the highly civilized Aryans of those days regarded the Gonds as 'Shapeless and ill-looking monster," and as "base-born wretches" who "perpetrate the greatest outrages." In all the works we find the Gonds with a pantheon of Gods almost wholly different from those of the Hindu mythology, and with some habits, rites and ceremonies which would be wholly repugnant to Hindu ethics and Brahminical doctrines.

All these circumstances make it clear that the origin of the Gonds was Non-Hindu even using the term Hindu in the wide

significance given to it by the Judicial Committee in *Rani Bhagwan Kuar* v. *Boss* (2). And it cannot be said that these aboriginal people, natives of the once isolated tracts of dense forest and extended hills named Gondwana, have even now been so affected and transformed by the ethnical and social changes which have taken place under the successive invaders of India—Aryans, Scythians, Mongols, and Latins—as to have become merged in the general Hindu population. In the case of *Gobra* v. *Man Singh* (9), S. A. No. 219 of 1877 decided by this Court on the 30th August 1877, the learned Judicial Commissioner Mr. (afterwards Sir Charles) Grant (who compiled the Central Provinces Gazetteer of 1871 containing a notice of the Gonds) wrote:—

"The plaintiff's father and mother belong to the Gond race, who come even below the lowest Hindu races in social standing; and as illegitimacy is held not to be a bar to inheritance among Hindu Sudras, such a modified form of it as would arise from a left-handed marriage (as in this case) can scarcely be regarded as creating any disability among races even more careless of the social law and ceremony."

It is manifest from this passage that so recently as 40 years ago Gonds were regarded by the highest judicial authority in these Provinces as something apart from, and even lower than, Hindu Sudras.

It was argued before me that the Gonds of these Provinces are Sudras. It is necessary to examine that contention and dispose of it. Though the text-books and commentaries of Hindu Law deal with Sudras, I have been unable to find any generally accepted definition of that expression beyond this that it refers to Hindus who do not belong to the twice-born classes. The Hindu Law divides Hindus into the following four divisions or castes:—

(1) the Brahmins or priestly caste;
(2) the Kshatriyas, or warrior caste;
(3) the Vaisyas or agricultural caste;
(4) the Sudras, or menial castes.

Various definitions of the Sudra, more or less of conjectural kind, have been put forward. Thus in the 8th Edition of Mayne's Hindu Law, at page 107, a foot-note (which also appeared on page 92 of the 7th Edition) reads:

"I take the Sudras as representing aborigines in early time, but I am aware there is much controversy on the point."

There is not even the semblance of authority to be found for this assumption in any of the Hindu text books. In *Gopal Narhar Safray* v. *Hanmanta Ganesh Safray* (10) Westropp, Chief Justice, stated that the Hindu Law regards Sudras as slaves. This statement is strongly controverted by Mr. G. C. Sastri in his book on Hindu Law, at page 151. He evolves a definition of his own for which he claims authority from certain texts cited by him. According to this view every Hindu is born a Sudra: but if by birth he is also a Brahman, a Kshatriya or a Vaishya, he can become regenerate by learning the sacred literature. If such an one fails to attain knowledge of the Vedas, he remains a Sudra. The learned author is constrained to admit the existence of a text which forbids to Sudras the privilege of studying the Vedas; but makes no attempt to explain the inconsistency which arises if the three superior castes are to be considered as within the category of Sudras unless they learn that which Sudras are forbidden to read. The idea that a Brahman begins life, and may end it, as a Sudra is novel and revolutionary. Mr. Sastri claims authority for it chiefly from a text of Manu (Chapter II, 168) which he translates thus:—

"That twice-born man who, without studying the Vedas, applies diligent attention to anything else, soon falls even when living, together with his decendants, to the conditions of a Sudra."

It will be observed that the text refers in express terms to a "twice-born man", and does not sustain Mr. Sastri's view that the second birth is postponed until after the Vedas have been learned. To my mind it contains nothing but a pious warning to every Hindu of the regenerate classes that, if he neglects the study of the sacred literature, he and his descendants will fall to the level of Sudras: not that they will become or remain Sudras, but in ignorance and consequent degradation will resemble Sūdras.

But Mr. Sastri's conception of a Sudra

(9) D. C. R. Part VIII, No. 35.

(10) 3 B. 273 at p. 280; 2 Ind. Dec. (N. S.) 183.

seems the most correct so far as it assumes every Sudra to be a Hindu by birth and religion: and I am of opinion that every Hindu, properly so called, who does not belong to one or other of the three regenerate classes, is a Sudra; and that to him the Hindu Law relating to Sudras applies of its own force, but I think that no non-Hindu can be a Sudra any more than he can be a member of any of the regenerate castes. Since a Gond is not a Hindu at all, it follows that he cannot be brought within the category of Sudras.

But the finding that the Gond is not within any definition, juristic or popular, of a Hindu does not conclude the matter. Dr. Gour in his said work, Volume I, at pages 28 and 29, has set out instances, supported by case-law, in which the Hindu Law has been followed in matters relating to inheritance and succession, by persons who are not Hindus by caste or religion. In dealing with this branch of the subject it is necessary to distinguish between

(1) apostates and dissenters from the Hindu religion, and

(2) those who by origin, birth and creed have always been non-Hindu.

The former class have been subjected to a considerable amount of legislative and judicial treatment, and the published case-law regarding them has not always been uniform and consistent. But with them I am not now concerned. Here I am presented with the case of a tribe which has always been non-Hindu. How far, if at all, should inheritance and succession in this tribe be governed by the Hindu Law? In this connection it is necessary to bear in mind that although that law is primarily a personal law, it has also become attached to localities: and that, therefore, a Hindu is presumed to be governed by the law of the locality in which he resides: *Ram Das* v. *Chandra Dassia* (11), *Fanindra Deb Raikat* v. *Rajeswar Das* (12), *Jugo Bundhoo Tiwaree* v. *Kurum Singh* (13), *Balaji* v. *Musammat Maina Bai* (14). The contrary view taken in *Shridhar* v. *Maina Bai* (15) seems to have been overruled. This Court has laid down that the Mitakshara of the Benares School is the Hindu *lex loci* in the Central Provinces: *Hira Lal* v. *Musammat Jani Bai* (16), *Dearao* v. *Sakhu* (17). It is immaterial now whether that law is based on immemorial local customs which Brahmanism found, adopted and shaped (as conjectured by Mr. Mayne in his Hindu Law), or is of divine origin as believed and claimed by Mr. Sastri and other Hindu commentators. The fact stands out beyond all dispute that the Mitakshara, as now accepted and applied, is saturated with Brahmanism and Hindu religious doctrines constitute the warp and woof of the principles and order of inheritance and succession contained in it. No doubt in some cases the religious element is entwined with legal conceptions which are not peculiar to Hindus, but are found in many other systems of law, *e.g.*, the heirship of a son to his father; but in other doctrines we find principles which are peculiar to the Hindu religion, indicating with reasonable certainty that in such matters the secular law followed out of the religion. The exclusion of the sister from the line of heirs, and the reversion of an estate held by a woman to the heirs of the last male holder after her death, are matters of that kind.

Now I am not unmindful of the advantage, in the administration of justice, of having a settled *lex loci* and of applying it to as many as possible of the inhabitants domiciled within the area of its operation. It may be open to doubt whether, as a matter of sound policy, every fragment of custom ought to be sought out and preserved. A wider and more uniform customary law may be more consistent with moral and material progress than an indefinite segmentation into slightly varying usages which causes perpetual doubt and difficulty in necessary transactions. But the legislative

(11) 20 C. 409; 10 Ind. Dec. (N. S.) 277.
(12) 11 C. 463; 12 I. A. 72; 4 Sar. P. C. J. 610; 9 Ind. Jur. 277; 5 Ind. Dec. (N. S.) 1068.
(13) 22 W. R. 341.
(14) D. C. R. Part VIII, No. 102.
(15) D. C. R. Part VIII, No. 25.
(16) 2 C. P. L. R. 18.
(17) 11 C. P. L. R. 49 at p. 53.

mandate is clear and conclusive. The usage of the country is the law of the people, and the Courts of British India stand bound by Statute and practice to preserve and apply to each class, tribe, caste and family the ancestral personal law thereof, unless it has been substituted by some other law or valid usage. It seems to me that it would be as incongruous to apply to the wild Gonds of the Central Provinces the peculiar principles of the Hindu Law as, their Lordships of the Privy Council considered [in *Rani Bhagwan Kuar* v. *Lose* (2)], it would be to govern inheritance among the Sikhs by the Indian Succession Act, 1865. Mr. Mayne, in his above work, enjoins much caution in applying Hindu Law to non-Brahminical tribes. Mr. Sastri, at page 363 of his treatise, gives a clear opinion that a person who is from birth a non-Hindu, cannot be subject to the personal law of the Hindus. That opinion appears to me to be correct.

There are races, tribes, communities, and families, non Hindu in origin, who have adopted some of the usages, both religious and secular, of the Hindus with whom they have been associated for centuries. It is natural that this imitation or assimilation should take place, more particularly in such domestic matters as the order of inheritance and succession, among tribes who have no written personal law of their own. But a man does not become a Hindu by calling himself one; nor is the adoption by a non-Hindu of usages resembling some parts of the Hindu Law a sufficient ground for applying the whole of that law to him *en bloc*, in the same way and to the same extent as if he were a Hindu. These considerations have apparently been overlooked by some commentators and by most of our subordinate Courts, who seem to have regarded the Hindu Law as a common law of the land, applicable to all cases which are not shown to be outside it. It is natural that such Courts, as at present constituted in these provinces, should have been led, by the presence at their elbows of a written Code of Law, to apply it beyond its scope to cases not governed by it, and that legal practitioners should have helped this error in cases where no other known system is apparent. Indeed it is a consummation devoutly to be desired that as many as possible of the diverse races and tribes occupying this vast country should be brought under a common law of inheritance and succession; but the time for that is not yet.

The Gonds in these provinces have not avoided the Hindu influences to which they have been subjected for centuries. Some branches of the tribe—notably the Raj Gonds—have closely imitated Hindu customs, have adopted Hindu names, have taken to wearing the sacred thread, and offer funeral cakes to the dead after the manner of regenerate Hindus. To many of these the local Courts have applied, without question by the parties and as a matter of course, the Mitakshara Law in cases relating to inheritance and succession. But an unconscious application of wrong law cannot set up a principle of *stare decisis* merely because it has been left unchallenged for a few years owing to the ignorance of the people affected by it: and the circumstance that in some cases our Courts may have treated as Hindus families of Gonds who have not adopted the Mitakshara as their personal law, ought not to affect the decision of this case, where the question of the law to be applied has been expressly raised. Moreover, an issue as to customary law must be decided according to the particular facts of each case as it comes up. There are many classes of Gonds, widely differing from one another in habits and status: and it does not follow because a family of Raj Gonds in the Jubbulpore or Mandla Districts have become so Hinduised as to justify the application of the Mitakshara in determining disputes as to inheritance and succession among them, that the same course would be proper in the cases, say, of Madias and Dhurs of Chhattisgarh, or the Koyas or Gaitas of the Chanda District.

The case of *Sultan Shah* v. *Dan Chunder Shah* (18) came before this Court from

(18) S. A. No. 331 of 1896.

the Betul District. The parties were Raj Gonds of a family converted to Islam in the days of Mogul rule. The lower Appellate Court having decided the case according to Muhammadan Law, the plaintiff appealed to this Court on the ground, *inter alia*, that the parties being Raj Gonds were governed by the Hindu Law in matters of marriage, inheritance and succession. Ismay, Judicial Commissioner, rightly treated the question as one of fact, and sent back the case for a finding, and eventually disposed of it by a judgment from which I make the following extract:—

"It is now found that the parties are governed by the Hindu Law as regards inheritance. This finding is objected to on the grounds that the onus was on the appellant to prove that the parties are not governed by Muhammadan Law and that the evidence to prove the custom is legally insufficient.

"I am not at all prepared to say that the *onus* was on the appellant. It may no doubt be laid down as a general rule that in questions of succession and inheritance the Hindu Law is to be applied to Hindus and the Muhammadan Law to Muhammadans, [*Jowala Buksh* v. *Dharum Singh* (19)], but there are many cases in which the universality of a custom superseding the law has been recognised. The Khojahs and Cutchi Memons have always been regarded as Hindus converted to Muhammadanism, but it has been constantly held that in the absence of proof of special custom they are governed by the Hindu Law of inheritance. Similarly it has been held by this Court (Civil Rulings—Hindu and Muhammadan Law) that the isolated Muhammadan communities who have for some two centuries dwelt amongst Hindus on the Satpura plateau have allowed their law of succession to be influenced by Hindu practice.

"In the present case the parties are Raj Gonds whose ancestors adopted the religion of Muhammad in the days of Aurangzeb. Notwithstanding their conversion they still marry into Gond families, and the presumption that they recognize the Muhammadan Law of succession, if any such presumption can be said to exist, must be singularly weak. The village share now in dispute passed from husband to widow, and on the widow's death, from father to daughter in direct accordance with the rules of Hindu Law.* * * * It must be borne in mind, that in comparison with Bhils, very few Gonds embraced the religion of Muhammad." The late Mr. Hislop, who was eminently qualified to write on the subject, notes as follows:

'The only instance that has come to my knowledge is that of Bakht Buland the Rajah of Dewagarh who was converted to Islam when on a visit to Aurangzeb at Delhi. Still his descendants, though adhering to the change of creed, have not ceased to marry into Gond families, and hence the present representative of that regal house is not only acknowledged by the whole race about Nagpur as their head and Judge, but is physically regarded as a pure Raj Gond.' (Essay on the Hill Tribes of the Central Provinces, page 5).

It is manifest that the decision of Ismay, Judicial Commissioner, rested on the facts of the particular case before him, and that it affords no authority for any presumption that all Gonds are governed by the Hindu Law. Indeed there was no question before the learned Judicial Commissioner whether Gonds are Hindus who are originarily amenable, as such, to the Hindu Law. It was found as a fact that, despite its conversion to the faith of Islam, the family had habitually governed itself by Hindu Law in matters of marriage, inheritance and succession. Under such circumstances that law was correctly applied, for clear proof of usage will outweigh all but Statute Law: *Abraham* v. *Abraham* (3), *Muthusami Mudaliar* v. *Masilamani* (20).

There is clear authority for the view that the onus of proving that a non-Hindu family has accepted the Hindu Law rests on him who alleges it. In *Fanindra Deb Raikat* v. *Rajeshwar Das* (12) their Lordships of the Privy Council laid down

(19) 10 M. I. A. 511; 2 Sar. P. C. J. 189; 19 W. R. 1036.

(20) 5 Ind. Cas. 42; 33 M. 342; 7 M. L. T. 17; 20 M. L. J. 49.

that in the case of a family which is not originally Hindu, but which has adopted Hindusim, the burden of proving that the family is governed in a particular matter by the Hindu Law is upon the person who asserts that it is so governed. The *ratio decidendi* seems to be that the adoption by a family of some parts of a law foreign to it does not raise any presumption in favour of its adoption of other parts thereof. We have seen that a Gond family may adopt Muhammadan religion without adopting the Muhammadan Law of inheritance. Similarly a Gond family may adopt the Hindu Law of marriage without accepting the Hindu Law of adoption or survivorship.

In the present case, by setting himself up as the owner of the property in suit, the plaintiff necessarily rests on two rules peculiar to the Mitakshara Law of inheritance, namely, (1) that on the death of *Musammat* Bayan the estate did not descend to her daughter but reverted to the heir of her son the last male holder, and (2) that the defendant, being the sister of that *propositus*, is excluded from inheritance. The burden of proving that these rules apply to the family of the parties lies heavily on the plaintiff. Owing to misapprehension of the law in the Courts below the onus of proof was misplaced on the defendant. It seems just to give the plaintiff an opportunity of proving his allegations, and the case must, therefore, go back.

It may be well to note that the rules of inheritance relied on by the plaintiff must be proved to be in force in their family by such evidence as the Courts usually require to justify them in giving effect to a custom. If the custom is not proved the suit must fail. It will not be necessary to decide what other law or custom of inheritance may be applicable. The defendant is in possession of property which has descended to her from her mother, and the plaintiff can only succeed if he establishes a better title. And in this connection it may be well to point out that evidence of occurrences in the family which are not peculiar to Hindu Law will not suffice to raise a presumption that the family has adopted that law. The devolution of property from father to son, or the equal division by several heirs of an estate inherited jointly from a common ancestor, are incidents common to all systems of inheritance. But evidence of adoption, of succession by survivorship to the exclusion of females, of reversion to the heirs of the last male holder taking place on the determination of an intervening female estate, of the exclusion of sisters from inheritance and other such matters peculiar to the Mitakshara having taken place in the family would sustain the plaintiff's case.

For the above reasons the appeal is allowed; the decree of the lower Appellate Court is reversed under Order XLI, rule 23 of the Civil Procedure Code, its decision on the preliminary point as to the law governing the parties being held to be erroneous. The case is remanded for a fresh decision on the merits with advertence to the above remarks. The appellant will be given the usual refund certificate. Other costs here and hitherto will abide the result.

Appeal allowed.
Case remanded.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 401 OF 1915
AND
RULE No. 49 OF 1916.
December 10, 1917.

Present:—Mr. Justice Teunon and Mr. Justice Newbould.

RAM LAL MANDAL AND OTHERS—DEFENDANTS NOS 9 TO 11—APPELLANTS
versus
ASUTOSH MANDAL AND OTHERS PLAINTIFFS AND OTHER DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 15, 19 (b)—Execution in case of cross-claims under the same decree.

Plaintiff, a co-sharer landlord, brought a suit for rent impleading several persons as defendants to the suit, of whom defendants Nos. 1 to 14 held a dual position being tenants and co-sharer landlords, Nos. 15 to 21 were purely tenants and Nos. 22 to 41 were co-sharer landlords. All the co-sharer landlords were made *pro forma* defendants. A decree was made for Rs. 76 and odd in favour of the plaintiff and for Rs. 380 and odd in favour of the co-sharer landlords, the *pro forma* defendants. The *pro forma* defendants Nos. 34 to 38, who were

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also tenants defendants Nos. 1 to 5, applied for execution of the decree against the defendants Nos. 7 to 21 for Rs. 285 and odd, which was the whole balance of the decree passed in favour of the *pro forma* defendants, Rs. 95 and odd having been realized in a previous execution proceeding:

Held, that such an execution was maintainable, but the Court under the provisions of Order XXI, rule 19 (*b*), of the Civil Procedure Code should first ascertain what amounts were due from each party to the other and thereafter allow execution to proceed for the difference, making such order as it deemed necessary for protecting the interests of the persons who had not joined in the application for execution. [p. 447, col. 1.]

Appeal against the order of the District Judge, 24-Parganas, dated the 16th June 1915, reversing that of the Munsif, 3rd Court, Alipore, dated the 17th March 1915.

FACTS.—A suit for rent was instituted by a co-sharer landlord whose interest was 2 annas and odd *gandas*, making a large number of men as parties defendants. The suit was against 41 persons, the first 14 defendants were tenants and co-sharer landlords, defendants Nos. 15 to 21 were purely tenants, defendants Nos. 22 to 41 were co-sharer landlords. The suit was decreed and the plaintiff became entitled to Rs. 76 as rent and Rs. 96 as costs. The *pro forma* defendants co-sharer landlords became entitled to Rs. 380. The plaintiff executed his decree and realised his share. The present execution was by defendants Nos. 1 to 5, who were *pro forma* defendants Nos. 34 to 38.

Babu *Amarendra Nath Bose* (with him Babus *Sarat Chandra Roy Choudhury*), for the Appellants.—The persons applying for execution are executing the decree against the defendants Nos. 7 to 21, *i.e.*, excepting themselves and defendant No. 6. The question now is whether such an application is maintainable. They are now executing for Rs. 285 from all the tenants defendants. Order XXI, rule 15, does not allow such an execution. The nature of the decree imposes a condition that one decree-holder can execute the decree against other decree-holders, but some of the decree-holders cannot execute a portion of the decree, otherwise Order XXI, rule 19, would be nullified. They cannot leave out Rs. 95 and take execution for Rs. 285.

Babu *Samatul Chandra Dutta* (with him Babu *Satish Chandra Mukherjee*), for the Respondents.—The executing Court cannot go behind the decree.

The decree must be executed as it has been passed by the Court. But the Court will have to act according to the provisions of Order XXI, rule 19, Civil Procedure Code.

Babu *Amarendra Nath Bose* replied.

JUDGMENT.—This appeal arises out of an application for execution. It appears that a co-sharer landlord brought a suit for rent against tenants 21 in number and made his co-sharers parties to the suit. They were defendants Nos. 22 to 41. In the result there was a decree in favour of the plaintiff against defendants Nos. 1 to 21 for the sum of Rs. 76 10 *karas* and in favour of the *pro forma* defendants Nos. 22 to 41 against the same tenants, defendants Nos. 1 to 21, for the sum of Rs. 380 3 *gandas* and 2 *karas*. In the present proceedings the *pro forma* defendants Nos. 34 to 38 have applied for execution in respect of a sum of Rs. 285 and odd annas against defendants Nos. 7 to 14 or according to the Munsif, against Nos. 7 to 21.

In this appeal in view of the provisions of Order XXI, rules 15 and 19, two objections have been taken. It is contended in the first place that the applicants should have prayed for execution of the whole decree made in favour of the defendants Nos. 22 to 41, that is to say, for execution in respect of the sum of Rs. 380 odd annas. But as a matter of fact the sum in respect of which the respondents-decree-holders have applied for execution represents, we are now informed, the whole balance of that decree now outstanding, credit having been given for a sum of Rs. 95 and odd annas realized by execution on a previous application. This objection, therefore, necessarily fails.

The second objection taken arises out of the fact that of the defendants against whom the decree has been made, defendants Nos. 1 to 14 hold a dual position. As defendants Nos. 1 to 14 they are tenants, and reckoned as *pro forma* defendants Nos. 28 to 41 they are co-sharer landlords. The decree that has been made is in fact in favour of defendants Nos. 1 to 14 and 6 others and is also made against themselves and 7 others. The result is that just as defendants Nos. 7 to 14 against whom execution is being taken and defendant No. 6 owe something to the executing decree-holder

defendants Nos. 34 to 38 (who are also tenant defendants Nos. 1 to 5), so defendants Nos. 1 to 5, that is, the executing decree-holder defendants Nos. 34 to 38 also owe something under this decree to decree-holder defendants Nos. 27 to 41, who are in fact also tenant defendants Nos. 6 to 14. It would seem, therefore, that under Order XXI, rule 19 (*b*), both parties being entitled to recover sums of money each from the other, the respective amounts due from each to the other should first have been ascertained and execution thereafter proceeded for the difference, the Court under the provisions of Order XXI, rule 15, making such order as it deemed necessary for protecting the interests of the persons who had not joined in the application. When the application goes back to the first Court the executing Court will take evidence and ascertain, if the parties are not agreed, what sum or share is in fact now payable under the decree by the executing decree-holders (defendants Nos. 34 to 38, otherwise defendants Nos. 1 to 5) to the other decree-holder defendants and after deducting that sum from the whole amount now due from the defendants Nos. 1 to 21 will realize the balance so ascertained.

We now learn that the money claimed, Rs. 285 odd, has already been paid into Court. In that case the executing Court will proceed to apportion it among the decree-holders on determination of their shares.

With these observations we dismiss this appeal, and as we consider that the appellants-defendants Nos. 9 to 11 are substantially in the wrong we direct that they do pay the costs of this appeal. We assess the hearing fee at two gold *mohurs*.

The appeal having been disposed of, the connected Rule No. 49 of 1916 is discharged.

Appeal dismissed;
Rule discharged.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 846 OF 1916.

October 30, 1917.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

P. V. MADHAVAN VYDIAR—PLAINTIFF—APPELLANT

versus

LAKSHMANA PATTAR AND ANOTHER—DEFENDANTS NOS. 2 AND 3—RESPONDENTS.

Mortgage—Redemption, suit for—Burden of proof—Admission of party, effect of—Amendment of plaint—Transfer of Property Act (IV of 1882), s. 60.

In a suit for redemption of a mortgage, the plaintiff has to prove, ordinarily, that there is a subsisting mortgage capable of being redeemed. The rule, however, is subject to exceptions. Where the defendant admits the existence of the mortgage, the onus is shifted to him to prove that he subsequently acquired an irredeemable right. [p. 448, col. 2.]

A plaintiff in a redemption suit may be permitted to amend a plaint which is based on a specific mortgage and claim a decree on the defendant's admission. [p. 448, col. 2.]

Vasudevan Nambudri v. *Krishna Pisharoti*, 13 M. L. J. 274, *Kalliani Amma* v. *Narayanan Nambiar*, 28 Ind. Cas. 69, 28 M. L. J 266, (1915) M. W. N. 105, 17 M. L. T. 170, explained.

Second appeal against the decree of the Subordinate Judge, South Malabar at Palghat, in Appeal Suit No. 454 of 1915, preferred against that of the District Munsif, Alatur, in Original Suit No. 218 of 1914.

Mr. *C. V. Ananthakrishna Iyer*, for the Appellant.

Messrs. *K. P. M. Menon*, *K. V. Madhavan Nair* and *P. V. Parameswari Iyer*, for the Respondents.

JUDGMENT.—The plaintiff's allegations are that a Nair Tarwad was the *jenmi* of the plaint property, that it was mortgaged to the ancestors of defendants Nos. 1 and 2, that the said persons sub-mortgaged it to a person not before the Court who transferred his rights to the 3rd defendant, that the 3rd defendant subsequently purchased the *jenm* right from the Nair Tarwad and gave the plaintiff a second mortgage in 1912 (Exhibit H). He sues to redeem the first mortgage. He does not give the date of the first mortgage, but relies upon the admission of the ancestor of the 1st and 2nd defendants contained in Exhibit A and upon the statement of the 2nd defendant contained in Exhibit L. In Exhibit A, while granting a sub-mortgage, the ancestor mentioned that the property was held by him under a *kanom*

from the Nair Tarwad. In Exhibit L, which was a statement filed in proceedings taken by the plaintiff under section 83 of the Transfer of Property Act, the 2nd defendant stated that the amount due and payable to him under the mortgage was not the amount deposited in Court. How far this admission is evidence against the 1st defendant and to what extent the 2nd defendant himself is bound by it are questions for the Appellate Court. The case for the defendants is that the mortgage sought to be redeemed is not subsisting and that the burden is on the plaintiff to prove that there is a redeemable mortgage.

The District Munsif held that the suit was not barred by limitation, but that as the plaintiff failed to prove the mortgage sued on, he was not entitled to a decree.

On appeal, the Subordinate Judge held that the burden of proving that the mortgage sought to be redeemed is subsisting was on the plaintiff and that as he failed to prove that fact, the suit was rightly dismissed.

Mr. K. P. M. Menon, for the respondent, has placed before us certain considerations which, if we were hearing the appeal, might have considerable weight with us. The 3rd defendant is certainly in a position to throw light on the date and nature of the mortgage and it may be that the plaintiff ought to have summoned him to produce the mortgage-deed, if it exists but that is a matter to be considered by the Appellate Court.

On the point decided by the Subordinate Judge we are unable to agree with him. As we read Exhibit L, the 2nd defendant admitted that at that time there was a mortgage capable of being redeemed. If the defendants have acquired an irredeemable right subsequently, they ought to prove it. [See *Dip Singh* v. *Girand Singh* (1) and *Daia Chand* v. *Sarfraz* (2).]

Mr. Menon sought to support the decision on the authorities cited in the judgment of the District Munsif. The proposition enunciated in *Krishna Pillai* v. *Rangasami Pillai* (3) is that where a plaintiff fails to establish the specific mortgage sued on, he should not be given a decree on a mortgage to be spelled out from documents or pleadings to which the defendant was a party. This view was followed in *Vasudevan Nambudri* v. *Krishna Pisharoti* (4) and in *Kalliani Amma* v. *Narayanan Nambiar* (5). As a general proposition there can be no objection to this statement of the law: but there may be exceptions. The plaintiff might have been under a *bona fide* mistake and might have been led into the error by the conduct of the defendants. In such cases notwithstanding his failure to prove the specific mortgage, he may be permitted, by allowing him to amend the plaint, to claim a decree on the admission of the defendant. [See *Paykat Manakkal* v. *Theyyankaran* (6) and *Kadakamvalli Sankaran Mussad* v. *Mokkath Ussain Haji* (7).] In no case may a plaintiff who has fabricated a document be allowed to obtain a decree on the admission of the defendant.

But in the present case both the plaintiff and the defendant had but one mortgage in their minds. See Exhibit L. The only question was whether that mortgage was subsisting or has become irredeemable. In this class of cases, the point for consideration is on whom does the burden of proof lie to prove that it is subsisting. Ordinarily on the principle that the mortgagee must be aware of the date of the transaction to which he or his predecessor was a party, the burden of proof will lie on the defendant. What quantum of evidence may displace this burden will depend on each case. [See *Khiali Ram* v. *Taik Ram* (8).] The view taken by the Subordinate Judge is, therefore, wrong. We must set aside his decree and remand the appeal to him for disposal according to law. Any application for fresh evidence must be made to him. Costs will abide the result.

Appeal allowed;
Case remanded.

(1) 26 A. 313 at p. 316; 1 A. L. J. 1; A. W. N. (1904) 38.
(2) 1 A. 117 at p. 124; 1 Ind. Dec. (N. S.) 79.
(3) 18 M. 462; 5 M. L. J. 187; 6 Ind. Dec. (N. S.) 672.
M. C. P.
(4) 13 M. L. J. 274.
(5) 28 Ind. Cas. 69; 28 M. L. J. 266; (1915) M. W. N. 105; 17 M. L. T. 170.
(6) 32 Ind. Cas. 624; (1916) 1 M. W. N. 171.
(7) 17 M. L. J. 329; 2 M. L. T. 354; 30 M. 388.
(8) 36 Ind. Cas. 452; 38 A. 540; 14 A. L. J. 834.

BOMBAY HIGH COURT.

CRIMINAL REFERENCE No. 43 of 1917.

November 21, 1917.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

PUNJA GUNI—ACCUSED—APPLICANT

versus

EMPEROR—RESPONDENT.

Merchant Shipping Act 57 and 58 Vict., C. 60, s. 686—"Natural born British subject", whether includes subject of Native State—Admiralty Offences (Colonial) Act (12 & 13 Vict, C. 96), s. 1—"Sea", meaning of—Penal Code Act XLV of 1860, s. 4—Jurisdiction—Offence committed on high seas by subject of Native State, whether cognizable by British Indian Courts.

The expression "natural born British subject" in section 686 of the Merchant Shipping Act does not include a natural born subject of a Native Indian State. [p. 449, col. 2.]

The word "sea" in section 1 of the Admiralty Offences (Colonial) Act means only that part of the sea over which the Admiral or Admirals has or have jurisdiction, that is to say, territorial waters [p. 450, col. 1.]

British Indian Courts have no jurisdiction to try a subject of a Native Indian State for an offence committed on board a ship belonging to a subject of a Native State outside territorial waters. [p. 450, col. 2.]

Criminal reference made by the Sessions Judge of Kanara.

Mr. *Taraporevalla* (with him Messrs. *Bhaishankar*, *Kanga* and *Girdharlal*), for the Junagadh State.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

HEATON, J.—The present matter has been referred to us by the Sessions Judge of Kanara in the following circumstances.

A subject of the State of Junagadh in Kathiawar was arrested in Bombay and accused of committing a serious offence on a ship belonging to a Junagadh subject on the high seas some eighteen miles or thereabouts from the coast of the Kanara District. Having been arrested in Bombay the accused was taken to Karwar. He was placed before the First Class Magistrate there and on the point being raised that Magistrate held that he had jurisdiction to enquire into the case. The Sessions Judge, however, doubted whether these proceedings were founded on any jurisdiction and has submitted the case to us for our orders.

If we find that the Kanara Courts have not jurisdiction, we shall have so to express our opinion and leave it to the Magistrate to discharge the accused. It cannot be doubted that some Court somewhere has jurisdiction to try this offence. And seeing that the accused is a subject of the Junagadh State and that the ship on which the alleged offence is said to have been committed belongs to a subject of that State and has not been registered as a British ship, we thought it proper to give notice to the Junagadh State. Mr. Taraporevalla has appeared as Counsel to represent the State and has put before us an interesting argument. But though, as I have said, there must be jurisdiction somewhere to try this offence, what we have to consider is whether the Courts of the Kanara District have such jurisdiction. The case is certainly not provided for either by the Code of Criminal Procedure or the Indian Penal Code. The offence, if any, committed is not territorially an offence under the Indian Penal Code, nor is it an offence which is made triable by any of the provisions of the Criminal Procedure Code. We must, therefore, look elsewhere for a foundation for jurisdiction if such jurisdiction exists in the Kanara Courts. We have looked elsewhere, under the assistance afforded us by the Counsel for the Junagadh State on the one hand and the Government Pleader on the other and we have undoubtedly derived great assistance from their arguments.

The most natural enactment to turn to in the first instance is no doubt the Merchant Shipping Act, which is 57 & 58 Vic. C. 60. The pertinent section there is 686 which tells us that if the ship were a British ship, no doubt British Courts would have jurisdiction. British ship is defined in section 1 of the same Act and indubitably the ship in this case cannot be a British ship unless the owner of that ship comes under the head "natural born British subject"; for he does not come under any of the other heads. We do not think that the expression "natural born British subject" in the Merchant Shipping Act can be read to include a natural born subject of the Junagadh State. So far as our researches have gone, we can find no suggestion in any case dealing with the Statute Law relating to, or the written law of, British India which brings a natural born subject

of the Junagadh State within the meaning of the expression "natural born British subject."

Whatever meaning these words might bear in international or diplomatic matters, it seems to me that we must treat them when used in the Merchant Shipping Act as having the meaning which appropriately attaches to them for the purpose of the written law of this country. In that view they cannot include a natural born subject of the Junagadh State.

Then we have been referred to the Admiralty Offences (Colonial) Act of 1849, 12 & 13 Vic. C. 96. It was suggested, when this matter was first argued before us, that within the words of that Statute we could find justification for saying that the Courts in the Kanara District had jurisdiction. The words of that Act in clause 1 refer to a jurisdiction in regard to offences committed upon the sea and also to offences committed in any haven, river, creek or place. It also refers to the jurisdiction of the Admiral or Admirals and the question arises as to whether the word "sea" there used means only that part of the sea over which the Admiral or Admirals has or have jurisdiction or whether it means the sea generally. If it means the latter, then seeing that the accused was found in India, the Courts would have jurisdiction to deal with him. But if the word "sea" therein used means only that part of the sea over which the Admirals have jurisdiction, then the Court would not have jurisdiction in this particular case; for Admirals have jurisdiction over the sea within territorial waters and a ship at a distance of eighteen miles from the coast is undoubtedly outside territorial waters. Personally I have no doubt that the word "sea" as used in this Statute means that portion of the sea over which the Admiral has jurisdiction, for two reasons, *firstly*, the Act is described as an Act to provide for the prosecution and trial in Her Majesty's Colonies of offences committed within the jurisdiction of the Admiral. That description implies that the Act is dealing only with places or with so much of the sea as the Admiral has jurisdiction over. That is the first reason. The *second* reason is this: that the jurisdiction given by this Statute to Colonial Courts, which jurisdiction has been extended to India by an Act of 1860, 23 & 24 Vic. C. 88, is a conferred jurisdiction. The intention, it seems to me, quite plainly is that Colonial Courts, and within that expression we must include Indian Courts, shall have conferred upon them the same jurisdiction as British Courts possess in British territory to which British Statutes relate. Such jurisdiction in Britain is discussed in the case of *Reg.* v. *Keyn* (1), and there can be no doubt after reading that case that the Admiral's jurisdiction in Britain does not extend as regards the open sea beyond territorial limits, which are some three miles from low water mark. If that is the only jurisdiction of the Admiralty Courts in Britain and if the Statute 12 & 13 Vic. is intended to extend such jurisdiction to Colonial Courts, then it is quite impossible to suppose that this Statute gave to Colonial Courts jurisdiction in the matter of offences committed on non-British ships on the high seas outside the territorial limits. These two reasons seem to me to show satisfactorily that we cannot find a basis for jurisdiction in the Kanara Courts in virtue of this Statute, 12 & 13 Vic. C. 69.

I have now exhausted all the sources which were suggested to us as a possible foundation for jurisdiction in the Kanara Courts, and I cannot myself think of any other source. The conclusion to my mind is quite inevitable that the Kanara Courts have no jurisdiction in this case. I do not think it is in any way necessary to proceed to consider what Court or Courts has or have jurisdiction.

The order that we must make, therefore, is that the First Class Magistrate in Kanara has no jurisdiction to deal with this alleged offender and that he should make an order discharging him.

The case is one which I have decided according to a somewhat narrow but, as it seems to me, a correct view of the law relating to jurisdiction. But the case suggests that the matter is one both of theoretical and practical importance, and I think the judgment of this Court should be sent to the Government of Bombay so that if they are so minded, they may address the Government of India on the subject with a view to

(1) (1877) 2 Ex. D. 63; 46 L. J. M. C. 17; 13 Cox C. C. 403.

determining whether legislation of any kind is necessary for the purpose of regulating jurisdiction in cases of this kind.

SHAH, J.—I agree.

Order accordingly.

PATNA HIGH COURT.

CRIMINAL REVISION No. 438 of 1917.

December 19, 1917.

Present:—Mr. Justice Jwala Prasad.

SARDAR SINGH AND ANOTHER—ACCUSED—PETITIONERS

versus

EMPEROR—OPPOSITE-PARTY.

Penal Code (Act XLV of 1860), s. 425—Mischief—Cutting down trees without impairing value—Offence—Landlord and tenant—Tenant, right of, to cut trees—Bengal Tenancy Act (VIII B. C. of 1885), s. 28—Tenure-holder, whether entitled to cut trees.

A permanent tenure-holder is entitled to cut down trees situate within his tenure. He can only be prevented from doing so by the landlord showing a custom contrary to the right of the tenure-holder. [p. 453, col. 2.]

Whatever the tenant, whether he be a tenure-holder or a lessee, has grown upon the land that belongs to him. [p. 453, col. 2.]

Where there is a dispute between the parties as to the ownership of a tree and one of them cuts it down, the case is beyond the cognizance of a Criminal Court and outside the scope of section 425 of the Penal Code. The cutting down of a tree does not amount to mischief unless it destroys or diminishes the dignity or value of the tree. [p. 454, col. 1.]

Criminal revision from an order of the Sub-Divisional Magistrate, Banka, dated the 22nd June 1917.

Mr. *Lalit Mohan Ghose*, for the Petitioners.

Mr. *G. C. Pal*, for the Opposite Party.

JUDGMENT:—This is an application against the order of the Sub-Divisional Magistrate of Banka, dated the 22nd June 1917, convicting the petitioners under section 426 of the Indian Penal Code.

The petitionor No. 2 is the servant of petitioner No. 1. The conviction is in respect of a *bar* tree said to have been cut by the petitioners in Mauza Ghutia. The plaintiff's master is the *mukarraridar* of this village. The accused No. 1 was recorded in the Survey Record of Rights as *malguzar istamrari lekin mukarrari nahin*. The Record of Rights was finally published in 1917. The plaintiff's master, Jamna Prasad, disputed the correctness of this entry as to the status of the petitioner No. 1 under section 106 of the Bengal Tenancy Act, but the Assistant Settlement Officer by his decision of October 14th, 1909, dismissed the claim of Jamna Prasad and upheld the entry in the Survey Record.

The basis of the claim of Jamna Prasad was that the petitioner No. 1 had only a lease of the village for a temporary period and that he was only a *mustajir*, or lessee, and had no right to remain in possession of the village after the expiry of the lease. He wanted a note to that effect to be made in the Survey Record of Rights. The entry in the Record of Rights amounts to a recognition of petitioner No. 1 as a permanent tenure-holder.

The Assistant Settlement Officer came to the conclusion that the petitioner was in possession of the village by virtue of a *patta* executed in his favour in 1262. This *patta* is referred to in the judgment of the Magistrate as Exhibit A. By this *patta* the petitioner obtained right and possession over the village with the trees and the jungles situate therein. The petitioners claimed before the Assistant Settlement Officer that they had been cultivating the lands of the village and had reclaimed jungles. This was accepted by the Assistant Settlement Officer and it was further held that the subsequent *kabuliyats* said to have been executed by the petitioners did not affect their title, which was corrected by the original lease of 1262. Two of these *kabuliyats* have been referred to in the judgment of the Assistant Settlement Officer as Exhibits 2 and 3, namely, the one dated 24th *Paus* 1305 and the other 20th *Kartik* 1315. The latter one was an application made by the petitioner to Jamna Prasad for permission to cut down two *sal* trees for the purpose of using the timber thereof in the house which was being constructed by him. The trees are said to be situate in Ranicharna and in the orchard of Kuli Roy of Singahua. There is no mention of Ghutia in this application and it is not known, therefore, whether the application at all related to any trees in the village in question. The decision of the Assistant Settlement Officer was upheld in

appeal by the District Judge of Bhagalpur on 30th March 1910.

In or about the year 1913 Jamna Prasad brought a civil suit against Sukh Lal and others for recovery of Rs. 120, price of six *sal* trees said to have been cut and removed by the defendants from the Bahera jungle. The suit was dismissed by the Munsif by his judgment of the 19th February 1914, upon the ground that it was not proved that the trees were at all cut by the defendants. It was in that case alleged by the plaintiff's witnesses that one Biranchi cut the trees. The Munsif held that Biranchi was not a defendant and therefore the plaintiffs could not obtain any decree in that case. The Munsif, however, upon issue No. 3, which runs as follows: "Are the tenants of the plaintiff to take wood from his jungle without payment of any price under any custom," held that the defendants could not take wood without payment of price. Before discussing this issue, the Munsif prefaced it by saying that it is unnecessary to decide it inasmuch as the suit of the plaintiff was dismissed upon facts. The judgment of the Munsif has also been referred to in the judgment of the Sub-Divisional Magistrate in this case.

The above is in short the history regarding the dispute between the parties as to the status of the petitioner No. 1 in the village and as to the petitioners' right in the trees situate in that village.

The present occurrence is said to have taken place on the 16th February 1917. It is said that the petitioners cut a branch of a *bar* tree. Jamna Prasad the plaintiff lodged an information before the Police On 6th March 1917 the Magistrate declined to issue warrants against the petitioners upon the ground that he felt "doubt if the branches had been cut dishonestly" by the petitioners and held a judicial enquiry. On 5th April 1917 he looked into the survey papers referred to above and other evidence adduced by the complainant and after hearing both the parties passed the following order:—

"It appears that the *bar* or *bargad* tree with respect to which am offence is said to have been committed stands on a piece of holding belonging to Jhajhu Mahto. The holding is in Mauza Tona Pathar, which is within the *mustajri* of the accused Sardar Singh. The complainant's master Thakur Jamna Prasad is the *mukarraridar* of the Mauza. In the Survey Records it is not mentioned in whose possession the *bargad* tree is. In the absence of any evidence in the Survey Records to the contrary the tree may be said to be in the holding of Jhajhu Mahto or his representative. The tree does not bear any fruit which is taken by anybody. It is extremely doubtful that the *mukarraridar* is in the possession of a tree standing on the holding of another. It is questionable as to whether the tenant, or the tenure-holder (the accused) or the superior landlord (the complainant's master) is in actual possession of the tree the branches of which have been cut. I cannot, therefore, hold that the accused who is the tenure-holder dishonestly cut the tree from the possession of the *mukarraridar* and so no cognizable offence is made out. Enter non-cognizable section 426, Indian Penal Code."

Nine days after the above order on the 14th of April the complainant filed a complaint before the same Magistrate. In his statement on oath recorded by the Magistrate on the back of the complainant's petition he admitted that "information was lodged at the Thana but as the case did not proceed I have come to complain." The Sub-Divisional Magistrate straightway upon that complaint ordered the accused to be summoned under section 426, Indian Penal Code. The complainant stated to him that the matter did not proceed on the information given to him by the Police. The Magistrate had upon a judicial enquiry come to the conclusion that the possession of the tree was not proved to be with the complainant and there was no dishonest intention of the accused in cutting away the tree. I do not know why in the face of his own finding the Sub Divisional Magistrate thought it fit upon the complainant's petition in respect of the same occurrence to issue summons against the accused persons. It is also not known whether the Magistrate looked into his former order at all, or in the course of the hearing of the present case whether his attention was ever drawn to it. In the judgment in revision the Sub-Divisional Magistrate does not make any reference to his order of the

5th April 1917 referred to above and surely it was expected that he would either before summoning the accused, or in the judgment, give reasons for his taking a different view from what he had taken at the earlier stage of the case. I am, therefore, entitled to infer from this that if the Magistrate had known of his other order refusing to take cognizance of the offence he would not have summoned the accused in this case. The cutting of the tree is admitted. The question before the Magistrate, therefore, was as to whether the cutting of the tree constituted mischief under section 425, Indian Penal Code. All that the Magistrate finds is that the accused knew that they had no right to cut the tree and, therefore, they acted dishonestly in doing so. This finding is based upon the judgment of the Munsif referred to above of February 1914 and upon the *kabuliyat* of 1305 and upon the application made by the petitioner No. 1. The two latter documents may be dispensed with summarily. The first document has been already held by the Assistant Settlement Officer as not sufficient to destroy the right of the petitioner which he had got in the village by virtue of the *patta* of 1263. The application, as already said above, does not refer at all to this village and even if it did, we do not know the circumstances under which that application was made and it cannot possibly take away the right that the petitioner had in the village and in the trees situate therein.

The only document of any importance is the judgment of the Munsif. This judgment referred to jungle Babera and to which the petitioners were not parties at all. It has not been at all contended by the learned Vakil for the respondent that the judgment is at all binding upon the petitioners. At the best the judgment may be admissible evidence under section 13 of the Evidence Act, as an instance of a transaction in which the custom was set up by one of the interested parties.

The question here is whether the dispute that arose between the petitioner and the opposite party in the survey and thereafter as regards their respective rights in the village has at all been settled by any competent Court. The judgment of the Munsif is not at all binding and cannot be taken as finally settling the dispute. The Assistant Settlement Officer's judgment upheld by the Special Judge under section 106 is a judgment *inter partes* It decides once for all the status that the accused had in the village. The status was that of a permanent tenure-holder. The right of the permanent tenure-holder cannot be disputed as regards the trees situate within the tenure. In the case of an occupancy *raiyat* under section 23 of the Bengal Tenancy Act a tenant is entitled to cut down the trees. He can only be prevented from doing so by the landlord showing a custom contrary to the right of the tenant. The principle underlying this section applies with greater force in the case of a permanent tenure-holder. It is not for me at this stage to say anything as to the view that was taken by the Munsif in that case, but it is sufficient to say that the onus of the custom lies upon the landlord. The tree in question stands upon plot No. 1090, *khata* No. 79, and the entry is *ghair ma rua malguzar*. The word *malguzar* is important, for the entry against the name of the petitioner is *malguzar istumbari*. The entry, therefore, means that No. 1090 was recorded as being in the *khas* possession of the petitioner as a tenure-holder thereof. No tree has been shown as standing in this particular plot in the Survey Record-of-Rights. This is explained by the petitioners by saying that the tree in question was planted on the land subsequent to the Survey Record of Rights which happened in 1907. The complainant has not in this case shown that the tree was planted by him. We have to accept the Survey Record as correct. There was no tree in existence and even supposing for a moment that the right of the *mukarraridar* was in respect of the tree, he can possibly have no right in the trees that were planted by the man in possession of the land so long as the lease of the petitioner continues. It is not at all the case of the other side that the lease has expired. Only the status is disputed. Whatever the tenant, whether he be a tenure-holder or a lessee, has grown upon the land, that belongs to him This fact of the case has not at all been noticed by the Sub-Divisional Magistrate. The question is one which could not be decided in any Criminal Court. It is obvious from the history of the dispute between the parties

that after the survey the parties are trying to assert their right over the trees in the village and to drive the opposite party to the Civil Court. A Criminal Court should, therefore, be careful in giving any advantage to any of the parties over his adversary.

The learned Magistrate admits that the petitioner is in possession of the village. He claims the trees as belonging to him and he has a right to cut the trees. The opposite party has ample opportunity to go to a Civil Court and establish his right. The case is similar to that of *Shakur Mahomed* v. *Chunder Mohun Sha* (1). I will borrow the language of that decision on the particular point, for it seems to me that every word of it applies to the present case:—

"Now, as bamboo is a thing which is grown to be cut, the cutting and removing it does not amount to its destruction or other injury defined above. If there be any dishonest intention, the act of the offender in causing a wrongful loss to the complainant would amount to theft, and not mischief; but it seems to me clear from complainant's own statement and certain documents filed by the accused that there is a dispute regarding the title to the land on which the bamboos said to have been cut and removed were situated.

"On these grounds, I think, the order of the Deputy Magistrate convicting the accused of mischief is wrong in law, and should be set aside."

I have taken pains to give in this judgment at the very outset the facts to show that there is a dispute between the parties. I, therefore, hold that the case was beyond the cognizance of the Criminal Court and outside the scope of section 425. This is enough to set aside the order of the Sub-Divisional Magistrate.

There is one thing more which to my mind goes to show that the conviction should be set aside. The facts found by the Magistrate were such as do not warrant any conviction under section 425. He does not at all find that the cutting of the tree in question did at all destroy or diminish the dignity or value of it. The petitioner is said to have cut it for the purpose of fuel. If the branch of the tree was fit for fuel, then there was no mischief done to it although theft may have been committed by taking it away from the possession of the complainant's master. There is no finding upon this point. The attention of the Magistrate was not at all directed to this. The above authorities as well as the case of *Miras Chowkidar, In the matter of* (2), where it was held that the cutting of paddy would not constitute mischief unless it diminished its utility or value on account of its being not ripe, are on all fours with the present case.

Upon the above grounds I set aside the conviction and the sentence and the fine, if paid, be refunded.

Conviction set aside.

(1) 21 W. R. Cr. 38.

(2) 7 C. W. N. 713.

BOMBAY HIGH COURT.

CRIMINAL REFERENCE No. 42 of 1917.

September 11, 1917.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

EMPEROR—PROSECUTOR

versus

BHIMAJI VENKAJI NADGIR—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 197, 209, 210—Offence committed by vatandar patil—*Sanction to prosecute, necessity of—Proceedings started before sanction, validity of—Commitment to Sessions, considerations governing—Government resolution whether binding on Magistrate.*

Where a Magistrate took cognizance of an offence committed by a *vatandar patil*, without the previous sanction required by section 197 of the Code of Criminal Procedure, and proceeded to record the whole of the evidence without being aware that any such sanction existed:

Held, that the whole of the proceedings were without jurisdiction and must be regarded as totally invalid [p. 455, cols. 1 & 2; p. 456, col. 1.]

When a Magistrate comes to consider whether he shall or shall not commit a case to the Court of Session, he has to consider the gravity of the offence, the punishment with which in his opinion it ought to be met and the section under which he charges the accused person. He may consider any special difficulties in the case, or that it is a matter of some peculiar public importance, and other matters, such as the wishes of the parties. But a Magistrate must not determine this important matter, whether he is to commit the case or to try it himself, solely by the wish of the parties and the

terms of a Government resolution. No resolution whatever that the Executive Government has issued can properly control or determine the discretion of a Magistrate in such a matter; for the Government have no authority whatever to interfere with this discretion, which is imposed on the Magistrate by the law and must be exercised by him. [p. 455, col. 2; p. 456, cols. 1 & 2.]

Criminal reference made by the Additional Sessions Judge of Dharwar.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

Mr. *A. G. Desai*, for the Accused.

JUDGMENT.

HEATON, J.—We understand that the accused person in this case, who is charged with harbouring an offender and receiving a bribe from him and who has been committed to the Court of Session at Dharwar, is a *vatandar patil* and consequently that he could not be prosecuted except with the sanction provided by section 197 of the Criminal Procedure Code. It is on this understanding that the judgment of this Court is based.

We start, therefore, with this, that a previous sanction was under section 197 essential to confer jurisdiction on the Magistrate to take cognizance of the offence. Now as a matter of fact he took cognizance of this offence and proceeded some way with his enquiry before any sanction was signed by the sanctioning officer. For he began to take evidence in the case on the 5th of April and the sanction was not signed until the 12th. So obviously there was no previous sanction. The defect becomes still more glaring when we learn, as happens to be true in this case, that the sanction itself was not placed on the record of the case until the 2nd of May, which was the very day on which the order of commitment to the Court of Session was made. Nor do the papers in the case give any justification for supposing that the sanction actually came into the hands of the Magistrate before the 2nd of May. So that although the law requires a previous sanction, the Magistrate had taken cognizance of the case and proceeded with it without that sanction and he had, so far as we can gather, proceeded to record the whole of the evidence without being aware that any such sanction existed. It is unfortunate but it seems to us that this being so, the whole of these proceedings are without jurisdiction and must be regarded as totally invalid.

It follows that the commitment to the Court of Session is invalid and that it must be quashed, and we make that order making it clear that the whole of the proceedings must start again from the very beginning if further proceedings are to be taken against this present accused.

We have not, it will be observed, dealt with the particular points on which the Additional Sessions Judge referred this case to us. They are points of interest and his statement of them is clear and forcible. It is not essential no doubt that we should express any opinion on them, but one of these points is of such importance and arises frequently enough to make it desirable to say something. That point is based on this: that the Magistrate committed this case to the Court of Session for reasons which appear in his own words as follows:—"The case is not exclusively triable by the Sessions Court, but the accused is a *vatandar* and relying on Government Resolution No. 8350, dated the 15th of December 1915, Revenue Department, both the parties pray for the committal of this case and I have no hesitation in doing so." It appears to me that when a Magistrate comes to consider whether he shall or shall not commit a case, he has to consider the gravity of the offence; the punishment with which in his opinion it ought to be met and the section under which he charges the accused person. He may no doubt properly consider any special difficulties in the case or that it is a matter of some peculiar public importance, and no doubt other matters also might enter into his consideration, such as the wish of the parties. But a Magistrate must not determine this important matter, whether he is to commit the case or to try it himself, solely by the wish of the parties and the terms of a Government Resolution. No resolution whatever that the Executive Government has issued can properly control or determine the discretion of a Magistrate in such a matter; for the Government have no authority whatever to interfere with this discretion, which is imposed on the Magistrate by the law and must be exercised by him.

SHAH, J.—I agree that the order of commitment should be set aside. It is not

denied in this case that a sanction under section 197, Criminal Procedure Code, is necessary. The sanction was granted by the Collector on the 12th April, and it was produced before the Committing Magistrate on the 2nd May. The proceedings had already commenced before the 12th April, and the order of commitment was made on the 2nd May. Therefore the proceedings before the Committing Magistrate including the order of commitment must be set aside. This will be without any prejudice to any proceedings that may be properly taken hereafter against the accused.

In this view of the case it is not necessary to consider the point raised by the Additional Sessions Judge as to the form of sanction. As regards the other ground upon which this order of commitment is liable to be set aside, I desire to add that it was the duty of the Magistrate to determine under the Code of Criminal Procedure on entirely judicial considerations whether the accused should be committed to a Court of Session or not. In the present case he has taken into consideration a Government resolution and expressed no opinion of his own in committing the case to the Court of Session. It is not necessary for me to state in detail what he may properly consider in committing the accused to a Court of Session. That is a question, with which the Committing Magistrate has to deal on the evidence in the case. It is necessary to point out that it is not open to him to take the Government Resolution into consideration in dealing with the question. This case affords an illustration of the manner in which such a resolution is apt to be used. It is also necessary to point out that section 60 of the Bombay Hereditary Offices Act (III of 1874), to which the Government Resolution relates, cannot be used as a ground for committing any case to a Court of Session. The section gives certain powers to the Government to deal with the *vatan*, when a representative *vatandar* or any deputy or substitute appointed by him is convicted by a Criminal Court not inferior to a Court of Session of any offence referred to in the section. That would indicate that when a person of the above description is properly committed to, and convicted by, a Court of Session, the Government may exercise the powers conferred by the section. The question whether a particular case should be committed to a Court of Session should be decided by the Committing Magistrate without any reference to the section or to the Government resolution relating to the section, just as the question of conviction must be decided without any reference to it.

The powers of Government under section 197, clause (2), of the Code of Criminal Procedure stand altogether on a different footing and my remarks have no application to any directions which may be properly issued under that clause. It is not suggested that the Government have specified the Court before which a trial is to be held in this case under section 197 (2) of the Criminal Procedure Code.

Order set aside.

PATNA HIGH COURT.

CRIMINAL APPEAL No. 171 OF 1917.

August 22, 1917.

Present:—Mr. Justice Atkinson and Mr. Justice Jwala Prasad.

LUCHMI SINGH—ACCUSED—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 463, 464, 467, 471—Forgery—Burden of proof—Criminal trial—Prosecution, duty of.

It is not sufficient in the case of the trial of an accused in a criminal cause for the Crown merely to establish a *prima facie* case of guilt. They must establish, so far as they can, by every reasonable means in their power, evidence to support the facts proving conclusively the guilt of the accused. [p. 459, col. 1.]

In order to establish that a document is forged, the prosecution must give conclusive evidence to establish that the document is a false document within the meaning of section 464 of the Penal Code, and further that it was forged by the accused with one of the intents mentioned in section 464. [p. 462, col. 1.]

In a charge of forgery it is for the prosecution to prove that the document is a forged one and that the accused did forge it, and not for the defence to prove that the document is a genuine one. [p 462, col 2.]

Appeal against the judgment of the Assistant Sessions Judge, Saran, dated the 3rd July 1917.

Mr. *Gour Chandra Pal*, for the Appellant.

Mr. *Fakhruddin*, Government Pleader, for the Crown.

JUDGMENT.

ATKINSON, J.—The accused Luchmi Singh was charged with an offence under section 471 read with section 467 of the Indian Penal Code and separately with an offence under section 193 of the Indian Penal Code, in respect of which charges the accused was put on trial and was convicted on each charge by the Assistant Sessions Judge of Saran on the 3rd July 1917. The learned Judge sentenced the accused to five years' rigorous imprisonment on each charge, the imprisonment to run concurrently in all cases. From that conviction the accused has filed an appeal to the High Court and he asks that on a consideration of the evidence and the facts of the case the convictions and sentences recorded against him may be set aside and the appeal allowed.

The facts out of which the prosecution arose may be very shortly stated. On the 16th April 1912 a man called Brij Mohan is alleged to have borrowed a sum of Rs. 200 from the accused Luchmi Singh for which he gave a hand-note to the accused dated the 16th April 1912. Brij Mohan appears to be an illiterate man, and the note appears to have been executed on his behalf by one Murath Thakur. The money was borrowed for a special purpose, as alleged by the accused, namely, to discharge some pressing debt due for the purchase of tobacco leaves. The borrower Brij Mohan promised to pay back the money within a very short time, that is to say, within a month or a month and a half, from the date of the loan. He failed to do so and on the 9th December 1912 Luchmi Singh, the accused, instituted proceedings on foot of the aforesaid hand-note against Brij Mohan. Apparently no appearance was entered to these proceedings by Brij Mohan ; with the result that an *ex parte* decree was obtained against him on the 31st January 1913.

On the 29th December it does appear that Brij Mohan instructed a Vakil practising in Chapra to file a petition on his behalf asking for time. Up to this stage no legal form of appearance by Brij Mohan to resist the suit instituted by Luchmi Singh was made. However, the Court did grant the application of Brij Mohan and the case was allowed to stand over for two days.

On the 31st of January 1913, when the case was called on for disposal, there was no appearance in person or by deputy for Brij Mohan and accordingly the Court granted a decree *ex parte*. In the month of August 1913 it became necessary for the decree-holder to have his decree transferred from Chapra to the district in which Brij Mohan lived for execution. On the 5th of August execution of this decree was taken out; and subsequently, on the 8th of August 1913, Brij Mohan was arrested in pursuance of the decree. After his arrest he was taken from the village where he lived to Chapra and he stated to the Munsif that he intended to impeach the entire transaction on which the *ex parte* decree was founded. He said that in fact he never borrowed money from Luchmi Singh; and that the hand-note was not a genuine document and that in fact he had no money transactions at all to any extent with Luchmi Singh; and that he was willing to deposit the security for the amount for which the *ex parte* decree had been obtained to secure his release. Accordingly Brij Mohan was released, on his depositing as security the amount of the debt sought to be recovered, which was considerably over Rs. 200 inclusive of interest; and immediately afterwards he instituted proceedings in the month of September 1913 to set aside the *ex parte* decree. That suit was No. 170 of 1913 and the plaint is dated the 8th of September 1913.

The suit was defended by Luchmi Singh, who contended that the hand-note was a genuine note; and that the money sued for was due; and that Brij Mohan was his debtor for the amount claimed in the previous suit and that there was no ground whatsoever for impeaching the transaction or the judgment which he had obtained *ex parte* on the 31st of January 1913, the plaintiff being properly served with necessary notices and all proper legal steps having been taken to justify his decree. After much discussion the learned Munsif was pleased on the 13th of June 1914 to set aside the *ex parte* decree which was obtained by Luchmi Singh against Brij Mohan on the 31st January

1913. Following that result Brij Mohan applied to the learned Munsif on the 2nd of February 1916 for leave to sanction the prosecution of Luchmi Singh under section 116, Indian Penal Code. It is right to observe that a considerable time—two years—elapsed between the date that the Munsif pronounced the decree setting aside the *ex parte* decree granted on the 31st of January and the 29th of May 1916, the date when the sanction for prosecution was eventually granted by the District Judge. It is a very remarkable fact that such a long space of time should be allowed to elapse between the date of the Munsif's decree setting aside the *ex parte* decree and the date when the application was made for leave to sanction the prosecution. It tends to some extent to show want of *bona fides* in support of the case put forward by the prosecution. However, the fact is that the learned Munsif on the 29th of May 1916, he having heard the case and being familiar with the case, declined and refused to give sanction for the prosecution of this accused Luchmi Singh.

The matter was taken on appeal before the District Judge who adopted a different view, and directed a prosecution of the accused exercising his powers under section 476 of the Code of Criminal Procedure and ordered Luchmi Singh to be prosecuted under sections 209 and 210, 193 and 371/476, etc.

Mr. Justice Roe on appeal to him held that the learned Judge had no jurisdiction at all to direct a prosecution under sections 209 and 210, but he upheld the direction for the prosecution of the accused under sections 471 and 193 of the Indian Penal Code.

These are the circumstances under which the present prosecution is brought. The judgment of the learned Assistant Sessions Judge who tried this case is not satisfactory. I think it is wanting very much in legal form; and shows an absolute want of judicial discretion. The case for trial was a simple one. The real and vital point in issue was whether or not the hand-note, dated the 16th April 1912, was or was not a genuine hand-note. A considerable mass of evidence was given in this case, which was irrelevant and unnecessary; and a considerable amount of time was wasted in taking evidence which was quite beyond and outside the scope of the obligation which was upon the prosecution to prove. The learned Public Prosecutor who appeared in this case endeavoured to frame the prosecution upon the following lines.

He alleged that the hand-note originally sued for was a deliberately false hand-note; and that the proceeding which was instituted on foot of that hand-note was a designed conspiracy manufactured to harass Brij Mohan. He alleged that Brij Mohan had a row or a dispute with a man called Kedru Singh, that Kedru Singh out of malice towards Brij Mohan entered into a conspiracy with Luchmi Singh and Balak Singh and two other men to institute a false case against Brij Mohan founded upon a false hand-note, and the learned Judge has gone out of his way irrespective of the evidence to try and wring from these facts a suggestion of a conspiracy to support the case put forward by the prosecution. In my opinion there was no evidence whatsoever to justify the learned Judge's conclusion based upon heated and intemperate premises which prejudiced the learned Judge's mind and deprived him of a sound discretion in giving a fair trial to the accused. To my mind there is no evidence of any fact from which the inference of conspiracy to defraud Brij Mohan can be inferred or legitimately drawn in support of the case put forward by the prosecution. Utter violence has been done to this aspect of the case by the learned Judge; and he has by reasons of his conclusions allowed his mind to be prejudiced in fairly determining the real issue for trial, namely, whether the hand-note of the 16th April 1912 was genuine or not; whether money was or was not due on that hand-note; and whether Luchmi Singh used that hand-note in any judicial proceeding knowing it to be a forged document.

Mr. Fakhruddin on behalf of the prosecution candidly admits that on reading the evidence he fails to find any corroboration of Brij Mohan's evidence. The prosecution and the learned Judge seem to have thought that when Brij Mohan denied that he made any hand-note, or that he

ever borrowed money from Luchmi Singh, or that he ever took money from Luchmi Singh, or that any financial transaction of any kind ever took place between Brij Mohan and Luchmi Singh, that that was the end of the obligation and onus of proof that was cast upon them. With great respect to the learned Public Prosecutor who appeared in this case, I say that he totally misconceived his duty and the requirements of the law. It is not sufficient in the case of the trial of an accused in a criminal cause for the Crown merely to establish a *prima facie* case of guilt. They must establish, so far as they can, by every reasonable means in their power, evidence to support the facts proving conclusively the guilt of the accused.

In this case there has been a breach of duty on the part of the Crown in the discharge of the onus of proof that rested on them inasmuch as they have examined one witness, and one witness only, in support of the case, who is not reliable even so far as his evidence is concerned. The evidence of Brij Mohan is unreliable and there is abundant evidence on the record to show that this witness is untrustworthy and untruthful. It was the clear duty of the prosecution to call at least the person who was alleged to have signed the hand note on behalf of Brij Mohan; and also the person who was present with him and signed the *vakalatnama* on his behalf on the 29th January 1913. Murath Thakur was the person who signed the hand-note as the agent of Brij Mohan. Every witness for the defence alleged in the second trial before the Munsif that Murath Thakur signed the hand-note at the request of Brij Mohan; and in the face of this evidence the Crown did not think worth while to consider what evidence this Murath Thakur could have given or to call him as a witness. In my opinion the duty was cast upon the Crown and not upon the defendant to prove that Murath Thakur did or did not sign on behalf of Brij Mohan. In addition it would have been material also for the purposes of this case, if the suggestion put forward by the Crown was true that the whole business was the result of a conspiracy; and that Brij Mohan never appeared to instruct the Pleader on the 29th January to get an adjournment; and that the person who did appear was some person personating Brij Mohan at the suggestion of Kedru Singh. Two important witnesses in support of the prosecution case have been failed to be produced by the Crown. Therefore, we are left with nothing in this case save the negative evidence of Brij Mohan uncorroborated by any document in the case which would tend to support the evidence he gave. The documents in the case rather go to contradict the evidence given by Brij Mohan than to support it.

There is a large body of evidence of at least 7 to 8 witnesses adduced on behalf of the defence, and that evidence has not been challenged or impeached on cross-examination and that evidence gives the most positive contradiction to the evidence of Brij Mohun. The success of this prosecution must depend upon accepting or rejecting the evidence of Brij Mohan.

How does Mr. Fakhruddin put the case on behalf of the Crown? He admitted that the sole issue was whether or not the hand-note was made and that question, as I have said before, must stand or fall by the evidence of Brij Mohan. In arriving at a conclusion he asked us to be guided by the probabilities of the case, which he suggested might be as follows:—

1. Did Brij Mohan ever borrow money from Luchmi Singh?

2. Even if he did borrow, would he not pay back the money rather than be sued?

3. Did he require money very urgently to buy tobacco leaves?

4. Even if he wanted to buy tobacco leaves, could he not have sent a man from his house on his return home with money to make the purchase that he wanted to?

5. Was it likely that if he was served with a summons that he would not have resisted the suit, and

6. Was it likely that having gone to see his Pleader on the 29th January, he would have returned home the next day not to return?

It is contended that Brij Mohan did not require this money in April 1911. He is alleged to be a well-to-do man; but I do not think that he is in any sense an

exceptionally well-to-do man. However, the fact is that Brij Mohan came to the district where Luchmi Singh lived, that is 60 miles away from his home, to purchase tobacco leaves and he went to Murath Thakur who is an agent in that district. He made a large expenditure, more than he had cash with him by Rs. 200 and wanted money. Murath Thakur came with him to Luchmi Singh who was in the company of another person at the time, and he tells his version of what happened in a very graphic way. What was the substance of the conversation? Brij Mohan said to Luchmi Singh:—"I want money at the present moment, can you lend me money?" The answer was given in the presence of three persons who were wholly disinterested in the case, directly or indirectly. Luchmi Singh said, "Yes, I would advance you money at $2\frac{1}{2}$ per cent." Thereupon Brij Mohan said: "$2\frac{1}{2}$ per cent. is too high, make it 2 per cent." "Very well," said Luchmi Singh, "I will give you money to-morrow. Please come with the stamp paper and we will carry through the transaction"

In conformity with that arrangement as deposed to, Brij Mohan turned up at 10 o'clock the next day at the house of Luchmi Singh and then in the presence of some 5 or 6 persons this transaction was alleged to have taken place, and the evidence is that at least four of the witnesses who were present there saw the writing of the note; and that the same was signed by Murath Thakur on behalf of Brij Mohan and the money being given by Luchmi Singh to Brij Mohan. The learned Judge has throughout his judgment ignored this evidence entirely. Is this evidence to be disbelieved? Is this evidence to be held doubtful merely because it has been given by witnesses called for the defence? The Assistant Sessions Judge has given no weight to the evidence of the defence, nor has he attached any degree of importance to it, though that evidence has not been impeached. It is a monstrous thing that the learned Judge should believe the case of conspiracy, without evidence to support it, and at the same time ignore all the evidence of the witnesses put forward by the defence. There is no reason or sense in allowing this judgment to stand; and it would be all the more monstrous to do so in the face of the absolute manner in which the learned Judge has ignored the weight of evidence adduced on behalf of the defence. The accused has been tried in a manner that was most improper and unfair. We see very cogent reasons why the entire sentence should be set aside, and the accused acquitted.

Whether Brij Mohan wanted the money or not; or whether there was any necessity for his borrowing money has not to be decided. Undoubtedly it appears to us that some transaction in the nature of making a note took place. What confirms this? Brij Mohan goes to his Pleader on the 29th January, in company with Manbaran Thakur, and he gave his Pleader instructions as to what to do; and the Pleader did that and then he waited for his client to come back, but the client never came back and the Pleader then wrote a letter addressed to the place where his client lived, and that letter was posted through his clerk and the letter must have been received by Brij Mohan. The suggestion put forward by the prosecution is that Brij Mohan never in fact appeared before the Pleader, that he was personated by somebody else. This somebody was instigated by Kedru Singh to personate Brij Mohan according to the prosecution; and it is also suggested that Kedru Singh managed to intercept and receive the Pleader's letter; and that he or some one on his behalf also wrote the post card in reply to the Pleader which has been produced. If it is believed that this card came from Brij Mohan himself, then there is really in fact an end of the whole case put forward by the prosecution on behalf of Brij Mohan.

Mr. Fakhruddin said that he believed that the card came not from Brij Mohan but from some person personating Brij Mohan, *viz.*, Kedru Singh. Now which is the most likely to be true? Either the card came from Brij Mohan or it came from Kedru Singh personating him. There is every reason to believe that it came from Brij Mohan and there is nothing to suggest that it came from Kedru Singh as his personator. Why all this evil motive was ascribed to Kedru Singh, though he was not an accused person, I do not know. He never lent the money in question.

This evil motive was suggested because Brij Mohan was his tenant and had some dispute with Kedru Singh owing to Brij Mohan's refusing to make some contribution towards the marriage of Kedru Singh's daughter in the shape of *ghee*, etc. I fail to see why the refusal of this contribution, if made, should create such a bad feud between Kedru Singh and Brij Mohan as to induce and prompt Kedru Singh to join in a conspiracy to get a third party to bring a maliciously false suit against Brij Mohan. I do not think the feud suggested between Brij Mohan and Kedru Singh was such as would induce Kedru Singh to take any such action as is suggested that he did take. We are not concerned with this aspect of this case. These topics have been laboured by the learned Judge irrespective of the real issue for trial in this case.

As to the post card, it was certainly posted in the district where Brij Mohan lived, who is an illiterate man, but no attempt to prove the authorship of the card has been attempted if it be not the post card of Brij Mohan. The Criminal Investigation Department could have been asked to trace the author of the post card and their report would have helped us to decide this case. As the case stands, we think the Crown case is irresistibly weak; and the evidence on the record induces and coerces us to believe that the post card is a genuine document and that it was written by Brij Mohan or by somebody on his behalf to his Vakil. It alleges that he owes the money to Luchmi Singh; and that he is willing to pay it off if he gets time; and he is willing to do whatever he can to make some satisfactory settlement with Luchmi Singh. And the post card also contains the admission that Brij Mohan instructed a Pleader to apply for time on his behalf and to get time to enable him to raise money to pay the debt due as soon as possible. If one believes that Brij Mohan was the author of this post card and that it is genuine, the Crown case disappears.

I have reviewed the evidence in detail. I have indicated what was the nature of the evidence adduced on behalf of the defence evidence. We are not concerned as to whether the plaintiff was duly served or not. We are here for the purpose of ascertaining whether or not the case put forward by the Crown is supported by evidence—evidence which in the view of reasonable men would appear to show that the accused person was guilty. I must say that reading and faithfully considering the evidence I have no hesitation in saying that the evidence does not support the case put forward by the Crown.

One important matter, and very important matter, I want to refer to. The learned Judge has said that Brij Mohan stated that Kedru Singh was the son-in-law of Luchmi Singh and that Luchmi Singh was the brother-in-law of Balak Singh. Much comment has been made upon this point by the learned Judge. The learned Judge has worked upon it to an astonishing degree and from it he has inferred that the accused and all his people have joined in a conspiracy. I do not think there is much in this point, save that it supplied food to strengthen the learned Judge's mind that the case was one in which Kedru Singh and others formed themselves into a body of conspirators to bring a false suit against Brij Mohan.

Brij Mohan said he never came to know anything about Kedru Singh until the suit was instituted. Immediately afterwards he swears in a deposition before the Court that he had known these people for about 20 years. This is a downright lie. First he stated that he did not know of their relationship. Then he said he knew them for 20 years and said positively that he was present at the marriage of Kedru Singh which took place 20 years before. It is little matters of this kind that one has to look at for the purposes of crediting the uncorroborated evidence of one witness.

One other matter requires attention and that refers to Brij Mohan's statement that he never dealt in tobacco leaves, that he never had any transaction of that kind and that he dealt in money-lending business only.

Seven or eight witnesses were examined on

behalf of the defence who proved beyond doubt that Brij Mohan did business in buying tobacco leaves up to the year 1911; and that even immediately before the hand-note transaction took place Brij Mohan dealt in tobacco leaves. Now who are these witnesses? They are the people with whom Brij Mohan used to deal in the purchase of tobacco leaves, either in buying or in selling tobacco leaves.

I have reviewed the evidence in detail and I am not satisfied that the learned Judge was right at the conclusion at which he arrived based upon the uncorroborated testimony of a complainant. I feel that the Crown has not discharged the onus of establishing the guilt of the accused. Therefore, we think it is improper and wrong to allow the conviction in this case to stand. Accordingly we set aside the conviction and acquit the accused.

JWALA PRASAD, J.—I do not think I am called upon to go into details in this case as the matter has been very fully dealt with by my learned brother. Suffice it to say that the prosecution in this case has failed to establish clearly the charge against the accused.

The only issue in this case is whether the hand-note in question is forged or not. In order to establish this issue the prosecution must give conclusive evidence to establish that the document is a false document within the meaning of section 464, and further that it was forged by the accused with one of the intents mentioned in section 463.

The learned Assistant Sessions Judge at the very outset of the judgment lays down a proposition for his consideration which, I think, was upon a misconception of the manner in which the criminal prosecution should be viewed. The learned Judge says:—"In a case like the present, however, the prosecution can give negative proof only to establish a *prima facie* case and it is for the defence to prove affirmatively that the document in question was really executed by the person by whom it purports to have been executed." The defence has no obligation of any kind as suggested in the latter portion of the passage quoted above. It is not for the defence in a charge of forgery to prove that the document was a genuine one. It is for the prosecution to prove that the document was a forged one and that the accused did forge it. In the civil case out of which this prosecution arose the issue no doubt was whether the hand-note was genuine or not and whether it was or was not executed by Brij Mohan and whether the money that was said to have been borrowed on the hand-note was really borrowed by him or not. It was then incumbent upon the plaintiff who is the accused in this case to establish that the document was a genuine one and as he failed to do so, the learned Munsif dismissed the suit and set aside the decree that was obtained *ex parte* upon the basis of that hand-note. As I have said above the table is turned and the onus is now upon the prosecution. The hand-note in question purports to have been executed by Brij Mohan, the body of it is said to be in the hand-writing of one Balak Singh and the signature of Brij Mohan is by the pen of one Murath Thakur. Brij Mohan in his evidence in order to prove that the document is a forged one says:—"I do not know Murath Thakur, I have never seen him, and I never asked him to sign any hand-note in my behalf." As regards Balak Singh he says "I never asked him to write the document in question." From the statement of Brij Mohan quoted above, it is clear that Murath Thakur and Balak Singh are necessary and primary witnesses to give information as to whether Murath Thakur did sign the document at the request of Brij Mohan and whether Balak Singh did write it at the request of Brij Mohan. Murath Thakur has not been examined in this case. It is impossible to hold upon the evidence of Brij Mohan alone that the prosecution has succeeded in proving that Murath Thakur did not sign the document in question at the request of Brij Mohan. No reason has been assigned, and nothing has been brought on the record, to show why Murath Thakur was not examined by the prosecution at any stage of the case. The prosecution has failed in its duty to place before the Court the best evidence available, and as such has failed

to establish the guilt against the accused. I, therefore, agree with the views of my learned brother that the accused in this case should be acquitted and the conviction set aside.

Accused acquitted.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 228 OF 1917.

October 4, 1917.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

BAI SAMRATH—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 341—Wrongful restraint—Joint owner locking up shop—Civil dispute—Procedure.

One of two joint owners of a shop leased it to the complainant without the consent of the other joint owner, whereupon the latter put her lock on the shop. The complainant accused her of wrongful restraint:

Held, that the accused had committed no offence.

Obiter dictum.—Even if the action of the accused could be construed as coming within any of the penal provisions of the Penal Code, yet the matter in dispute was so plainly a civil dispute that a Magistrate would not only be justified, but would be acting in a very desirable way, if he dismissed the complaint as being an abuse of the process of a Criminal Court.

Criminal application for revision from conviction and sentence passed by the First Class Magistrate at Ahmedabad.

Mr. *T. R. Desai*, for the Applicant.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

HEATON, J.—We think that this is quite plainly a bad conviction. The accused, who, according to the facts found, is one of two joint owners of a shop, put her lock on the shop. Without her agreement the other joint owner had leased the shop to the complainant; and the complainant has accused the present applicant that she has wrongfully restrained him because she has put her lock on to the shop and thereby prevented him from entering the shop.

There are two observations I should like to make on this case. The first is that even if the action of the applicant could be construed as coming within any of the penal provisions of the Penal Code, yet the matter in dispute is so plainly a civil dispute that I think any Magistrate would have been not only justified, but would have been acting in a very desirable way, had he dismissed such a complaint as being an abuse of the process of a Criminal Court. But on the facts here proved it cannot, it seems to me—and this is my second observation—be truly said that what the applicant has done can possibly come within any of the penal provisions of the Code. She has affixed her lock to a house of which she is the joint owner, and how that can conceivably amount to wrongfully restraining a supposed tenant, who is not her tenant, from entering the shop, I cannot understand.

I am quite clear, therefore, in my own mind, that this conviction must be set aside and that the fine, if paid, must be ordered to be refunded.

SHAH, J.—I am of the same opinion.

Conviction set aside.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 795 OF 1917.

February 2, 1918.

Present:—Mr. Justice Piggott.

INDAR AND OTHERS—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 110 (f), 117—Security for good behaviour—Proof—General repute—Evidence.

Where it is alleged against a person, even in a proceeding under section 110 of the Code of Criminal Procedure, that he on a certain occasion committed a particular offence, that fact must be proved by relevant evidence. It is not at all the same thing as proving by evidence of general repute that a man is a habitual offender. [p. 464, col. 1.]

The fact that a person is so desperate and dangerous as to render his being at large without security hazardous to the community is not one which can, under section 117 of the Code of Criminal Procedure, be proved by evidence of general repute. [p. 464, col. 2.]

INDAR *v.* EMPEROR.

Criminal revision from an order of the District Magistrate, Farrukhabad.

Mr. *A. H. C. Hamilton*, for the Applicants.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—In this case Indar, Jhabbu Lal and Bhopal, a father and two sons, have been required by a Sub-Divisional Magistrate to give security to be of good behaviour for a period of one year under the provisions of section 110 of the Code of Criminal Procedure. An appeal against that order has been dismissed by the District Magistrate. The case is before me on an application for revision in respect of these two orders. I have been through the record and I am quite satisfied that the orders complained of are illegal, on more than one ground, and cannot be affirmed. The order of the District Magistrate is perfectly clear and straightforward and shows beyond possible doubt the grounds upon which the prosecution of these men for bad livelihood has proceeded and the order against them passed. There was a dacoity at the house of one Ram Dayal, in the course of which the said Ram Dayal was murdered. Information was forthcoming to the effect that this dacoity had been organised by Indar, and that he and his sons, Jhabbu Lal and Bhopal, had taken part in it. The three men were placed on their trial along with others, charged with having taken part in this dacoity and in the murder of Ram Dayal. They were acquitted by the Sessions Court. The present proceedings are an attempt to prove by hearsay evidence what the prosecution were unable to prove by direct evidence at the Sessions trial. The learned District Magistrate says quite frankly that he is satisfied by the evidence on the record that Indar, Bhopal and Jhabbu Lal had got up the dacoity at the house of Ram Dayal. There is practically no legal evidence to this effect on the record. If it is alleged against a person, even in a proceeding under section 110 of the Code of Criminal Procedure, that he on a certain occasion committed a particular offence, that fact must be proved by relevant evidence. It is not at all the same thing as proving by evidence of general repute that a man is a habitual offender. Moreover, in the present case the preliminary order drawn up by the Magistrate shows clearly that the prosecution were not prepared to undertake to prove, by evidence of general repute or otherwise, that these men were habitual robbers or habitual receivers of stolen property. The case against them was that they were so desperate and dangerous as to render their being allowed without security hazardous to the community. This is not a fact which under section 117 of the Code of Criminal Procedure can be proved by evidence of general repute. I do not say that in a proceeding of this sort evidence of general repute may not be offered in support of an allegation that a person against whom proceedings have been taken is habitually a robber or habitually commits extortion, and that the Court may not be asked at the same time to consider whether this evidence of the man's general repute, read in connection with direct evidence establishing definite facts against him, may not justify a conclusion that he is a desperate and dangerous character and within the scope of clause (*f*) of section 110 of the Code of Criminal Procedure. If, however, it is intended to conduct a prosecution on these lines, the accused should have fair notice of the fact in the preliminary order drawn up against him. The form of the preliminary order passed in this case clearly shows that those responsible for the conduct of the prosecution were not prepared to ask the Court to find that these men were habitual robbers or habitual receivers of stolen property. For all these reasons I am quite satisfied that the orders complained of cannot be sustained. I set aside the order of the Sub-Divisional Magistrate and discharge Indar, Bhopal and Jhabbu Lal. If they have furnished the securities required, their sureties will be discharged and their own recognizances cancelled. If they are in custody for failure to furnish security, they must be at once released.

Order set aside.

GURU PROSANNA LAHIRI v. SAMIRUDDIN SARKAR.

CALCUTTA HIGH COURT.

RULES NOS. 593 AND 621 TO 631 OF 1917.

December 17, 1917.

Present:—Mr. Justice Teunon and Mr. Justice Newbould.

GURU PROSANNA LAHIRI AND OTHERS—PLAINTIFFS—PETITIONERS

versus

Munshi SAMIRUDDIN SARKAR AND OTHERS—DEFENDANTS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), O. I, r. 10 (2)—Addition of parties—Heirs of original tenant, whether can be added as parties defendants in rent suit brought against one of them.

In a suit for recovery of arrears of rent instituted against one of the heirs of the original tenant whose name was recorded in the landlord's *sherista*, the remaining heirs of the tenant were on their application added as parties to the suit:

Held, that although the added defendants were not strictly necessary parties to the adjudication of the question arising between the plaintiff and the original defendant, yet they were not improperly added as parties to the suit. [p. 466, col. 2.]

Basli Bibi v. *Hanif-ud-Din*, 6 Ind. Cas. 570, 12 C. L. J. 267, followed.

Rule against the order of the Court of the Munsif, Dhubri.

FACTS appear from the judgment.

Sir *Rash Behari Ghose* (with him Babu *Debendra Nath Bagchi*), for the Petitioners.—The Rule was directed against an order directing that the opposite parties should be joined as parties defendants to this suit, which is a suit for the recovery of arrears of rent. The opposite parties are strangers to the suit and applied to be made defendants on the ground that they were co-owners in the tenant's interest. The allegation of the opposite parties is that they are also the successors of the original tenant, and the tenancy has devolved upon them together with the defendant who has been sued for the recovery of rent and whose name has been registered in the landlord's *sherista* in place of the original tenant deceased. If they are not made parties to the suit their interest in the tenancy will be prejudiced.

Order I, rule 10, sub rule (2), of the Civil Procedure Code deals with the addition of parties. The plaintiff is not bound to add the opposite parties as defendants because he is not seeking any relief against them. The law laid down in *McCheane* v. *Gyles* (1) applies to the facts of this case, and on the authority of that case the plaintiff can very well contend that the order of the learned Munsif directing the addition of parties should be set aside as having been passed without jurisdiction.

Babu *Sarat Chandra Roy Choudhury* (with him Babu *Jnanendra Mohan Das*), for the Opposite Parties.—Order I, rule 10, sub-rule (2), of the Civil Procedure Code provides that the Court may, at any stage of the proceedings either upon or without the application of a party, order that the name of any person who ought to have been joined as a party to the suit or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit be added as a defendant. Both the Munsif and the Subordinate Judge have found that the added defendants are necessary parties to this suit, and that irreparable loss will be incurred by them if they are not added as defendants, because the defendant No. 1 who has been sued upon is in collusion with the plaintiff-landlord and has consented to the enhancement of rent and to allow the holding to be treated as a non-occupancy holding, although in reality the holding is an occupancy holding.

[TEUNON, J.—If the landlord gets a decree against the defendant No. 1 only, the interests of the added defendants cannot be affected by that decree.]

No doubt, the decree will not be binding upon them, but the inevitable result of that would be to lead to a multiplicity of suits. The property may be put up to sale in execution of the decree so obtained by the landlord, and they will, in that case, be obliged to launch into expensive and ruinous litigation to protect their interests. The whole proceeding, as will appear from the judgments of the Courts below, is collusive and is meant to defraud the added defendants and to deprive them of the rights and interests which they have acquired in the holding by right of succession.

The case in *Basli Bibi* v. *Hanif-ud Din* (2) is an authority for the proposition that all

(1) (1902) 1 Ch. 911 at p 914; 71 L. J. Ch. 446; 86 L. T. 217; 50 W. R. 337.

(2) 6 Ind. Cas. 570; 12 C. L. J. 267.

the heirs of the deceased registered tenant should be made parties in a suit for recovery of arrears of rent. The case of *Dwarka Nath* v. *Kishori Lal* (3) also indicates the circumstances under which addition of parties should be allowed. On the authority of those cases there is not the least doubt that the order of the Courts below is a just and proper one.

Then again, under Order I, rule 10, sub rule (2), the Court has jurisdiction to exercise discretion in the matter of addition of parties, and in the exercise of their discretion the Courts below have found that having regard to the facts and circumstances of the case the defendants other than the defendant No. 1 should be added as parties. The order is an interlocutory order, and the Courts below have exercised their discretion properly, and so it is not open to revision under section 115, Civil Procedure Code. Refers to *Chandi Roy* v. *Kirpal Roy* (4).

Sir *Rash Behari Ghose* in reply.—If the opposite parties are not necessary parties, then the decision of the Courts below can be interfered with in revision. The presence of the added defendants is not necessary for the adjudication of any question that can arise in the rent suits between the plaintiff and the defendant No. 1, because they cannot be bound by any decree to which they are not parties. Under section 115, Civil Procedure Code, the High Court can revise an interlocutory order if there is any illegality or irregularity in the exercise of jurisdiction by the lower Courts.

JUDGMENT.—These 15 Rules arise out of 15 suits for arrears of rent instituted three in the Court of the Subordinate Judge and twelve in the Court of the Munsif of Goalpara. The suit is brought by the admitted landlord and as instituted was against one of the heirs of the original tenant, a person of the name of Taripat who died in 1316. The heirs other than the original defendant being eight in number, two sons of Taripat and six female heirs applied that they should be added as parties to the suit. Their application was opposed by the plaintiff mainly apparently on the ground that the original defendant, the eldest son of Taripat, was the person whose name was recorded in his *sherista*. But in dealing with the application of the remaining heirs the Courts below have found that they are in fact heirs of Taripat and are in possession equally with the first defendant in the holdings in question. On these facts we are unable to distinguish these cases from the case of *Basli Bibi* v. *Hanif-ud-Din* (2), and though speaking for myself I am not prepared to say that the added defendants were strictly necessary parties to the adjudication of the questions that arise between the plaintiff and defendant No. 1, yet in view of the decision to which we have referred we are unable to say that the Courts below have exercised their discretion improperly by adding the co sharer tenants of the holdings as parties to these suits. In this view these Rules are discharged with costs. We assess the hearing fee at the aggregate sum of five gold *mohurs*.

Rule discharged.

(3) 6 Ind. Cas. 549; 11 C. L. J. 426 at p. 428; 14 C. W. N. 703.

(4) 10 Ind. Cas. 308; 15 C. W. N. 682.

MADRAS HIGH COURT.

CIVIL APPEAL No. 134 OF 1911.

August 30, 1917.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Seshagiri Aiyar.

P. L. A. PALANIAPPA CHETTIAR—PLAINTIFF—APPELLANT

versus

V. L. A. R VEERAPPA CHETTIAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), ss. 13, 20, scope of—Partnership, suit against—Absence of one partner from British India, effect of—Deduction of time as against absentee defendant—Legal representatives of deceased partner, position of—Release by one partner, whether binds other partners—Contract Act (IX of 1872), ss. 43, 241, 263—Entries in debtor's books, whether payments.

Entries in the account books of a debtor cannot be treated as payments of interest within the meaning of section 20 of the Limitation Act. [p. 467, cols. 1 & 2.]

In a suit against a partnership firm for moneys due on accounts, the plaintiff is entitled to a deduction of the time during which any of the partners was absent from British India, but such absence will save limitation only as against the absentee partner and not as against those who were within jurisdiction. [p. 469, col. 1.]

PALANIAPPA CHETTIAR *v.* VEERAPPA CHETTIAR.

The legal representative of a deceased partner does not continue to be a partner after the latter's death for purposes of winding up. He only becomes a lender in respect of any business that might be carried on by the surviving partners. If no business is carried on, he is a tenant-in-common with the surviving partners in respect of the assets of the business. [p. 470, col. 1.]

It is open to one of the partners of a firm to release a partnership liability. [p. 469, col. 2.]

After the death of one of the partners the surviving partners have power to release a claim. [p. 469, col. 2.]

If the release is fraudulent, the other partners can avoid it and seek to recover their share of the released debt The right, however, is personal to the partners, and the legal representative of a deceased partner is not entitled to it. [p. 470, col. 1.]

Appeal against the decree of the Court of the Temporary Subordinate Judge, Ramnad, in Original Suit No. 72 of 1910.

Mr. *Patanjali Sastri* for Mr. *A. Krishnasami Ayyar*, for the Appellant.

Mr. *S. Desika Chariar*, for the Respondents.

JUDGMENT.—The suit was found by the Subordinate Judge to be barred by limitation. The suit loans were taken on 28th December 1903 and 20th January 1904, but the suit was not instituted till 3rd November 1909.

Appellant's first contention may be briefly disposed of. His Vakil argues that in accordance with a usage of the trading community to which the parties belong, there was an automatic renewal at the end of every 3 months, the accrued interest being added to the principal and the total being treated as a fresh loan. There are entries in defendants' accounts which might be consistent with such a usage, but no evidence whatever has been adduced to show its actual existence. No such contention appears to have been raised in the lower Court as far as can be seen, and in paragraph 14 of his judgment the Subordinate Judge says these quarterly entries were made according to custom merely with a view to record exactly the amount of liability. In the absence of evidence of the usage this plea must be rejected.

It is next urged that these entries in defendants' accounts should be treated as payments of interest within the meaning of section 20, Indian Limitation Act. This position is equally untenable. Entries in the debtor's account books cannot be treated as payments. *Vide Ichha Dhanji* v. *Natha* (1). Appellant relies on *Kariyappa* v. *Rachapa* (2), but the ruling in that case is clearly against him. There is nothing to show that similar entries were made in plaintiff's own books: and the entries in the books of the debtor firm could in no circumstances be a complete answer to a suit brought by a creditor for recovery of the amount due to him.

The entries are not signed and so cannot be treated as acknowledgments under section 19, Indian Limitation Act.

The last argument of Mr. Patanjali Sastri on the question of limitation is entitled to far more weight. He argues that as the 1st defendant was not in British India for 6 years from 1903 to 1908, the plaintiff's cause of action was suspended during that period under section 13 of the Limitation Act, not only against the 1st defendant but also against defendants Nos. 6 and 8. Before disposing of this question of law, we must deal with a preliminary objection raised by the respondents to its consideration. It was argued on their behalf that this exemption from limitation was not specifically pleaded in the plaint, and that consequently the appellant is not entitled to be heard on it. We asked the learned Vakils whether, in view of the fact that the question was considered at length by the Subordinate Judge, there are any grounds for holding that they were prejudiced by the procedure adopted by the lower Court. In answer, we were told that if this point had been mentioned in the plaint and raised in the issue, the defendants could have pleaded that under the law of Epoh, the suit was barred by limitation altogether. We are unable to understand why this plea should not have been put forward, even though the exemption under section 13 of the Indian Limitation Act was not specifically raised in the plaint. Having regard to the fact that the plea of limitation can be disposed of upon the admission made by the defendant himself, and having also regard to the fact that the question was considered by the lower Court, we think

(1) 13 B. 538; 7 Ind. Dec. (N. S.) 225.

(2) 24 B. 493; 2 Bom. L. R. 378; 12 Ind. Dec. (N. S.) 860.

we should not be justified in refusing to hear the appellant on this point. Before proceeding further we may say that the deposition of the 1st defendant is clear and unambiguous that between 1903 (we shall take the end of 1903) and December 1908 he was not in British India. On this evidence there can be no doubt that if the 1st defendant were the sole defendant, the suit will be in time.

The question argued by the learned Vakil for the appellant has two aspects. One is, whether the plaintiff is entitled to claim a reduction of time as against all the defendants by the fact that one of them was absent from British India, and the other, whether the plaintiff is not entitled to deduct the time at least as against the particular defendant who was not resident in India. These questions are not covered by any Indian authority. Mr. Patanjali Sastri drew our attention to some English cases bearing upon the Statute of Queen Anne. The language of that Statute is not very different from the one we have to construe. In *Fannin* v. *Anderson* (3) Lord Denman, Chief Justice, held that if one of the defendants were absent in a foreign country, the plaintiff was entitled to have the period of absence deducted in his favour as against the particular defendant and his co-promisors. This was followed by Jervis, C. J., in *Towns* v. *Mead* (4). The other learned Judges who sat with him expressed no opinion on the question. These two cases were quoted with approval in *Roddam* v. *Morley* (5). *Prima facie*, therefore, the extreme contention of the learned Vakil for the appellant would seem to derive support from these decisions; but, on examining them, we are of opinion that the plaintiff is not entitled to deduct the time of absence of the 1st defendant as against the other defendants. Mr. Shephard in his Commentary on the Indian Limitation Act points out that, under the English Law, if a co-obligor who is within the jurisdiction is sued, it is open to him to demur to the trial of the action on the ground that the other co-obligors should also be proceeded with at the same trial. Reference may be made in this connection to the well-known case of *King* v. *Hoare* (6). Having regard to section 43 of the Indian Contract Act which declares that co-promisors are jointly and severally liable, such a plea will not be available in India. Secondly, it is stated in *Fannin* v. *Anderson* (3): "The plaintiff cannot bring the absent defendants into Court by any act of his: and, therefore, if he be compelled to sue those who are within 6 years, without joining those who are absent, he may possibly recover against insolvent persons, and lose his remedy against the solvent ones who are absent." That again is not the rule of law which obtains in this country. See *Muhammad Askari* v. *Radhe Ram Singh* (7) and *Moolchand* v. *Alwar Chetty* (8). It is doubtful whether the principle mentioned by Lord Denman, C. J., is good law now even in England. See Bullen and Leake's Precedents of Pleadings, note A, at page 614 and Leake on Contracts, page 684 (6th Edition). In this treatise the law is stated in these terms:—"A judgment recovered against one of the joint obligors of a bond merges a joint liability on the bond, and is a bar to an action against the others; but if the obligors are bound jointly and severally, the judgment against one, without satisfaction, is no bar to an action against another upon his several liability, whilst any part of the debt remains due." A third ground upon which the English decisions proceed is pointed out in Darby and Bosanquet on Limitation, and that is that the principle of the cases decided under the Statute of James which applies to one of several plaintiffs residing abroad should govern the construction of the Statute of Queen Anne as well. None of the above special grounds are applicable to India. Moreover, the language of section 13 of the Limitation Act does not lend

(3) (1845) 115 E. R. 693; 7 Q. B. 811; 14 L. J. Q. B. 282; 9 Jur. 969; 68 R. R. 573.

(4) (1855) 139 E. R. 711; 16 C. B. 123; 3 C. L. R. 381; 24 L. J. C. P. 89; 1 Jur. (N. S.) 355; 3 W. R. 178; 24 L. T. (O. S.) 238; 100 R. R. 648.

(5) (1856) 44 E. R. 622; 1 De G. & J. 1; 26 L. J. Ch. 438; 3 Jur. (N. S.) 449; 5 W. R. 510; 118 R. R. 1.

(6) (1844) 153 E. R. 206; 13 M. & W. 494; 2 Dowl. & L. 382; 14 L. J. Ex. 29; 8 Jur. 1127; 67 R. R. 694.

(7) 22 A. 307; A. W. N. (1900) 73; 9 Ind. Dec. (N. S.) 1236.

(8) 29 Ind. Cas. 303; 39 M. 548; 17 M. L. T. 449.

itself to the extreme contention of the appellant. Although the singular 'defendant' would include the plural 'defendants' the contention would necessitate our reading into the section some words like these, namely: "If there are more defendants than one and any one of them happens to be out of British India." We see no reason for adopting such a construction. We must, therefore, hold that the absence of the 1st defendant would not entitle the plaintiff to count the period of his absence in his favour as against defendants Nos. 6 and 8.

On the other hand, we think that the alternative contention of the learned Vakil for the appellant is well-founded. As we stated already, under section 43 of the Indian Contract Act the liability of co-promisors is joint and several. Section 249 of the Contract Act enunciates the same principle as regards partners. Consequently the plaintiff could sue for the whole of the amount the 1st defendant alone; and he would be entitled under section 13 of the Limitation Act to deduct the time during which the latter was absent from British India. The fact that in the suit thus brought, the plaintiff has impleaded defendants Nos. 6 and 8 is no ground for rejecting the claim as against the 1st defendant also. No violence will be done to the language of section 13 of the Limitation Act by holding that as against the absentee defendant alone the plaintiff is entitled to the deduction of time during which he was away from British India. The fact that he could have sued his co-obligors who were within British India is not a ground for holding that the claim against the 1st defendant is barred by limitation. See *Abdul Khadir* v. *Ahammad Shaiwa* (9). We must, therefore, hold that the appeal so far as defendants Nos. 6 and 8 are concerned fails and must be dismissed. The appeal also fails as against defendants Nos. 3, 4, 5, 7, 9 and 10 who are members of a joint family with defendants Nos. 6 and 8. We must now proceed to hear the appeal against the defendants Nos. 1 and 2 on the merits.

This appeal as against respondents Nos. 1 and 2 coming on for hearing the Court made the following

(9) 30 Ind. Cas. 423; 38 M. 419.

JUDGMENT.—On the 2nd question argued by Mr. A Krishnasami Ayyar, the facts are these:- The father of the plaintiff was a partner with defendants Nos. 3, 6 and 8 in the Epoh Firm, which we shall denominate as the creditor firm. Defendants Nos. 3, 6 and 8 were also partners with the 1st defendant in the Singapore Firm which we shall call the debtor firm. The plaintiff's father died in 1903. During the course of the winding up of the creditor firm, defendants Nos 3, 6 and 8 lent the debtor firm a certain sum of money. The present suit is to recover the plaintiff's share of that loan. The question whether the plaintiff can maintain a suit against a firm which consists of some of his own partners need not be decided, as we agree with the lower Court upon another point.

By Exhibit I, the debtor firm entered into a deed of composition with the outside creditors of that firm. The main provisions of that document are that the 1st defendant should pay a certain sum of money to pay off these outside creditors and that he should be released from liability to his partners for any moneys advanced by them. The arrangement come to appears to us to have been *bona fide* and reflects credit on the partners, in that they agreed to forego their own rights with a view to pay off those who had lent monies to the firm. We are unable to agree with Mr. A. Krishnasami Ayyar that by such an understanding, defendants Nos. 3, 6 and 8 secured any personal advantage to themselves. We agree that moral turpitude need not be brought home to them [see *Nocton* v. *Ashburton (Lord)* (10)], but we think that the arrangement was a business-like one and was entered into for the purpose of securing the best interests of the debtor firm. The question, under these circumstances, is whether the release of the 1st defendant is impeachable by the plaintiff. That one partner can release a partnership liability is well established. See Lindley, page 180. That after dissolution by the death of one of the partners, the surviving partners still have the right of releasing a claim is clear from section 263 of the Contract

(10) (1914) A. C. 932; 83 L. J. Ch. 784; 111 L. T. 641; 30 T. L. R. 602.

Act. *Vide* also *Motilal Bechardass* v. *Ghellabhai Hariram* (11).

Mr. A. Krishnasami Ayyar put forward the ingenious argument that after the death of one of the partners, his legal representative continues to be a partner for the purpose of winding up. We are unable to accede to this proposition. Under section 241, the legal representative of a deceased partner will become a lender in respect of any business that might have been carried on by the surviving partners. If no business is carried on, then the legal representative will be a tenant-in-common with the surviving partners in respect of the assets of the business. *Vide* Story on Partnership, section 346. That the principle of section 45 of the Contract Act is applicable to partners was decided in *Motilal Bechardass* v. *Ghellabhai Hariram* (11) and we agree with this proposition. The argument that by section 263 of the Contract Act, the legal representative of a deceased partner is by implication a partner is opposed to the language of the section. Clause 2 of section 29 of the English Partnership Act was relied on. That only shows that if during the winding up, the partner makes a secret profit, he is accountable to the legal representatives of the deceased partner for it. That section is no authority for the proposition contended for by the learned Vakil. *Piercy* v. *Fynney* (12), *Veerasami Naicker* v. *Ibramsa Routher* (13) and *Baikunta Nath* v. *Hara Lal* (14) lay down that if a release by one of the partners is fraudulent, the other partners can avoid it and seek to recover their share of the released debt. The legal representative is not entitled to such a right which is personal to the partners. We are therefore of opinion that the release of the 1st defendant is binding on the plaintiff. If he has been damnified by the conduct of defendants Nos. 3, 6 and 8, his remedy is to sue them for damages. As we have held that the claim against the defendants Nos. 3, 6 and 8 is barred by limitation, this matter need not be pursued any further.

The decision of the Court below is right and we dismiss the appeal with the costs of defendants Nos. 1 and 2.

Appeal dismissed.

M.C.P.

(11) 17 B. 6 at p. 13; Chetty's S. C. C. R. 336; 9 Ind. Dec. (N. S.) 4.

(12) (1871) 12 Eq. 69; 40 L. J. Ch. 404; 19 W. R. 710.

(13) 1 Ind. Cas. 200; 19 M. L. J. 221; 5 M. L. T. 209.

(14) 9 Ind. Cas. 116; 13 C. L. J. 234.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 278 OF 1917.

January 31, 1918.

Present:—Mr. Justice Roe and Mr. Justice Jwala Prasad.

DHARAMDEO SINGH—PLAINTIFF—APPELLANT

versus

RAM PRASAD SAH AND OTHERS—DEFENDANTS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 27 (b)—Specific performance of contract, suit for—Subsequent bona fide transferee for value—Burden of proof.

A party pleading an exception must prove the exception. [p. 471, col. 1.]

Where in a suit for specific performance of a contract the plaintiff proves his prior contract, the burden of proving a subsequent *bona fide* transfer for value without notice under section 27 (*b*) of the Specific Relief Act lies on the party alleging it. [p. 471, col. 1.]

Appeal from a decision of the District Judge, Saran, dated the 24th November 1916, reversing that of the Subordinate Judge, 1st Court, Saran, dated the 6th October 1915.

FACTS.—The plaintiff sued for specific performance of a contract for sale of land. The findings of the Court of Appeal were as follows:—"Thus I consider that the letter also has been satisfactorily proved and it proves the existence of the previous contract as alleged by the plaintiff. .....The next point to be considered is whether the subsequent purchasers had notice of the previous contract..... Altogther I consider that the plaintiff has failed to prove that defendants Nos. 1 and 2 had notice of the previous contract."

Messrs. *Lakshmi Narayan Singh* and *Rajendra Prasad*, for the Appellant, submitted that the onus of proving that the defendants were

bona fide purchasers for value without notice of the plaintiff's prior contract and that they had paid their money without such notice was on the defendants and the Court below had erred in throwing the onus on the plaintiff—*Himatlal* v. *Vasudeo Ganesh* (1) and *Tiruvenkatachariar* v. *Venkatachariar* (2).

[ROE, J., referred to *Gudur Ranga Reddi v. Gundala Pitchi Reddi* (3)].

Messrs. *Kulwant Sahay* and *Nirsu Narayan Sinha*, for the Respondents, replied.

JUDGMENT.—In this case the last question in issue No. 5 seems to us to have been decided upon an erroneous view of the burden of proof. That issue runs:—If so, whether such contract can prevail against the defendant's sale-deed? The answer to it is to be found in section 27, clause (*b*). The contract would prevail except against a transferee for value who has paid his money in good faith and without notice of the original contract. It is, we believe, well settled that a party pleading an exception must prove the exception. We, therefore, remand the case to the lower Appellate Court for a decision upon the evidence upon the record of the following issues:—

(*a*) Have the defendants Nos. 1 and 2 put before the Court a *prima facie* case which, if unrebutted, would show that they were transferees for value who have paid their money in good faith and without notice of the original contract, and

(*b*) If such a *prima facie* case has been put before the Court, have the plaintiffs succeeded in rebutting it either by cross-examination of the defendants or by direct evidence of their own?

Let the record be returned with the findings upon these issues before the Easter Vacation.

Case remanded for findings.

(1) 16 Ind. Cas. 680; 36 B. 446; 14 Bom. L. R. 634.
(2) 23 Ind. Cas. 621; 26 M. L. J. 218.
(3) 25 Ind. Cas. 973; 1 L. W. 879.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 283 OF 1916.

September 21, 1917.

Present:—Sir John Wallis, KT, Chief Justice, Mr. Justice Bakewell and Mr. Justice Kumaraswami Sastri.

MANJESHWARA KRISHNAYA—DEFENDANT No. 3—APPELLANT

versus

VASUDEVA MALLYA AND OTHERS—PLAINTIFFS NOS. 1 TO 5 AND DEFENDANT No. 1'S LEGAL REPRESENTATIVE—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 52, scope of—Lis pendens, *doctrine of, applicability of, to parties ranged on same side—'Any other party', meaning of—Purchases at auction sale, applicability of doctrine to.*

The doctrine of *lis pendens* contained in section 52 of the Transfer of Property Act is applicable only as between opponents with regard to alienations made by any one of them during suit and it cannot be extended to parties to the suit who are ranged on the same side and between whom there is no issue for adjudication. The section does not bar a transferee from one of the parties pending suit from raising an issue which his transferor and transferees from his transferor after decree are at liberty to raise. [p. 473, col. 1.]

The expression 'any other party' in the section means any other party who can be said to be arrayed on the opposite side to the party alienating owing to the existence of some issue between them upon which the Court is called to adjudicate in the suit, which may thus be regarded as a contentious suit between them in which each of them requires the protection of the doctrine against alienations by the other. [p. 472, col. 2.]

The doctrine of *lis pendens* is an extension of the doctrine of *res judicata* and makes the adjudication in the suit binding on alienees from the parties pending the suit, just as the law of *res judicata* makes the adjudication binding on parties to the suit and on alienees from them after decree. [p. 473, col. 1.]

The doctrine of *lis pendens* applies to purchases at auction sales in execution of decrees against parties to the suit as well as to private alienations by the parties. [p. 472, col. 1.]

Appeal under clause 15 of the Letters Patent against the judgment of Mr. Justice Phillips, in Second Appeal No. 1736 of 1914, reported as 40 Ind. Cas. 826, preferred against the decree of the District Court of South Kanara, in Appeal Suit No. 45 of 1913, preferred against that of the Court of the Subordinate Judge, South Kanara, in Original Suit No. 60 of 1911 (Original Suit No. 63 of 1906 on the file of the District Court, South Kanara).

Mr. *B. Sitarama Rao*, for the Appellant.

Mr. *A. Narasimhachari* for Mr. *V. V. Srinivasa Aiyangar*, for the Respondents.

MANJESHWARA KRISHNAYA *v.* VASUDEVA MALLYA.

JUDGMENT.

WALLIS, C. J.—Manguntha Bhandari filed a suit, Original Suit No. 114 of 1898, for a declaration that the sale deed of the suit properties which he had executed in favour of the 1st defendant in that suit and this was not binding on him, and for a further declaration that the mortgage for Rs. 2,000 executed by the 1st defendant in favour of the 3rd defendant in that suit, the father of the present plaintiffs, was not valid and binding on him. The real question was the validity of the sale under Exhibit D as, if that was upheld, the plaintiff had no concern with the subsequent mortgage by the vendee, the 1st defendant, to the 3rd defendant, the father of the present plaintiffs. The 1st and 3rd defendants in that suit made common cause and succeeded in upholding the validity of the sale under Exhibit D, subject to the plaintiff's lien for unpaid purchase-money. The 1st defendant in his written statement admitted his mortgage to the 3rd defendant, and as there was no contest about the mortgage, what the High Court apparently decided was that the plaintiff was entitled to a charge on the property for his unpaid purchase-money in priority to the 3rd defendant's mortgage. While this suit Original Suit No. 114 of 1898 was pending, the present 2nd defendant, by Exhibit H dated 18th December 1899, acquired the 1st defendant's interest in the suit properties at a sale in execution. It is well settled that the doctrine of *lis pendens* applies to purchases at auction sales in execution of decrees against parties to the suit as well as to private alienation by the parties, and the question before us is whether the 2nd defendant's purchase from the 1st defendant pending the suit was subject to the result of the suit and whether the result of the suit was to preclude the present 2nd defendant as alienee from the 1st defendant from disputing the validity of the mortgage executed by the 1st defendant to the 3rd defendant, the father of the present plaintiffs, in the present suit which they have brought to enforce it. That again raises the question whether the alienation by the 1st to the 2nd defendant pending suit is affected by the doctrine of *lis pendens* as embodied in section 52 of the Transfer of Property Act. As there was absolutely no contest on the point between the 1st and 3rd defendants in that suit, it seems clear that the present case is not within the English doctrine as to *lis pendens* which is intended to protect the parties to litigation against alienations by their opponents pending suit. This is clearly explained by Lord Cranworth in *Bellamy* v. *Sabine* (1), where he observes that *lis pendens* affects a purchaser, "not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party." Later on he observes, "*pendente lite* neither party to the litigation can alienate the property in dispute so as to affect his opponent," and in *Faiyaz Husain Khan* v. *Prag Narain* (2) Lord Macnaghten, delivering the judgment of the Judicial Committee in a case governed by section 52 of the Transfer of Property Act, referred to this as the 'correct mode of stating the doctrine.' If then the English doctrine and the principle on which it rests is only applicable as between opponents with regard to alienations made by any one of them during suit, does the language of section 52 of the Transfer of Property Act compel us to apply the doctrine as between parties to the suit who were ranged on the same side and between whom there was no issue for adjudication? The section provides that "during the active prosecution of a contentious suit or proceeding in which any right to immoveable property is directly and specifically in question, the property cannot be transferred by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein." It is not, I think, putting an unduly restrictive construction on the section to say that "any other party" whose rights are not to be affected means any other party who can be said to be arrayed on the opposite side to the party alienating, owing to the existence of some issue between them upon which the Court is called to adjudicate in the suit, which may thus be regarded as a contentious suit between them in which each of them requires the protection of the doctrine against aliena-

(1) (1857) 1 De G. & J. 566; 26 L. J. Ch 797; 3 Jur. (N. S.) 943; 6 W. R. 1; 44 E. R. 842; 118 R. R. 228.

(2) 29 A. 339; 9 Bom. L. R. 656; 11 C. W. N. 561; 4 A. L. J. 314; 5 C. L. J. 563; 17 M. L. J. 263; 2 M. L. T. 191; 10 O. C. 314; 34 I. A. 102 (P. C.).

tions by the other. In other words, "any other party" in this section means any other party between whom and the party alienating there is an issue for decision which might be prejudiced by the alienation.

To hold otherwise would have strange and incongruous results which cannot have been contemplated by the Legislature. The law of *lis pendens* is an extension of the law of *res judicata* and makes the adjudication in the suit binding on alienees from the parties pending suit, just as the law of *res judicata* makes the adjudication binding on the parties to the suit and on alienees from them after decree. Now it is well settled that the bar of *res judicata* does not arise between defendants in a suit unless there is an active contest between them. Consequently the issue as to the validity of the mortgage would not be *res judicata* as between the present plaintiffs, the representatives of the 3rd defendant in the former suit, and the 1st defendant in that suit and this, or between them and the 2nd defendant, if the alienation by the 1st defendant to the 2nd defendant had been made after the decree instead of during the pendency of the suit. It would be indeed incongruous if the effect of section 52 were to bar a transferee from one of the parties pending suit from raising an issue which his transferor and transferees from his transferor after decree are at liberty to raise. In these circumstances I think we are justified in placing a restrictive construction on the language of section 52 so as to avoid this incongruity and to bring the section into line with the English Law, more especially as the observations of Lord Macnaghten already referred to seem to support this interpretation. This is the construction put on the section by Oldfield, J., with whom I agree.

This is sufficient to dispose of the appeal but, as some reliance has been placed on the fact that the decree of the High Court in Second Appeal No. 323 of 1902, on appeal from the decree of the District Judge in Appeal Suit No. 299 of 1900 affirming the decree of the District Munsif in Original Suit No. 114 of 1898, contains a declaration of the validity of the mortgage Exhibit I by the defendant to the 3rd defendant subject to the plaintiff's claim for Rs. 1,000 for unpaid purchase-money which it is said amounts to an adjudication on the question, I may state that this declaration is not, in my opinion, an adjudication between the 1st and the 3rd defendants in that suit. In their judgment, Exhibit E, the High Court expressly directed the decree of the lower Court to be modified by the insertion of this declaration, "as between the plaintiff and the 3rd defendant," and accepted the findings of the lower Court, one of which was that the mortgage by the 1st defendant to the 3rd defendant was fraudulent and without consideration (paragraph 5). It is not easy to reconcile their acceptance of this finding with the declaration they granted of the validity of the mortgage as between the plaintiff and the 3rd defendant. But, as already pointed out, in the result of the suit the plaintiff was not concerned with the validity of the mortgage, seeing that it was postponed to his claim for unpaid purchase-money and that he had failed to set aside his sale to the 1st defendant; and probably all that was meant was that the mortgage, which the 1st defendant, the mortgagor, did not dispute, was to be subject to the plaintiff's lien for Rs. 1,000 for unpaid purchase-money. In the result I agree with Oldfield, J., and would allow the Letters Patent Appeal with costs and make the order proposed by him.

BAKEWELL, J.—I agree.

KUMARASWAMI SASTRI, J.—I agree.

Appeal allowed.

M.C.P.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 191 OF 1916.

January 11, 1918.

Present:—Mr. Justice Teunon and Mr. Justice Newbould.

SARADA CHARAN BASAR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

JURO RAM MANDAL—DEFENDANT—RESPONDENT.

Bengal Tenancy Act (VIII B. C. of 1885), s. 66—Extension of time, application for, after expiry of period—Court, power of, to allow extension.

SARADA CHARAN BASAR *v.* JURO RAM MANDAL.

It is open to a Court to grant an extension of the time limited by section 66 of the Bengal Tenancy Act, even where the application for extension is made after the expiry of the period prescribed by the section. [p. 574, col. 2.]

Appeal against the order of the Subordinate Judge, Khulna, dated the 15th April 1916, reversing that of the Additional Munsif at that place, dated the 25th September 1915.

FACTS appear from the judgment.

Dr. *Jadunath Kanjilal*, for the Appellants:—The decree-holder-appellant applied for the execution of the decree passed under section 66 of the Bengal Tenancy Act. The judgment-debtor then applied for extension of time to pay off the decretal amount. The first Court disallowed the application for extension of time, but on appeal the lower Appellate Court allowed the application and granted further time within which the money due under the decree was to be paid. My submission is that as the application for extension of time was made after the expiration of 15 days mentioned in section 66 of the Bengal Tenancy Act and after the decree for ejectment had become absolute, the lower Appellate Court was wrong in allowing extension of time. Extension of time can be granted if it is applied for within 15 days limited by section 66 but not after that. See *Sunkur Singh* v. *Huree Mohun Thakoor* (1). Moreover, the application to extend the time was made to the executing Court which cannot extend the period of 15 days to save the judgment-debtor from the alternative consequence of ejectment. The decree must be executed as it stands, and the executing Court, to which the application for extension of time was made, cannot go behind the decree.

Babu *Satindranath Mukherjee*, for the Respondent:—The Court has power to extend the time though the application was made after the expiration of 15 days. See *Rao Banee Ram* v. *Prannath Shaha Koyal* (2).

Dr. *Jadunath Kanjilal* in reply.

JUDGMENT.—This appeal arises out of proceedings in execution of a decree for rent made under the provisions of section 66 of the Bengal Tenancy Act. The order for ejectment could, therefore, not be carried into effect until after the expiry of the 15 days allowed for payment by the second sub-section of the section which we have cited. The decree was made on the 24th May. The order was drawn up and signed on the 31st May. The arrears should, therefore, have been paid on or before the 15th June. As a matter of fact the amount was not so paid into Court, and on the 5th August the decree-holder applied for execution. Notice was issued upon the judgment-debtor, and on the 7th September he appeared and applied for extension of time, it being his case that he had no notice of the decree and that no notice of the application in execution was served upon him. The first Court found no reason to extend the time and accordingly rejected his application. Against that order the tenant judgment-debtor preferred an appeal to the District Judge of Khulna, and at the hearing of the appeal the learned Subordinate Judge extended the time by a period of one week from the date of his order. We are informed that the payment has been made in accordance with the terms of that order, against which the decree-holder now appeals.

His main contention is that inasmuch as before the 7th September, on which date the judgment-debtor made his application for extension, the period of 15 days had already expired, it was no longer open to the Court to enlarge the time. In support of this contention he refers us first to the case of *Sunkar Singh* v. *Huree Mohan Thakoor* (1), in which it was held under the corresponding provisions of Act X of 1859 and Act VIII of 1869 that no extension of the period of grace could be granted. But under the law as contained in those two enactments the Court had no power, or at least was not expressly given the power, to extend the statutory period. Under the present Act by virtue of sub-section (3) of section 66 the Court is expressly authorized and empowered to enlarge the time. The appellant has next sought to distinguish the case of *Bodh Narain* v. *Mahomed Moosa* (3), in which it was held that under the provisions of section 66 of the Bengal Tenancy Act and the provisions of section 244, now section 47 of the Code of Civil Procedure, it was open

(1) 22 W. R. 460.
(2) 18 W. R. 412; 10 B. L. R. App. 2.
(3) 26 C. 639; 3 C. W. N. 628; 13 Ind. Dec. (N. S.) 1010.

to the executing Court to extend the time, on the ground that there the application by the judgment-debtor was made before the expiration of the statutory period. That no doubt is so, but the reasoning which led the Judges to the conclusion at which they arrived would equally support an extension granted on an application made after the statutory period had expired. We also find that in section 148, Civil Procedure Code, the principle that the Court may enlarge a period prescribed or allowed even though the period originally fixed may have expired has been expressly recognised, and we further find that even under the old Rent Act in the case of *Rao Banee Ram* v. *Prannath Shaha Koyal* (2) an extension of time was granted though the statutory period had expired before the application for enlargement was made. We can see no reason why the power of the Court to extend or enlarge the period allowed by law should be restricted in the manner suggested by the appellant. In so far as the exercise of the Appellate Court's discretion is concerned, we are of opinion that for the extension of time the learned Subordinate Judge has given sufficient reason and has exercised his discretion in a proper manner. He points out that the decree here in question was an *ex parte* decree and there is nothing to show that it was in fact brought to the notice of the judgment debtor until the proceedings in execution were taken. Further, as the learned Subordinate Judge has pointed out, in making the decree the first Court had omitted to specify, as he should have specified, the amount of the arrear and of the interest due.

For these reasons we dismiss this appeal with costs. We assess the hearing fee at two gold *mohurs*.

Appeal dismissed.

PATNA HIGH COURT.

PRIVY COUNCIL APPEAL No. 50 OF 1917.

February 12, 1918.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Mullick.

Maharaja KESHO PRASAD SINGH —DEFENDANT—APPELLANT

versus

SHIVA SARAN LAL—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 110—Leave to appeal to Privy Council—Subject-matter of suit, value of—Property directly or indirectly involved—Interest on arrears, whether can be added.

Plaintiff brought a suit to recover arrears of pension from September 1911 to July 1912 together with interest thereon and valued his suit at Rs. 5,445. His suit was dismissed by the first Court but was decreed by the High Court. The defendant applied for leave to appeal to the Privy Council:

Held, (1) that the subject-matter of the suit was not above Rs. 10,000, nor did the decree involve a claim to or question respecting property of the value of Rs. 10,000: [p. 476, col. 2; p. 477, col. 2; p. 478, col 2; p. 479, col. 2.]

(2) that in determining the value of the subject-matter of the suit the interest payable until realisation of the decree could not be added to the amount claimed, nor could the arrears of pension accrued due since the decree be taken into consideration; [p. 476, col. 2; p. 478, col. 2.]

(3) that no question respecting future payment of the pension was involved in the decree; [p. 478, col. 2; p. 479, col. 1.]

(4) that the value of the properties to be attached in execution of the decree could not be said to have even an indirect connection with the decree. [p. 478, col. 1.]

Privy Council Appeal from a decision of Sir Edward Chamier, Kt., Chief Justice, and Mr. Justice Sharfuddin, in First Appeal No. 358 of 1914, dated the 27th July 1917, reported as 42 Ind. Cas. 122.

Messrs. *Hasan Imam*, *Krishna Sahai* and *Nirsu Narain Sinha*, for the Appellant.

Messrs. *S. Sinha*, *B. B. Lal* and *S. N. Palit*, for the Respondent.

JUDGMENT.

MILLER, C. J.—In this case the defendant applies for a certificate that the case complies with the requirements of section 110 of the Code of Civil Procedure and is a fit one for appeal to His Majesty in Council. The facts may be shortly stated. The plaintiff Babu Shiv Saran Lal was appointed in 1902 to act as Manager of the Dumraon Raj by the late Maharani Beni Prasad Koeri, who under her deceased husband's Will had a life-interest in the estate. In 1906 the Maharani executed an *ekrarnama* in favour

of the plaintiff granting him a pension of Rs. 500 per month from the date when he should retire from the management of the estate. The Maharani died in December 1907. After some litigation the first defendant the Maharaja Kesho Prasad Singh succeeded in proving his title to the estate. In March 1908 the plaintiff ceased to be Manager of the estate and was paid his pension until September 1911, when the first defendant obtained possession of the Raj. In August 1912 the plaintiff instituted the present suit claiming the pension from September 1911 to July 1912 and interest on unpaid arrears. He failed before the Subordinate Judge of Shahabad, but on appeal to this Court he obtained a decree against the first defendant for Rs. 5,445 together with interest at 6 per cent. per annum until realisation. By the terms of the decree it was ordered that the decree should be executed only against the property of the late Maharani in the hands of the first defendant and which had not been duly administered by him. The judgment was based upon the findings that although she could not bind the estate, the Maharani as tenant for life had power to dispose of her own acquisitions and that these did not form part of the estate at her death and that there was *prima facie* evidence to shew that the first defendant came into possession of property, both moveable and immoveable, which the late Maharani might have disposed of if she pleased. There is no finding either as to the exact value of such property, although there was evidence to shew that it was considerable, amounting to some lakhs of rupees, or as to whether it had been duly administered by the first defendant. It was but faintly argued that the amount or value of the subject-matter of the suit amounted to Rs. 10,000 within the meaning of the first paragraph of section 110 of the Civil Procedure Code, but it was contended that the decree of this Court involves directly or indirectly a claim to or question respecting property of that amount or value within the meaning of the second paragraph of the section. It was urged in support of the second contention that the decision arrived at by the judgment from which the defendant seeks to appeal involves a claim to have the accrued and future instalments of pension paid out of the Maharani's estate and as the instalments which are now due but still unsatisfied amount to considerably more than Rs. 10,000, the requirements of the second part of the section are fulfilled. In my opinion neither of these contentions can succeed. The first can be shortly dealt with. The plaint does not claim anything beyond the sum of Rs. 5,445 made up of pension and interest to July 1912 and further interest until realisation. No claim is made for a declaration that the plaintiff is entitled to furture pension or to a charge on the property for such pension, although it is true there is a general claim for any other relief to which the plaintiff may be entitled without specifying its nature. That interest payable until realisation cannot be added in ascertaining the amount of the subject-matter of the suit in the Court of first instance was definitely determined in the case of *Moti Chand* v. *Ganga Prasad Singh* (1), where their Lordships of the Privy Council rejected this contention and refused leave to appeal. But two decisions of the High Court at Calcutta were referred to where a claim for future mesne profits was allowed to be taken into consideration in estimating the amount of the subject-matter of the suit in the Court of first instance although the addition of mesne profits at the date of the decree in such Court did not bring the total up to the appealable amount. [See *Dalgleish* v. *Damodar Narain Chowdhury* (2) and *Basanta Kumar Roy* v. *Secretary of State* (3).] How far these decisions are consistent with the principle which guided their Lordships in *Moti Chand* v. *Ganga Prasad Singh* (1) (*ubi sup.*) or how far their authority may have been shaken by the more recent decision of the Madras High Court in *Subramania Aiyar* v. *Sellammal* (4), it is not necessary to determine. It is sufficient to say that in the present case the subject-matter of the suit in the Court of first instance amounts to nothing more than the sum claimed and there is no claim for mesne profits or anything analogous thereto. It follows, therefore, that the case does not fulfil the requirments of the first paragraph of the section.

(1) 24 A. 174; 6 C. W. N. 362; 29 I. A. 40; 4 Bom. L. R. 159; 8 Sar. P. C. J. 247.
(2) 33 C. 1286.
(3) 6 Ind. Cas. 792; 14 C. W. N. 872.
(4) 31 Ind. Cas. 296; 39 M. 843; 2 L. W. 1057; 18 M. L. T. 450; (1915) M. W. N. 941; 30 M. L. J. 317.

The second contention, *viz.*, that the case fell within the second paragraph of the section led to some argument before us as to the class of cases to which the second paragraph of section 110 is meant to apply. The case of *Subramania Aiyar* v. *Sellammal* (4) (*ubi sup.*) was relied on by the respondent who opposed the application. In that case the subject-matter of the suit including mesne profits in the Court of first instance was under Rs. 10,000, but by the addition of mesne profits for the period between the institution of the suit and the date of the petition for leave to appeal to his Majesty in Council the value of the subject-matter in dispute exceeded that amount. It was there decided, in a judgment reviewing at length the earlier decisions, that the second paragraph of the section applied only to cases involving some claim or question to or respecting property other than that in respect to which the claim is brought and which may be taken into account therewith in making up the appealable value, or that it may possibly also apply to cases involving claims incapable of a money valuation such as claims to easements and the like, but apart from this, if nothing beyond what is in one of the judgments in that case described as the object-matter in dispute is involved, the first paragraph of section 110 alone applies. This decision was at variance with the view expressed by Sir Francis Maclean at the end of his judgment in *Dalgleish's case* (2), although this part of his judgment was not necessary for the determination of the case, he having already held that the first paragraph of the section had been complied with. Were it necessary for us to choose between these authorities. I should be inclined to give more weight to the reasoned decision of the Madras High Court than to the dictum of Sir F. Maclean in the earlier case, but a further point which, in my opinion, concludes the case against the petitioner was raised and argued before us.

It was contended by the respondent that the petitioner had failed to shew that there was any property of the value of Rs. 10,000 or upwards in respect to which any claim or question was involved, as the petitioner's case was and always had been that there was no property belonging to the late Maharani in his hands and not only administered against which alone under the form of the decree the respondent's claim could be executed. In the petition praying for a certificate that the case fulfils the requirements of the section, the grounds of appeal are set out and under the headings (*n*) to (*s*) the petitioner disputes the contention that any property of the late Maharani came into his hands or that she ever had any separate property. It seems to me that whether any property such as that mentioned in the decree exists is a matter at present undecided and one which can only be finally determined in the execution proceedings now pending, in which proceedings the petitioner is vigorously contesting the existence of such property and has all along refused to pay the decretal amount, although his application to stay execution pending the appeal to His Majesty in Council has on a previous occasion been rejected by this Court. In these circumstances I think that even if the second alternative in section 110 is applicable, the petitioner has failed to show that the decree involves a claim or question to or respecting property of the requisite amount of value. The petition will, therefore, be dismissed with costs. Hearing fee five gold *mohurs*.

MULLICK, J.—I agree that leave should be refused, but as both sides have sought to draw an analogy from certain cases relating to mesne profits I think it is necessary to make some reference to them. The first case on which the defendant petitioner for leave relies is *Dalgleish* v. *Damodar Narain Chowdhury* (2). There the plaintiff sued for recovery of possession of land of the value of Rs. 5,400 and claimed mesne profits till possession was delivered. The suit was decreed in favour of the plaintiff and in the execution proceedings he put in a claim for mesne profits for over Rs. 30,000. The defendant appealed to the High Court, and the execution proceedings were stayed. The appeal was allowed and the plaintiff applied for leave to appeal to His Majesty in Council. It was contended that the case did not fall within the first part of section 595 of the Civil Procedure Code of 1882, which corresponds to section 110 of the present Civil Procedure Code, because although the claim in the appeal exceeded Rs. 10,000 the value of the subject-matter of the suit was below that sum. Maclean, C. J., and

Holmwood, J., held that mesne profits could be taken into account in estimating the value of the subject matter of the suit. They also expressed the opinion that even if the first part of section 596 was not applicable, still the decree involved directly or indirectly some claim or question to or respecting property of the value of Rs. 10,000 or upwards within the meaning of the second clause of section 596.

The defendant next draws our attention to *Basanta Kumar Roy* v. *Secretary of State* (3). That was a suit for possession of land with mesne profits. The value of the land as stated in the plaint was Rs. 6,156. In the application for leave to appeal to the Privy Council mesne profits and interest down to the date of the High Court decree were estimated at Rs. 5,607. It was admitted that the value of the matter in dispute on appeal was over Rs. 10,000, but it was contended that the value of the subject-matter in the Court of first instance was less. Jenkins, C. J., in holding that mesne profits and interest thereon could be taken into account in estimating the value of the subject-matter of the suit made the following observations: —

"Seeing that under the Code of Civil Procedure of 1882, the Court could provide in the decree for the payment of mesne profits in respect of the property from the institution of the suit until the delivery of possession or until the expiration of three years from the date of the decree with interest, such mesne profits and interest can, I think, be legitimately regarded as part of the subject-matter of the suit."

The applicability of the second part of section 596 of the Civil Procedure Code was not considered.

On the other hand, the plaintiff relies on *Subramania Aiyar* v. *Sellammal* (4). There the value of the land was under Rs. 10,000 but by the addition of mesne profits the value of the matter in dispute at the time of the application for leave to appeal to His Majesty in Council exceeded Rs. 10,000. The Court held that mesne profits could not be added for the purpose of calculating the value of the subject-matter of the suit. The Court also observed that the second part of section 110 of the Civil Procedure Code did not apply and that the decree for mesne profits could not be said to involve directly or indirectly some claim or question to or respecting property of value exceeding Rs. 10,000.

There is, therefore, a clear conflict between the views of the High Courts of Calcutta and Madras, but in my opinion it is unnecessary for the disposal of the application now before us to decide which of these views is correct.

Here the first question is whether the value of the matter in dispute on appeal to His Majesty is Rs. 10,000. Admittedly it is not, even if interest up to the date of the High Court decree is taken into account. But it is suggested that in calculating the value of the matter in dispute on appeal as well as the value of the subject-matter of the suit we should include arrears of pension which may have become due since the trial Court's decree with interest thereon. In my opinion this suggestion cannot be accepted. I think it is quite clear that the subject matter of the suit was only the specific and ascertained sum of Rs. 5,445 due on account of arrears of pension and interest thereon. The suit did not in any way concern itself with any future arrears of pension. The plaintiff made no claim for them and it is not known whether he intends to bring future suits in respect of them. How then can anything which the plaintiff does not claim and which has not and could not have been given by the decree be the subject-matter of the suit or be in dispute on appeal? No analogy can be drawn from the practice of the Calcutta High Court in respect of mesne profits which the Civil Procedure Code compels the Court to grant if claimed in the plaint.

At the same time I prefer not to rest my decision on the view of their Lordships of the Madras Court and I am satisfied without any reference to the decision in *Subramania Aiyar's case* (4) that the present application does not come within the first part of section 110 of the Civil Procedure Code.

The next question is whether the decree involves a claim directly or indirectly to property of the value of Rs. 10,000. It is contended that the decree involves a claim to subsequent arrears of pension which have by now amounted to more than Rs. 10,000. The answer to this is that the decree does not involve either directly or indirectly a claim

to anything more than the sum decreed and the interest thereon. According to the decided cases it might have been otherwise if the plaintiff had brought suits for these subsequent arrears, but it seems clear that while such suits are in *gremio futuri* the second part of section 110, Civil Procedure Code, does not apply.

The next question is whether the decree directly or indirectly involves a question respecting property of the value of Rs. 10,000. It is contended that it does, because the arrears of pension which have become due subject to the decree are the property of the plaintiff just as much as the arrears already decreed. The reply to this is that such arrears do not become the plaintiff's property till he has obtained a decree from Court or till the defendant has admitted liability for the same.

Finally it is contended that the decree involves indirectly the question whether property of the value exceeding Rs. 10,000 is liable to attachment in execution of the decree. The answer to this is that it has not been found by any Court whether the defendant has in his hands any property of which attachment can be made in execution of the decree. That matter was expressly left open in the appellate judgment of the High Court, and the defendant's case before us is that he has no such property in his hands. Moreover, the question as to what properties can be attached in execution of the decree cannot, in my opinion, be said to have even an indirect connection with the decree itself. The decree-holder may attach property or may not; if he does attach property the value of such property may be over Rs. 10,000 or it may not. It does not necessarily follow that any question as to title to property is directly or indirectly involved in the relief which the Court has here given to the decree-holder.

In this view of the case it is unnecessary to discuss the correctness of the opinion which has been expressed in *Subramania Aiyar's case* (4) to the effect that the property referred to in the second part of section 110 of the Civil Procedure Code must be property other than the subject-matter of the suit. Such a view might, I apprehend, lead to difficulties in drawing the line between property which is the subject matter of the suit and property which is not. In my opinion the Legislature has expressly enacted the second clause in wide terms, so that each case may be dealt with upon its own facts.

In the present case, giving the words of the second part of section 110 of the Civil Procedure Code the most liberal construction, it does not seem to me possible to say that the decree involves a claim to or question respecting property of the value of Rs. 10,000.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1406 OF 1916.

CIVIL REVISION PETITION No. 800 of 1915.

November 6, 1917.

Present:—Mr Justice Seshagiri Aiyar and Mr. Justice Napier.

Maharaja PERUMAL MUDALIAR AND ANOTHER—APPELLANTS IN S. A. No. 1406 OF 1916 AND RESPONDENTS IN C. R. P. No. 800 of 1915

versus

SENDANATHA MUDALIAR—RESPONDENT IN S. A. No. 1406 OF 1916 AND PETITIONER IN C. R. P. No. 800 OF 1915.

Contract Act (IX of 1872), s. 2 (d)—'Consideration,' what is—Hindu Law—Promissory note, executed for promise made by executant's father—Repudiation of promise by father, effect of.

The consideration required to support a promise may consist of any damage or any suspension or forbearance of his right or any possibility of a loss occasioned to the plaintiff by the promise of another, though no actual benefit accrues to the promisee. [p. 480, cols. 1 & 2.]

Kedar Nath Battacharji v. *Gorie Mahomed*, 14 C. 64; 7 Ind. Dec. (N. S.) 43, *Abdul Aziz* v. *Masum Ali*, 23 Ind. Cas. 600; 36 A. 268; 12 A. L. J. 351 and *Carlill* v. *Carbolic Smoke Ball Co.*, (1893) 1 Q. B. 256; 62 L. J. Q.B. 257; 4 R. 176; 67 L. T. 837; 41 W. R. 210; 57 J. P. 325, followed.

A promissory note given by a Hindu on a promise made by his father cannot be enforced against him as a pious obligation if the promise was repudiated by the father or is otherwise not enforceable. [p. 480, col. 1.]

Second appeal against the decree of the District Court, Tinnevelly, in Appeal Suit No. 448 of 1915, preferred against that of the Court of the Additional District Munsif, Tinnevelly, in Original Suit No. 244 of 1913, and petition under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge, Tinnevelly, dated 30th June of 1915, in Small Cause Suit No. 1575 of 1913.

Messrs. *E. S. Chidambaram Pillai* and *O. N. Marthandam Pillai*, for the Appellants in S. A. No. 1405 of 1916 and for the Respondents in C. R P. No. 800 of 1915.

Mr. *M. D. Deva Doss*, for the Respondents in S. A. No. 1406 of 1916 and for the Petitioners in C. R. P. No. 800 of 1915.

JUDGMENT.—We are unable to uphold the judgment of the learned District Judge. He is apparently of opinion that the promissory note given by the plaintiff can be supported on the theory that the promise by the father is binding on the son as a pious obligation. If the father himself could have repudiated the promise, the son cannot be placed in a worse position. Therefore, the real question is whether the original promise by the father is enforceable.

Notwithstanding the adverse criticism of Sir Frederick Pollock on *Kedar Nath Battacharji* v. *Gorie Mahomed* (1), we are not prepared to differ from the statement of the law therein contained. The fact that a similar promise in England may not be enforced by the Courts of law is not conclusive of the question, as definition of consideration in the Indian Contract Act is wider and more comprehensive than is accepted in the English Courts. *Kedar Nath Bhattacharji* v. *Gorie Mahomed* (1) has been accepted as good law in *Abdul Aziz* v. *Masum Ali* (2) and we are prepared to follow these rulings. But before applying them the necessary facts have to be ascertained.

It may be, as argued by Mr. Deva Doss, that the defendant was himself induced to pay money towards the charitable purposes on the faith of the plaintiff's promise. In that case according to the definition of the term *consideration*, the plaintiff's promise will be enforceable. The definition taken by Leake from the well-known case of *Carlill* v. *Carbolic Smoke Ball Co.* (3) will be equally applicable to such a promise. This is what Leake says: "The consideration required to support a promise has been defined as consisting of any damage, or any suspension or forbearance of his right or any *posibility of a loss* occasioned to the plaintiff by the promise of another, although no actual benefit accrues to the party undertaking." It may also be found that the daily services have been performed by the defendant, relying on the promise of the plaintiff. The learned Counsel for the respondent has stated that his client has paid interest believing that the promised subscription will come in. If that detriment has been suffered the promise of the plaintiff will be enforceable.

The District Judge has not expressed any opinion on these questions of fact. We must reverse his decree and direct him to dispose of the appeal in the light of the above observations. The decree of the Subordinate Judge in Small Cause Suit No. 1575 of 1913 must also be reversed, because that case cannot be disposed of independently. We transfer the Small Cause suit to the District Judge. He will dispose of that suit in accordance with his conclusions in the appeal. Costs in both the second appeal and the civil revision petition will abide the result.

Appeal allowed.

M.C.P.

(1) 14 C. 64; 7 Ind. Dec. (N. S.) 43.
(2) 23 Ind. Cas. 600; 36 A. 268; 12 A. L. J. 351.
(3) (1893) 1 Q. B. 256; 62 L. J. Q. B. 257; 4 R. 176; 67 L. T. 837; 41 W. R. 210; 57 J. P. 325.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1703 OF 1915.

January 30, 1918.

Present:—Mr. Justice Fletcher and Justice Sir Shamsul Huda, Kt.

HARIDAS DEY—PLAINTIFF—APPELLANT

versus

KAILASH CHANDRA BOSE AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, rr. 4, 33—Appellate Court, power of, to vary decree in favour of persons who do not appeal—Arbitration—Reference on application of some of the parties, validity of.

Except under Order XLI, rule 4, Civil Procedure Code, an Appellate Court cannot vary a decree of a lower Court as regards its adjudication on the rights and liabilities of the parties who have not joined in the appeal and who are not parties to the litigation in the Appellate Court. [p. 482, col. 2.]

Order XLI, rule 33, Civil Procedure Code, does not apply to a person who is not a party to the appeal. [p. 482, col. 2.]

Quære.—Whether an order of reference to arbitration made by the Court on the application of the plaintiff and one of the defendants is legal?

Appeal against the decree of the Officiating Sub-Judge, Dacca, dated the 23rd April 1915, modifying that of the Munsif, 1st Court, Dacca, dated the 17th of December 1914.

HARIDAS DEY *v.* KAILASH CHANDRA BOSE.

FACTS appear from the judgment.

A preliminary objection was taken on behalf of the Respondents by Babu *Dwarka Nath Chakravarty* that no appeal lay in the case, because the suit was referred to arbitration and the decree which had been passed was in accordance with the award of the arbitrator.

Babu *Sarat Chandra Roy Chowdhury* (with him Babu *Sasadhur Roy*, Junior), for the Appellant.—The whole question turns upon Order XLI, rule 33, Civil Procedure Code. Moreover, the decree of the Munsif was in accordance with the award. So the Subordinate Judge in appeal had no jurisdiction to set aside or vary the decree made by the Munsif. As the decree appealed from did not proceed on any ground common to all the defendants, and the non-contesting defendants Nos. 1 and 3 to 7 did not prefer any appeal against the decree of the Munsif, the Subordinate Judge had no power to set aside the judgment of the Munsif so far as it related to these non-contesting defendants who did not join in the appeal to the Subordinate Judge. I also submit that the reference to arbitration was not legal. Out of the seven defendants only one defendant No. 2 joined with the plaintiff in applying to the Court for an order of reference to arbitration.

Babu *Upendra Lall Roy* (with him Babus *Dwarka Nath Chakrabarty* and *Prokash Chundra Pakrashi*), on behalf of the Respondents (defendants Nos. 3 to 7).—The decree passed in this case was not in accordance with the award. Only one witness was examined by the Munsif on behalf of the plaintiff, but this witness did not prove the plaintiff's title to the land in the suit. How could the Munsif pass a decree declaring the plaintiff's title and ordering delivery of possession to the plaintiff as against the defendants Nos. 1 and 3 to 7 who did not join in the application for reference to arbitration and who were not, therefore, bound by the award?

[HUDA, J.—You did not appeal against the Munsif's decree, and as the appeal preferred by defendant No. 2 did not proceed on any ground common to all the defendants, how could the decree made by the Munsif against your clients be set aside by the Appellate Court?]

When defendant No. 2 preferred an appeal in the lower Appellate Court, my clients defendants Nos. 3 to 7 were not made parties and I submit that the decree which was made by the Munsif did not affect my clients at all, as the decree was not against all the defendants but against *the defendant*, obviously meaning thereby the defendant No. 2 who alone contested the suit, and who alone joined the plaintiff in the application for reference to arbitration.

[FLETCHER, J.—But the Privy Council has held that a decree must be read along with the judgment. The use of the singular word "defendant" is a clerical mistake for defendants.]

[HUDA, J.—The word in the decree is a Bengali word * * * (*pratibadi*) which does not necessarily mean a single defendant.]

Babu *Sarat Chandra Roy Chowdhury*, in reply.—The reference to arbitration was illegal so the arbitrators had no jurisdiction to make the award. The plaint shows that the plaintiff's cause of action was common against all the defendants. The question is, did all the parties interested in the suit agree that the matter in difference between them shall be referred to arbitration? The defendants Nos. 1 and 3 to 7 did neither agree nor sign the application for reference to arbitration. Therefore, I submit that the entire arbitration proceedings were illegal and the award made on the illegal reference was void and of no effect. He referred to *Ghulam Khan* v. *Muhammad Hassan* (1) and *Joy Prokash Lall* v. *Sheo Golam Singh* (2).

[FLETCHER, J.—The award is all right; if there was any illegality in the award, objection ought to have been taken at the proper time after the award was filed. The Privy Council case in *Ghulam Khan* v. *Mohamad Hassan* (1) is quite distinguishable and does not apply here. Under the present Civil Procedure Code no appeal lies from a decree which is in accordance with the award.]

JUDGMENT.

FLETCHER, J.—This is an appeal by the plaintiff against the judgment of the learned Subordinate Judge of Dacca, dated the 23rd April 1915, modifying the decision of the Munsif of the same place. The plaintiff

(1) 29 C. 167; 6 C. W. N. 226; 29 I. A. 51; 12 M. L. J. 77; 4 Bom. L. R. 161; 8 Sar. P. C. J. 154; 25 P. R. 1902 (P. C.).

(2) 11 C. 37; 5 Ind. Dec. (N. S.) 782.

brought the suit to recover possession of a plot of land on the ground that the *pro forma* defendants who were his *burgadars* had been dispossessed by the defendant No. 2 and the defendants Nos. 1 and 3 to 7 all acting together. One defendant only, namely, the defendant No. 2 contested the suit, and, therefore, it seems to have been assumed that under the terms of the Civil Procedure Code the plaintiff and the defendant No. 2—were the only parties who were interested in the matter and accordingly those two parties—the plaintiff and the defendant No. 2 agreed to refer the matter to arbitration. The arbitrators had made their award. The award was presented to the Court and no objection within the time allowed by the Indian Limitation Act was preferred against the award so made. The case then came on for final disposal before the learned Munsif and the learned Munsif—whether it was noticed by the parties before or not I do not know and it does not matter—proceeded in this way: First of all, he recorded evidence as against the non-appearing defendants and then he decreed the suit in the terms following. The suit be decreed in accordance with the award of the arbitrators in so far as it relates to the plaintiff's title to the land, that the plaintiff's title to the land be declared and that he do recover possession of the disputed land as against the defendants. It is quite clear that it was a good order which all the defendants were bound to obey, namely, to deliver possession of the land to the plaintiff in accordance with the judgment of the learned Munsif. Thereupon the defendant No. 2 alone preferred an appeal to the learned Subordinate Judge. The learned Subordinate Judge dismissed the appeal of the defendant No. 2, but set aside the judgment of the learned Munsif so far as it related to the non-contesting defendants who had not joined in the appeal to the learned Subordinate Judge. Now, we have an appeal and a cross-objection.

The cross-objection was preferred by the defendant No. 2, who was one of the parties who went to arbitration. His case can be very shortly disposed of. He lodged no objection against the award made by the arbitrators and, in accordance with section 16 of the Second Schedule to the Code of Civil Procedure, the Court passed a decree. It is not suggested that the decree so made is in excess of the award, nor it is suggested that it is not in accordance with the award. The provisions of the existing Code of Civil Procedure clearly prohibit questions as to the validity of the decree after it has been passed, except in cases where the decree is in excess of or is not in accordance with the award. That being so, whatever may be one's own views with regard to the order of reference made in the suit between the plaintiff and the defendant No. 2, it is much too late now to question the validity of the decree passed on the award. The cross-objection of the defendant No. 2 must accordingly be refused.

The appeal of the plaintiff may also be disposed of in an equally short way. The non-contesting defendants were directed by the learned Judge of the primary Court to deliver over possession of the land to the plaintiff. They preferred no appeal against that order and it was not competent to the learned Judge of the lower Appellate Court in the appeal to which the non-contesting defendants were not parties to vary the decree of the first Court in the manner he did as regards them. It is suggested that he had power under Order XLI, rule 33, Civil Procedure Code. That obviously is not so. That section does not apply to a person who was not a party to the appeal. These non-contesting defendants were not parties to the litigation in the lower Appellate Court. Obviously, on first principles, the learned Judge in that Court could not vary the decree of the Court of first instance as regards their rights and liabilities as adjudicated on by that Court. The appeal must, therefore, be allowed to this extent that the decree of the lower Appellate Court, in so far as it concerns the defendants Nos. 1 and 3 to 7, must be set aside and the decree of the Court of first instance as regards them will be restored. The appellant will be entitled to realize his costs in this appeal from the defendants Nos. 1 and 3 to 7. The appeal as against the defendant No. 2 will be dismissed. The defendant No. 2's costs in the appeal and the plaintiff's costs in the cross-objection will be set off one against the other and neither of these two parties will be entitled to claim anything against the other.

SHAMSUL HUDA, J.—I agree.

Appeal allowed.

AMBA *v.* SHRINIVASA KAMATHI.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 24 OF 1916.

November 28, 1917.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Oldfield.

AMBA *alias* PADMAVATI—PLAINTIFF—APPELLANT

versus

SHRINIVASA KAMATHI—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), s. 16—Undue influence, tests of—Gift, deed of, cancellation of, before registration, effect of—Non-delivery of document to donee, effect of—Registration Act (XVI of 1908), s. 17—Transfer of Property Act (IV of 1882), s 123.

A deed of gift which is repudiated by the donor before registration, though presented by him to be registered, is inoperative and confers no rights on the donee. [p. 489, col. 1.]

Non-delivery of the document to the donee renders it unenforceable. [p. 489, col. 2.]

Gangadara Mudali v. *Sambasiva Mudali*, 40 Ind. Cas. 192; 33 M. L. J. 51; 40 M. 759, explained and distinguished.

Presentation of a document for registration is not equivalent to its registration. [p. 495, col. 2.]

Per *Abdur Rahim, J.*—A deed cannot be treated as void for undue influence merely because it is unreasonable or its terms are prejudicial to the donor or his kinsmen. If the deed is true and a well-understood and voluntary act of the donor, no legal objection can be taken to it merely on the ground that it is such as would not be expected from a man of ordinary prudence. [p. 484, col. 1.]

Undue influence is not a matter always capable of direct proof, and must depend, in its very nature, on the conclusions to be drawn from the entire circumstances in which the transaction had its origin. [p. 484, col. 2.]

Per *Oldfield, J.*—The proof of undue influence may be either direct, though that cannot be insisted on, or indirect with reference to the opportunities for and disposition to the exercise of influence on the one side and the result of its exercise, as indicated by the merits of the transaction, the acceptance of false representations and the entertainment of false beliefs on the other. [p. 490, col. 2.]

Appeal against the decree of the Court of the Subordinate Judge, South Kanara, in Original Suit No. 73 of 1914.

Mr. *K. Ramanath Shenai*, for the Appellant.

Mr. *K. Srinivasa Aiyangar*, for the Respondent.

This appeal coming on for hearing on the 17th, 18th, 19th and 22nd October 1917 and having stood over for consideration till this day, the Court delivered the following

JUDGMENT.

ABDUR RAHIM, J.—The appellant, who is a minor, instituted the suit by her next friend, her father, to recover certain properties from the respondent-defendant, her husband. Her title is based on a deed of gift executed by Krishna Kampti, the adoptive father of the respondent, who died on the 17th April 1909. The defence on the merits, broadly speaking, was of two-fold character. *Firstly*, that the alleged deed of gift was executed under the undue influence of the appellant's father who procured it by means of misrepresentation and fraud and *secondly*, that the contemplated gift was never completed according to law and was in fact revoked by Krishna Kampti before it could be completed.

Krishna Kampti, who was possessed of considerable properties, moveable and immoveable, was an inhabitant of a village called Karingan in the South Kanara District. He adopted the defendant when he was only 9 months old and until shortly before the date of the transaction in question, the defendant and his first wife lived in the same house with Krishna Kampti and his wife on the best of terms. The defendant, however, had no child though he was nearly 39 years old and his wife about 33. Krishna Kampti, who was 70 years old in 1908, being concerned that his son had no issue conceived the idea of marrying him to a second wife. The defendant was much attached to his first wife and did not want to marry again; but he was at last prevailed upon to marry the plaintiff who was at the time a girl of 11 years, she being the daughter of Krishna Kampti's wife's brother, one Ramayya Shanbhogu. The case of the defendant is that this Ramayya Shanbhogu had much influence over Krishna Kampti, that even before the marriage actually took place, he had formed designs with regard to Krishna Kampti's properties and that it was he who by means of misrepresentations and unfair devices succeeded within a few months of the marriage in alienating his father's affections from him and misleading his father to execute documents, the effect of which on his own and the family's interest he did not fully realize. The plaintiff's marriage with the defendant was brought about on the 9th March

1908, and according to custom, she came and lived in the house of the husband for a few days. Then she went back to her father's house; 10 or 15 days afterwards, the defendant was asked to go and fetch her. The case of the plaintiff is that instigated by his first wife, he refused to do so and thereupon the old man Krishna Kampti was very angry and in order to coerce the defendant to submission or to punish him and to make provision for the plaintiff, decided upon making a gift of his share of the immoveable properties to her. He consulted his lawyers (the 2nd and 3rd witnesses for the plaintiff), and upon their advice had a deed of partition drawn up and also a deed of gift of the immoveable properties which fell to his share. The defendant's version of what occurred was that it was the plaintiff's father who persistently maligned him to the old man and by means of various false representations and insinuations worked upon the mind of Krishna Kampti to such an extent that he did not in fact know what he was about. The defendant says that he did not refuse to bring the plaintiff back to his house when asked by his father, but only delayed doing so as his first wife's father was seriously ill and he wanted to see him, that in fact it is not the custom for immature girls of the plaintiff's age to live in the husband's house but that, among Hindus of his caste, girls before the attainment of puberty live mostly in their father's house. He says that there was nothing unreasonable in what he did and his conduct could not give offence to any reasonable man. It may be that Krishna Kampti, in compelling the defendant to marry a second wife in the lifetime of his first wife to whom he was evidently much attached and afterwards taking offence at the hesitation or delay displayed by the defendant in bringing the plaintiff back from her house when asked to do so, was acting arbitrarily and harshly. But if the alleged gift to the plaintiff was a true, well-understood and voluntary act of Krishna Kampti's mind, no legal objection can be taken to it merely on the ground that it was such as would not be expected from a man of ordinary prudence. An owner of property is entitled to dispose of it as he pleases and the validity of his disposition does not depend upon whether it is prejudicial to himself or to his relatives and heirs.

The point for consideration is whether the defendant has proved that in making the alienation in question, Krishna Kampti's mind was unduly influenced and dominated by the plaintiff's father. This is not a matter always capable of direct proof and must depend by its very nature on the conclusion to be drawn from the entire circumstances in which the transaction had its origin. The motive of the gift, its nature, its effect on the donor and his family, the state of the mind of the donor, whether he acted upon any misrepresentations or misconceptions, the benefit which the person who is alleged to have dominated the will of the donor derives by the act, how the donor regarded the act when removed from the influence of the person for whose benefit the gift was made, what independent and competent advice he had and whether the persons advising him knew of the influence he was acting under, these are some of the circumstances which have to be borne in mind in ascertaining whether the transaction is vitiated on the ground of undue influence. Krishna Kampti, as I have said, was entirely happy in his family relations until the marriage of the plaintiff with the defendant. The defendant charges the plaintiff's father with having broached the idea of this marriage and on the evidence, I am inclined to the opinion that the plaintiff's father was mainly instrumental in bringing it about. He professes in his evidence that in fact he was reluctant to give his daughter to the defendant but gave in under the pressure of Krishna Kampti. He, however, knew or must have known that the defendant was much attached to his wife and was unwilling to marry a second time. Under these circumstances when the plaintiff's father showed readiness to give the plaintiff, a very young girl, in marriage to the defendant, it seems to me that his act must have been influenced by some strong motive, and the more so if, as I think, he actively suggested the idea to Krishna Kampti. Krishna Kampti was,

generally speaking, an intelligent man, and managed his properties himself, which apparently he substantially improved, and also the household affairs. He was much respected in the neighbourhood by reason of his position and wealth.

But it is argued on behalf of the respondent that about the date of the transaction under consideration his natural faculties and the strength of his mind must have undergone deterioration. This, it is contended, is evident from all that he did from the inception of these transactions in April 1908 till his death on 17th April 1909 as evidenced by the various documents executed by him during this period. I cannot but hold that there is force in this argument.

All along the relations between him and the son were of the most friendly character. The respondent was perfectly obedient to him, in fact he married the plaintiff simply to please him much against his own inclinations. The only cause of quarrel suggested by the appellant is that the respondent showed hesitation in bringing back the appellant a second time to the house after marriage. I believe the case of the respondent that this was not because he did not want to live with the appellant but because it is not customary for a bride of immature age to live in the house of the husband. Krishna Kampti himself could have had no apparent object to serve by insisting on the respondent bringing the appellant back to the house, for she was too young for connubial intercourse. No doubt, it is likely that the respondent's first wife did not like his marrying the plaintiff, and one reason why the respondent hesitated to comply with his father's wishes was to avoid unnecessary domestic unpleasantness. It is contended on behalf of the respondent that the appellant's father wanted to bring about a quarrel between the respondent and his father in order to accomplish the object he had in view, namely, to get hold of Krishna Kampti's properties.

It is clear from the statements in Exhibit I that the respondent was charged with the intention to marry a third wife and to adopt a stranger boy. The respondent says that he had no such idea and there was no such talk. Who is then responsible for the story? Krishna Kampti himself was not interested in inventing it and so it was in all probability the appellant's father who made these false representations to Krishna Kampti, for no one else is suggested as being interested in doing so. The appellant herself was too young to conceive such a plan. The respondent, according to the evidence, had no enemy and as the events showed, the only person who could have been interested in causing a breach between him and his father was the plaintiff's father.

To begin with, therefore, we have the fact that the motive for these transactions was supplied from outside by means of false representations and insinuations. If Krishna Kampti's mind had retained its original vigour, it is impossible to conceive that he would not have taken some steps to ascertain the truth of these representations or that simply because the respondent did not evince promptness in getting the appellant back to the house, he would have taken the extreme step of alienating his entire share in the family immoveable properties. In his reply to Exhibit P by which Krishna Kampti notified his intention to the respondent to partition the family properties, the respondent as early as 9th May 1908 asserted that the appellant's father (he is alluding to him as "our relatives and friends who make a show of being our well-wishers") had, for sometime, been trying, by various means and from interested motives, to poison Krishna Kampt's mind against him. The marriage of the appellant with the respondent took place only in March 1908. We find that a month or so later Krishna Kampti, who had hitherto been an affectionate father to the respondent, was so infuriated with him that he determined to give away half the family properties to a young girl of eleven years, reserving for himself and his wife, his partner in life for more than 30 years, the barest maintenance. The respondent, it seems to me, must have had good reasons for stating in May 1908 that this state of things was brought about by unfair and insidious means by plaintiff's father.

By the deed of gift, following upon the deed of partition on the 23rd May, he purports to give away to the plaintiff

the bulk of what he possessed, on the ground that the respondent had been disobedient to him and that he did not care to have anything to do with such a person. He presents the deed for registration on the 1st June. The documents were not immediately registered, as the Sub-Registrar was not sure if the stamp was sufficient and made a reference to the District Registrar. Four days after presentation, however, and within three weeks of the execution, this very Krishna Kampti put in a petition to the Sub-Registrar asking for a return of the document on the ground that he did not want them to be registered. It is clear that by this time he was no longer under the influence of the appellant's father and that the real state of facts was explained to him by the respondent and his friends, so that he began to realise that he had been misled. The documents were not returned because the appellant's father gave notice of his intention to file a suit for compulsory registration and obtained an injunction. On the 9th June 1908 he executes a document called Tahanamah, an agreement between himself and the respondent by which he treats the entire property as still joint, states that there was no necessity for alienating any portion (alluding apparently to the deeds of partition and gift) and undertaking on his part not to alienate any property. He states in so many words that he was old and had lost his peace of mind latterly owing to the disobedience of the respondent and that he had at the instigation of the relations of the appellant executed those documents. He obtains an undertaking from the respondent that he would not discard the appellant or marry a third wife or adopt any boy who does not belong to the family of certain *dayadis*. This shows that he had not yet been able to shake off entirely the effect of the representations that must have been made to him to the effect that the respondent wanted to discard the appellant by marrying a third wife and to adopt a stranger boy. I may mention that the respondent was so much attached to his first wife that he did not want to marry the appellant at all; and the suggestion, therefore, that he intended to marry a third wife, must have been entirely baseless and must have been, as I have pointed out, made by some interested and scheming person, in all probability by the appellant's father who was taking steps to compel registration of the document and filed a suit in the District Court of South Kanara (Original Suit No. 44 of 1908) for the purpose. Krishna Kampti filed a written statement in this suit in November 1908. There he plainly states that the plaintiff's father, taking advantage of his old age, represented to him that the respondent had been wilfully disobedient to him, that he wanted to abandon the appellant to marry a third wife and to adopt a stranger boy, that when he was under the influence of these false representations the appellant's father prevailed upon him to execute a deed of partition and a deed of gift and that for these reasons he did not want that those documents should be registered. The learned Advocate for the appellant argues that these allegations of misrepresentation, undue influence and fraud were untrue, and inserted at the instance of the respondent. But I have already tried to show that the representations alluded to are in fact false and must in all likelihood have been made by the appellant's father. At the least, it is clear that the old man was ready to make any statement suggested to him by the persons who happened to be about him at the time.

The next document is of 20th March 1909, that is to say, four months after the filing of the written statement. It is called a "deed of rectification". It is clear that by that time Krishna Kampti had come again under the influence of the appellant's father and his friends. In this document the appellant's father finds it advisable to content himself with much less than under the deed of gift. The most important modification is the curtailment of the absolute gift in favour of the plaintiff to a gift of an estate for life and the fixing of a maintenance for his wife, but on the other hand the management of the property is made over to the appellants's father and two other persons, one of whom is a clerk of the Pleader who drafted the document. The reason given by Krishna Kampti for not retaining the management in his own hands is that he was weak in health,

Furthermore it clearly indicates consciousness on the part of the appellant's father himself that the deed of gift was not a completed document or one which could stand scrutiny in a Court of Law. It was on the basis of this document that the suit for compelling registration was compromised. Krishna Kampti entirely resiled from his own written statement and consented to have the deed of gift registered, subject to considerable modifications or amendment as so called under Exhibit F. This took place about a fortnight before he died. The appellant's father apparently did not leave him alone till the date of his death. On that very day he carried the old man, while he was suffering from fever and must have been in quite a prostrate condition, from his house in the village to Amtur, about 2 miles or so distant, and there in the house of a stranger a Will was executed. In this Will it is stated that the respondent, although he promised to behave obediently, had again become disobedient and therefore all the rest of his property, moveables and cash, whatever had not been disposed of by the so-called deed of rectification was disposed of in favour of the appellant.

This is the history, as proved by documents, of the last year of Krishna Kampti's life. Upon these facts, apart from the oral evidence, I should not have the least hesitation in holding that the man's mind had become enfeebled, that the various documents in favour of the appellant were got up when his mind had been poisoned by the influence exerted and the means adopted by the appellant's father. He worked upon the mind of Krishna Kampti by making all sorts of false representations and suggestions to him with a view to secure the property for his minor daughter of which he would, in the circumstances, have entire control and management.

The internal evidence furnished by the documents themselves is strongly corroborated by the circumstances under which the deeds in question were executed and registered. For this purpose it is important to bear in mind the situation of the different villages mentioned in the evidence. Karingan, which is the residence of Krishna Kampti and the respondent, lies within the jurisdiction of the Sub-Registrar of Buntwal, only 3 miles distant. The appellant's father resides at Puttur, which is 8 miles distant from Karingan. Puttur is within the jurisdiction of the Sub-Registrar of Vittal. Vittal and Buntwal are in the opposite directions of Karingan. Buntwal which is the proper registration office for Karingan is, as I have said, 3 miles distant while Vittal, where the Sub-Registrar within whose jurisdiction, Puttur is, is 8 miles from Karingan. From Vittal to Puttur is 10 miles. Exhibits A and B, instead of being presented to the Registrar of Buntwal, were executed and presented for registration at Puttur, the Sub-Registrar of Vittal being called there for the purpose. No satisfactory explanation is given by the appellant why the document should have been executed away from Karingan and presented for registration to the Vittal Sub-Registrar and not to the Buntwal Sub-Registrar. The respondent's suggestion is that the Buntwal Sub-Registrar knew Krishna Kampti well and his affairs and if the documents were presented to him, he would have been more strict in requiring proof as to how far Krishna Kampti realised and understood the effect of those documents.

The appellant's father took the precaution of having the documents executed at places other than Karingan, removing the old man for the purpose from his house to his own house about 8 miles distant, lest the respondent who happened to be away from Karingan on the particular days might unexpectedly turn up and frustrate his designs. The execution of the Will was part and parcel of the same scheme and cannot be separated from the rest of the transactions. According to the evidence, on that date the respondent happened to be away from Karingan in order to get some medicine from the doctor for his father, who was then suffering from fever. The appellant's father, taking advantage of it, removes the old man to Amtur, which though $1\frac{1}{2}$ miles distant from Karingan is situated within the jurisdiction of the Sub-Registrar of Vittal. He asks the Sub-Registrar to come to the house of an ordinary *ryot*, a stranger to Krishna Kampti, and there the Will is executed. These facts considerably strengthen the conclusion furnished by the nature and tenor of the various documents, that he was in feeble health owing to old

age and that all the dispositions in favour of the plaintiff must be attributed to the exercise of fraudulent means by which the appellant's father dominated the mind and will of Krishna Kampti.

As regards the oral evidence, as was to be expected, it is of a conflicting nature. But it is proved beyond any doubt that during the days of the transactions in question the appellant's father was all along with Krishna Kampti, that he went so far as to write his books of accounts during those days so as to ingratiate himself with Krishna Kampti. (See Exhibit IV.) Much reliance has been placed, and naturally so, by the learned Advocate for the appellant on the evidence of plaintiff's witnesses Nos. 2 and 3.

The first is a second grade Pleader and the second a first grade Pleader. Both of them had been acting for Krishna Kampti for sometime before the transactions in question. These gentlemen were called in for consultation as to how Krishna Kampti could make a gift of his share of the family immoveable properties to the appellant and for the purpose of preparing the necessary documents. They speak to Krishna Kampti having expressed much anger and displeasure at the respondent's delaying to get his second wife back from her father's house and to a quarrel between the two. But none of them were in a position to say how Krishna Kampti had been worked up to such a state of fury, nor could they be expected to speak as to what part the appellant's father or anybody else had been playing in the matter. We take it upon their evidence and upon other evidence in the case—in fact that was not disputed before us at all—that in executing the deed of partition and the deed of gift Krishna Kampti knew the nature of the dispositions he was making. But that does not, by itself, dispose of the question as to whether those documents were brought about by the undue influence of any one. The value of these witnesses' evidence, especially the 3rd witness, must to my mind be taken to be much discounted by the fact that it was he who filed the written statement Exhibit III, which contains a statement that the deeds of partition and gift, to the drafting of which this Pleader was a party, were brought about at the instigation of the appellant's father and under the influence of misrepresentations and false suggestions made by him. Plaintiff's witness No. 3 should have known that the statements in Exhibit III must be false if he means to convey by his evidence in Court that the deed of partition and the deed of gift were not in fact brought about by improper means employed by the appellant's father. P. W. No. 2 says that it was at his suggestion and for his convenience that the deeds of partition and gift were executed at Puttur in the plaintiff's father's house, which is only a few yards off from his own house. But all the facts in connection with the execution of this and other various documents induce me not to accept this statement as the main reason for the execution of Exhibits A and B in Puttur.

Krishna Kampti was made to give away by a deed of gift property of the value of Rs. 40,000 or more including the family house, allowing himself and his wife, with whom he had been on loving terms, to be maintained at the discretion of a young girl of 11 years or her father. The deed itself says that the gift was made in order to make provision for her. That could not be the true reason as she could not want so much for her maintenance. The real benefit would in fact go to the appellant's father. If the making of provision for the appellant was not the real motive, the other motive suggested is Krishna Kampti's displeasure with his son. No doubt, he was angry with him for not going to the appellant's father's house to bring the appellant as desired. But in the circumstances which I have mentioned, that alone could not adequately account for Krishna Kampti's action. His mind must have been poisoned, as found by the Subordinate Judge, by the appellant's father by means of false representations to the prejudice of the respondent. It can hardly be doubted that Krishna Kampti's intelligence must have considerably declined and his will power greatly weakened during the period covered by these transactions. And that made it possible for the appellant's father to influence him in the way he did. Krishna Kampti repudiated what he had done as soon as he was removed from the influence of appellant's father. It was part of the latter's plan, in order

to facilitate the object he had in view, to take Krishna Kampti away from his house to his own house for the purpose of getting him to execute and register those documents. I agree with the Subordinate Judge who saw the witnesses give their evidence, that the documents A and B were executed under undue influence and are, therefore, invalid.

This is sufficient to dispose of the appeal. But the appeal fails on another clear ground, namely, that Exhibits A and B were repudiated by Krishna Kampti before they were registered. Under the Transfer of Property Act a gift can be made only by a registered instrument. They were presented for registration by Krishna Kampti on the 1st June, but on the 5th June before they could be registered he put in a petition saying that he did not want the documents to be registered and asked that they may be returned to him. They were therefore entered in Book No. 2, which is the book containing entries of documents the registration of which is refused and the reasons for refusal to register.

They were not actually returned to Krishna Kampti because the appellant had obtained an injunction from the Civil Court. The fact, however, remains that Krishna Kampti repudiated the gift and the partition on 5th June. On 9th June he executed the Tahanamah and registered it. The effect of this is the cancellation of the contemplated gift and partition. Some reliance was placed on behalf of the appellant on a recent Full Bench decision of this Court in *Gangadara Mudali* v. *Sambasiva Mudali* (1), where it has been ruled that if a donor dies after the execution of a deed of gift but before registering it and the donee presents it for registration during the time allowed by the Registration Act, the gift becomes complete on its being registered at the instance of the donee. The reasoning on which the decision is based is that a deed of gift may be registered not merely on presentation by the executant but also on presentation by the claimant, that is, the donee. Therefore, if the donor, after executing a deed of gift, delivers the document to the donee, the latter is entitled under the law to present it for registration and once it is registered, it takes effect from the date of execution. But here the deed was not delivered to the appellant or her guardian or father or to any one acting on her behalf as guardian. The donor kept it with himself. He presented it for registration, but repudiated it afterwards and executed a document inconsistent with and having the effect of cancelling the contemplated gift. If the arguments addressed on behalf of the appellant were to be accepted, the logical result would be that directly a deed of gift is executed, even though the donor never delivers it to the intended donee or to any person on his behalf but keeps it locked in his own box, yet the donee can compel him to register it. The Full Bench decision referred to certainly does not go so far. All that it lays down is that if the donor has done all that lies in his power to complete the gift either by having it registered himself or by handing it to the donee, then he cannot afterwards retract the gift. To go any further would be to make a serious breach in the well-established principle of law, that a donor cannot be compelled to complete an incomplete gift. There were also other questions of law argued by Mr. K. Srinivasa Aiyangar, the learned Vakil for the respondent, on which it was contended that the Exhibit A is invalid and inoperative in law; it is not necessary to discuss them. I confirm the decree of the Subordinate Judge and dismiss the appeal with costs.

OLDFIELD, J.—I concur in the decree proposed by my learned brother and I deal with the question, on which I differ from him, that of undue influence, because plaintiff is entitled to the benefit of my finding in view of the possibility of an appeal.

The doctrine of undue influence has been invoked by defendant to disable plaintiff, his second wife, from recovering on Exhibit B, a deed of gift to her by Krishna Kampti, his adoptive father, of part of the property obtained in the partition under Exhibit A. The former document was executed three days after the latter and they are according to defendant one transaction, into which Krishnan was induced to enter by the undue influence of plaintiff's father, 7th plaintiff's witness, with the result that defendant was cut out of a large part of

(1) 40 Ind. Cas. 192; 33 M. L. J. 51; 40 M. 759.

the property, to which he would have been entitled in the event of Krishnan's death undivided from him. His allegations are in particular that, from shortly after his marriage to plaintiff and whilst he was absent from home, 7th plaintiff's witness began to dominate the mind of Krishnan, who was aged seventy, and by telling him false tales induced him to execute these documents. The burden of proof of this is of course on defendant.

Firstly, as to the ostensible motives for the execution of Exhibits A and B and next as to those alleged to have really secured it. In 1908 defendant, aged thirty-seven, had been married some years without issue and he admits that he had no mind to marry plaintiff or any other second wife and that he married her, because Krishnan pressed him to do so. He says generally that Krishnan did so at the instigation of plaintiff's father, his brother-in-law. But there is no evidence that the latter had begun to exercise undue influence at that time and no explanation as to his means of doing so. The undisputed fact is that from the beginning defendant was averse from the marriage, whilst Krishnan insisted on it. A few days after it plaintiff, a girl of eleven, who had not yet attained her age, returned to her parent's house, where, as 2nd plaintiff's witness and 1st defendant's witness deposed, she would in accordance with custom mostly live until she did so. Krishnan, however, pressed defendant to go there and, as appears from 7th plaintiff's witness's evidence, to fetch her back in order that she might remain with him. He did not do so, but went away with his first wife to her family house, where her father was ill. Whilst he was there, Krishnan sent him Exhibit P, in which he referred to his disobedient conduct and to his having left the house "on vain pretexts, uttering some improper words" and having taken with him all the jewels belonging to his first wife and certain valuable securities; he announced his intention of making a partition and called on defendant to choose the properties in one or other of two lists enclosed as his share. The removal of the jewels could be matter for reproach, only if they were the family jewels in defendant's wife's possession; and the abstraction of the documents is not referred to again in the case. In his reply, Exhibit Q, defendant denied having taken them or been disobedient, attributed Krishnan's decision to the intrigues of relatives and friends, attempted to dissuade him from dividing and, in case the decision was insisted on, chose the properties in one list. This was on 9th May 1908. Exhibit A was executed ten and Exhibit B fourteen days later.

The period, in which all this took place, is important, because it was before the date of the document, which is attacked, and because during it the exercise of undue influence must be established, the later occurrences calling for attention only as indicative of Krishnan's mental position and capacity. There is, it may be conceded, no doubt according to any standard, European or Indian, that his insistence, not only on defendant's re-marriage contrary to his wishes, but also on his bringing back his bride, before he was willing or was obliged by custom to do so, was unreasonable. But that is not enough for defendant's case. He must prove further that this conduct was induced by influence, which was within the legal definition "undue." Such proof may be either direct, though that cannot be insisted on and is possible to a small extent only in this case, or indirect with reference to the opportunities for and disposition to the exercise of influence on the one side and the result of its exercise, as indicated by the merits of the transaction, the acceptance of false representations and the entertainment of false beliefs on the other. Following the discussion of the decision in *Huguenin* v. *Basely* (2), I deal with the evidence with regard to these points.

Krishnan owned a half share in considerable property and, except for his age, there was nothing against his capacity, defendant himself deposing that he joined in the management until his death, had taken leases and other documents in his name, in particular two mortgages in 1907, was managing well and except for 7th plaintiff's witness's influence, was a good and intelligent man. Generally, therefore, there is no ground for any suggestion that he would be the prey of a designing relative, such as 7th plaintiff's witness; and

(2) 2 White and Tudor's Leading Cases, 6th Ed., 597.

I see no reason for making the assumption, which defendant's case requires, but for which there is no distinct evidence, that his mental capacity deteriorated at this time. The 7th plaintiff's witness's opportunities for influence before Exhibit A can be stated shortly. He was Krishnan's brother-in-law and naturally his intimate. He came, he says, at Krishnan's invitation, though that is not corroborated, to his house from his own house, whither he had gone after the marriage, and was then told of defendant's refusal to go for his wife and of his other conduct, which was perverse in Krishnan's eyes, and he was with the latter, when Exhibit P was sent, as his entries in the accounts Exhibit IV on 6th to 17th May 1908 show. But this goes very little, if any, way towards proving that he dominated Krishanan's will. The proved facts, his relationship to him and the fact that he was plaintiff's father made it natural that he should be consulted, but did not entail that his opinion would be decisive. There is nothing on defendant's side to show that the story of an invitation by Krishnan is untrue and it cannot be assumed that it is so. The entries in the accounts are not shown to be of a character involving any confidential relation. There is neither at this nor any other stage any suggestion that attempts were made to prevent Krishnan and defendant meeting. Why should it be assumed that 7th plaintiff's witness was the moving spirit and that Krishnan's advocacy of plaintiff's claims was not the crotchet, unreasonable it may be, of an obstinate old man desirous of a grandchild and his endowment of her the means he adopted for bringing her and the defendant together?

The suggestion, it has been said, is that Krishnan was deceived by 7th plaintiff's witness's untrue statements as to the relation between plaintiff and defendant. But there is no direct evidence of this, no witness having been called, who refers to any allegations as having been made by 7th plaintiff's witness in his hearing or as referred to by Krishnan; and there is no evidence that as regards the period before Exhibit A 7th plaintiff's witness ever made any complaint, Exhibit W referring to much later events. In fact, if anything to prejudice Krishnan had occurred between the couple, it must have been during plaintiff's short stay in his house or in connection with defendant's refusal to bring plaintiff back there; and of those matters Krishnan's own information would be exhaustive. Defendant did not specify 7th plaintiff's witness in Exhibit Q as among the relations and friends, to whose machinations he attributed Krishnan's desire for a partition; and, although in evidence he said that his mother and the servants told him of the way in which Krishnan's mind was poisoned, he called none of them. If the charge in Exhibit P of abstracting jewels and documents refers, as it must be understood to have done, to family jewels in defendant's first wife's possession, there is no more reason for supposing that Krishnan would have shrunk from making a false charge than that 7th plaintiff's witness would have done so; and in fact on defendant's denial, that matter does not seem to have been considered further. When, as was the case, Krishnan's own information was full, there is no reason for assuming that he derived his prejudice from 7th plaintiff's witness or any other person.

It is next important that, whatever the extent of his dependence on 7th plaintiff's witness, and it is not shown to have been material, the latter is not alleged to have attempted to keep him from intercourse with defendant or any other person likely to influence him. There is some conflict of evidence, which it is not possible to resolve, as to the presence of defendant and 7th plaintiff's witness, when Exhibit A was being prepared; but the former eventually withdrew his statement that he returned home on receiving Exhibit P and said that he did not do so as he knew Krishnan would not listen to him, a statement indicating that the two had parted on a strained footing, with which 7th plaintiff's witness could have had nothing to do. There is in fact no explanation given for defendant's failure to return instead of merely sending Exhibit Q, and devote himself to undoing what had been done and counteracting 7th plaintiff's witness's influence in the future; and, perhaps because he was conscious of more acute past disagreement than the evidence discloses, it will be found consistently with this that, although he throughout had access

to his father, he at no time attempted to protect Krishnan from undesirable influence or to prevent 7th plaintiff's witness retaining or regaining his ascendency. At the time of the partition, threatened in Exhibit P and agreed to in Exhibit Q, Krishnan's wife, of whom defendant makes no complaint, was with him and he executed Exhibits A and B after consultation with 2nd and 3rd plaintiff's witnesses, the latter a first grade Pleader and defendant's mother's step-brother. 2nd plaintiff's witness says that he advised both parties to be reconciled and 3rd plaintiff's witness that he advised defendant. Neither witness is beyond criticism as regards credit and independence, 2nd plaintiff giving 7th plaintiff's witness legal assistance at a later stage and 3rd plaintiff's witness's subsequent conduct in connection with Exhibit III being explicable only on the assumption that he could act as a mere mouthpiece for his client without regard to facts (as he now speaks to them) or that client's previous professions. But nothing as to 7th plaintiff's witness's exercise of influence over Krishnan was elicited from either of them. Similarly as regards 4th plaintiff's witness, a retired 2nd grade Pleader paying a substantial assessment, who had known Krishnan for thirty years privately and professionally and who attested Exhibits A and B. In reply to his remonstrance Krishnan said that he must execute them, because he was bound to see to the welfare of his son's second wife and that defendant wanted to neglect her. Defendant admitted that, when he attested, 7th plaintiff's witness was present; but the latter did not support him further and no reason has been shown for distrusting his evidence. On the other hand defendant adduced nothing whatever on this part of the case.

Exhibits A and B were presented for registration at the Vittal office, which is not the nearest to Krishnan's house at Karingan. But there is no reason for doubting the explanation given that Vittal was more convenient for 2nd plaintiff's witness, who drafted them and had advised over the partition; and the suggestion that secrecy was intended is not established, since defendant had been told in Exhibit P of the partition at least and there is no reason for supposing that he would have heard of Exhibit B also, if it had been registered at the nearest office at Buntwal, earlier than he actually did; that is within a fortnight, before Exhibit C. The suggestion, that the reference in Exhibit A to his purchase of a stamp for it was an attempt to fix him with concurrence in its terms, is unsustainable. He, no doubt, denied the purchase and in the alternative has pointed out that it was made on 3rd April 1905 sometime before any question of partition arose. But against this denial there is no reason for distrusting the endorsement of the stamp vendor made in the course of his duty; and as regards the second point and the probability that the stamp was purchased for some other transaction, the suggestion that there was any sinister design in its use for Exhibit A is sufficiently answered, when it is observed that such a design would be intelligible in connection only with Exhibit B, not with Exhibit A, which he had admitted Krishnan's right to execute and to the terms of which he had consented in Exhibit Q. It is possible, and a similar statement in Exhibit B indicates, that it was the document writer's habit to include such recitals in his drafts; and in the circumstances no inference adverse to plaintiff has been sustained.

Exhibit B effected a transfer to plaintiff of all the immoveable property comprised in Krishnan's share under Exhibit A and of a mortgage with possession for Rs. 12,000 and left him with only other mortgages aggregating Rs. 8,015, moveables and cash in hand Rs. 3,271 and outstanding Rs. 1,854, in all over Rs. 13,000, although the last item might not all be realizable. It is difficult to arrive at the proportion of this to his share under Exhibit A. But, if the latter is taken, as it was by the Sub-Registrar in Exhibit G, as worth Rs. 41,424 Krishnan gave up three quarters of his property, retaining the remaining quarter and the benefit of a stipulation in Exhibit B for his and his wife's maintenance at a specified and apparently a fairly liberal rate. Such arrangements by aged persons for their maintenance are not in my experience uncommon, although in this the selection of plaintiff, a young girl, as the donee was certainly exceptional and

the provision for her would, it may be conceded, be excessively liberal according to ordinary opinion. But it is material that firstly no such total surrender and no creation of opportunity for such further aggrandisement by plaintiff or her father was created as complete domination of Krishnan's Will by the latter might naturally secure. For it must be noted that, not only was the gift limited to a portion of Krishnan's property, but he retained the management of that portion as plaintiff's trustee until her majority; that is, for as long as he was likely to be capable of it. And next in view of the occasion on which the arrangement was made and the surrounding circumstances, it is intelligible as an attempt to provide defendant with a motive for accepting plaintiff as his wife and eventually cohabiting with her.

I turn next to a portion of the case, on which defendant has laid much stress, that relating to Krishnan's subsequent conduct and dispositions. The latter must, of course, be considered without reference to the formal objections to their validity and, as they are relied on, only as evidence of his liability to succumb to any temporary influence and of the intention as to his property, which resulted from the free exercise of his will. It is to be observed that the simultaneous conduct of argument in each of these senses is difficult. For, if Krishnan's successive dispositions varied according to the influence to which he was temporarily subject, it will be hard to deduce from them any continuous underlying intention. It may be added that such intention, so far as it can be deduced, seems to me on the whole consistent with the desire to benefit plaintiff, expressed in Exhibit B.

Exhibit B was executed on 23rd May 1908 and presented for registration seven days later. But on 5th June 1908, Exhibit C, the petition for withdrawal of Exhibits A and B, which, as defendant says, may have been drafted in his presence, was presented; and on 9th June 1908 after a *panchayat* had been held, Exhibit I was executed and eventually registered, virtually cancelling Exhibits A and B. Next, however, apparently within the time fixed in Exhibit N, the Sub-Registrar's decision to return the documents unregistered, the plaintiff brought Original Suit No. 44 of 1908 for a direction to him to register them. It ended on 31st March 1909 in a compromise decree, Exhibit U, directing their registration, as modified by an agreement, Exhibit F dated 29th March 1909 executed by Krishnan. Between Exhibit I and Exhibit F, 7 P. W. had been coming to his house and on two days in November 1908 made entries in his account, Exhibit IV. It does not appear, however, that defendant, who no doubt was not a party to Exhibit F or the compromise, was not there also and could not have counteracted 7 P. W.'s manœuvres; and admittedly he was with Krishnan on the next important date, 17th April 1908. On it during his temporary absence Krishnan was taken a mile and-a-half to a place within the Vittal Sub-Registrar's jurisdiction, where he registered Exhibit F and Exhibit S, his Will, dying the same day.

Of these documents defendant relies mainly on Exhibits C and I as evidencing a total revulsion of feeling on the part of Krishnan. But, although the registration of Exhibits A and B was in terms abandoned and, inconsistently with them and especially the former, the father and son decided to remain joint and agreed not to change their status in the future and although Exhibit I starts with a recital regarding the previous instigation of plaintiff's relatives and (a suggestion not persevered in) the insertion in the previous documents of unauthorised matter, there is also a recital regarding defendant's disobedience and the necessity for preventing quarrels between his two wives and there are stringent provisions for the protection of plaintiff and also of the first wife against the contingencies of defendant's discarding either, marrying a third wife or adopting a stranger. These provisions require attention, because it is suggested that nothing in defendant's conduct made them necessary and that they were due to the further misrepresentations as to his intentions by 7 P. W. to Krishnan, referred to by the latter in his written statement in the suit, Exhibit III. Reference to Exhibit III, however, does

not improve the argument. For, although it was no doubt signed by Krishnan and presented by 3 P. W, it is not clear how far it really embodied the former's views, since the only first hand evidence is that the draft for it was given to 3 P. W. by 3 D. W., who is brother of defendant's first wife and would, therefore, naturally assist him; and, as 3 D. W. says that he had it from another Pleader, not examined, there is only Krishnan's signature as security for his responsibility for its details. It is worth noticing that Krishnan signed it within a week of 7 P. W.'s writing entries in his accounts, when, on the defence case, he should still have been subject to the latter's influence. The provisions of Exhibit I need not in fact be explained by reference to any particular mistaken impression, however produced. For they correspond with obvious possibilities in conjugal relation, as it exists between members of the parties' community; and there is no necessity to suppose that they were founded on misrepresentations by 7 P. W. when Krishnan was equally aware of those possibilities and had expressed and was again to express distrust of defendant's intentions and when the precautionary provisions insisted on were calculated also to protect the interest of defendant's first wife. Their primary object was, it may fairly be taken, that already suggested for Exhibit A, although it was now to be effected more simply and at less expense, to promote a reconciliation between defendant and plaintiff by imposing terms for the latter's protection. Those terms were arrived at under defendant's influence and after a *panchayat* had been held, the members of which could presumably have been called to support this part of defendant's case; and there is no ground for ascribing them to the misrepresentation of 7th P. W. In fact they indicate that Krishnan, in spite of defendant's presence and after due deliberation and advice from his friends, persisted in his apprehension for and intention to protect plaintiff.

This intention is more clearly expressed in Exhibit F. For, although Krishnan returned to Exhibits A and B and a scheme for plaintiff's endowment and transferred the immediate management of her property from himself to 7th plaintiff's witness, he displayed a greater regard for defendant's claim in case his conduct should be satisfactory. Firstly, a separate maintenance is provided for Krishnan's wife and next there is an important explicit provision for defendant's right to manage the property, in case he "brings plaintiff and keeps her with him and lives with her in the family house amicably." Further the absolute estate conferred on plaintiff by Exhibit B is replaced by provisions (1) giving her only a life-interest, (2) directing the devolution of the properties on her children, if she has any, and otherwise on those of the first wife, if any, and in case an adoption is necessary on a son, if adopted from specified families. On this I observe firstly that, although Exhibit F refers generally to the inclusion in Exhibit B of unauthorised matter, that matter is not specified and the dispositions made are, though less favourable to plaintiff, still sufficiently so to indicate Krishnan's persistence in the intention already attributed to him to protect her. Secondly we have nothing in detail as to the execution of Exhibit F or its presentation to the Court and nothing to explain, if defendant's case is true, how 7th plaintiff's witness was able to re-establish his influence and defendant was unable to counteract it, although we know that he was with Krishnan within three weeks of the execution on the date of Exhibit S. The inference must be that Krishnan acted on a well formed intention throughout, though with discrimination, the concessions to defendant's interests being evidence on the latter point.

Lastly as to Exhibit S which, in the absence of anything definite to the contrary and in view of its registration, must be treated as made with full capacity. It was made during defendant's temporary absence and he contends that it and the simultaneous registration of Exhibit F correspond with a revival of 7th plaintiff's witness's influence since his own departure in the morning. This, it is said, is indicated first by the journey to register the document within the Vittal jurisdiction; and no doubt, if (as would have been

natural) the Bantwal Sub-Registrar had been sent for to the house, he would not have had so far to come as the Vittal Sub-Registrar to the place chosen. But, previous dispositions (including Exhibit 1) having been registered by the latter, there was good reason for employing him again; and in view of defendant's merely temporary absence it is difficult to believe that there could have been any serious expectation of concealing the transaction from him. There is nothing clear as to the time he had been in Krishnan's house. But it is extremely unlikely that he was ignorant of Exhibit F, since it is mentioned in the compromise petition, Exhibit R, and he had presumably had notice of the passing of the compromise decree, Exhibit U; and it is then remarkable that Exhibit F had not been destroyed at his instance. And next, Exhibit S is significant, because, whilst it refers to the course of the dispute between Krishnan and defendant, it confirms Exhibit F, except as to one particular, the appointment of 7 P. W. as one of the executors for the disposal of the items of property not included in the earlier documents. This is not favourable to defendant. But the disposition of those items in no way supports an intention to despoil him. For it benefits only Krishnan's widow, defendant, who is to take the residue, if he lives with plaintiff within ten years, and various charities, except as regards an annual allowance to the two executors of Rs. 50 each. It is not possible to recognise in Exhibit S any material result of the exercise of influence adversely to defendant; and it is impossible to believe that any would have been exercised by 7 P. W. to secure so little advantage.

It has been pointed out that the burden of proof is on defendant. He has, in my opinion, proved only that 7 P. W. had some opportunities of influencing Krishnan; that the latter was in Exhibit B unduly liberal to plaintiff; and that for one short period he changed his mind as to benefitting her directly, although he never did so as to the general necessity for protecting her interest. There is no reason in the circumstances for the assumptions, which we are asked to make, that Krishnan's intelligence was failing and that he was moved by misrepresentations regarding matters mostly within his own knowledge, which 7 P. W. is not proved to have made and which defendant, his adoptive mother and the friends consulted could have corrected. On the other hand it is not proved that any attempt was made to keep Krishnan from the influence of defendant or any other person or that the former either before or after Exhibit B acted as though he has anything to fear from 7 P. W. The case is in fact one of an old man of full capacity, which is not shown to have been impaired, anxious, no doubt unreasonably, to secure the continuance of his family and to interfere in his son's affairs, who made a disposition, unduly liberal, but not so extravagantly comprehensive as to be irreconcilable with his own comfort or his exercise of independent volition; and who persisted in the sentiment, which dictated it, almost continuously and in defendant's immediate society until his end. That does not justify a finding for undue influence and I would, therefore, dissent from this part of the lower Court's decision.

There remains the defence that Exhibits A and B are unenforcible, because they have not been registered either by Krishnan or after delivery by him by any person legally competent on plaintiff's behalf; and I agree that it must prevail. It is not disputed that these documents cannot be given in evidence or enforced, if they are not registered. Then firstly, the original registration proceedings initiated by Krishnan were abortive, since an order was passed for the return of the documents unregistered and this cannot be affected by the actual failure of Krishnan to receive them. It has no doubt been argued that, having presented them, he had done everything in his power to make them effectual. But the principle that presentation of such documents can be treated as equivalent to registration as against their executants is not supported by anything in section 47 or elsewhere in the Act or, so far as we have been shown, by any authority. And secondly, if it is assumed that the decree, Exhibit U, was equivalent to a delivery of the documents by Krishnan to plaintiff, there is first the difficulty that Exhibit A and therefore Exhibit B had impliedly been cancelled before its date by Exhibit 1 and are, therefore, unenforcible, whether or no

the subsequent presentation and registration were regular. I should, moreover, be ready to hold that they were invalid, because under section 32, Registration Act, the documents could be presented only by plaintiff's representative or assign; and 7th P. W., who presented them, was not her assign, or her representative under section 2 (10), since he had ceased to be her natural guardian on her marriage and had not been appointed her legal guardian.

In these circumstances I agree with my learned brother's decision, dismissing the appeal with costs.

Appeal dismissed.

M. C. P.

CALCUTTA HIGH COURT.
CIVIL RULE No. 665 OF 1917.
January 25, 1918.
Present:—Mr. Justice Teunon and Mr. Justice Newbould.
PANCHANAN SEN—PETITIONER
versus
MADHU SUDAN MALLIK AND OTHERS—DEFENDANTS NOS. 1, 2 AND 7—OPPOSITE PARTIES.

Commissioner for local investigation, remuneration of, whether can be disallowed by District Judge.

The District Judge has no power to disallow a portion of the remuneration claimed by a Commissioner for local investigation in connection with a suit pending in the Court of the Subordinate Judge. The matter is one which must be dealt with by the Subordinate Judge in whose Court the suit is pending.

Rule against the order of the Court of the Sub-Judge, Nadia, in Title Suit No. 562 of 1914

Mr. *S. N. Banerjee* and Babu *Narendra Kumar Bose*, for the Petitioner.

JUDGMENT.—This Rule is directed against an order by which the District Judge of Nadia disallows a certain portion of the remuneration claimed by a Commissioner for local investigation. In making the order he has done the District Judge appears to have acted under a misconception of the Rules and Circular Orders of this Court by which the District Judge is given certain powers in the matter of the appointment of Commissioner to make local enquiries; and in this connection we should refer him to the case of *Peari Mohan Kandu* v. *Mohini Kanta Saha Choudhary* (1). We are informed that as a matter of fact the parties to the suit in question do

(1) 34 Ind. Cas. 855.

not take exception to the bill that has been submitted by the Commissioner and are prepared to pay him the remuneration which he claims. In any case the matter is one which must be dealt with by the Subordinate Judge in whose Court the suit is pending. We, therefore, set aside the District Judge's order now complained of and remit the matter to the Subordinate Judge to be dealt with by him.

We make no order as to costs.

Order set aside.

PATNA HIGH COURT.
CIVIL REVISION NO. 257 OF 1917.
February 13, 1918.
Present:—Mr. Justice Roe and Mr. Justice Jwala Prasad.
Syed Shah MALHIUDDIN AHMAD
Sajjadanashin—DEFENDANT—APPELLANT
versus
MR. *Syed Shah* ATHAR HOSSAIN—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIX, r. 2—Injunction—Person not party to suit, whether can be summoned.

A Court has no jurisdiction to issue an injunction against a person not a party to the suit, or to summon before it any person not a party to the injunction.

Civil revision from an order of the Munsif, Sasseram.

Messrs. Syed *A. Sharfuddin* and *Amir Hussain*, for the Appellant.

Messrs. *Fakhruddin* and *Mohammad Hasan Jan*, for the Respondent.

JUDGMENT.—We are of opinion that the order of the learned Munsif, so far as it affects Shah Malhiuddin, must be set aside under our powers of superintendence, as being entirely without jurisdiction. The learned Munsif had no authority to summon before him any person not a party to the injunction and he had no authority to issue an injunction against any person not a party to the suit. The application is, therefore, admitted. The order of the learned Munsif directing Malhiuddin to appear before him to show cause why he should not be punished under Order XXXIX, rule 2 (3), is set aside. The plaintiffs-opposite party before us will pay the costs of this application, hearing fee two gold *mohurs*.

Order set aside.

CALCUTTA HIGH COURT.
CIVIL RULE No. 714 OF 1917.
February 1, 1918.
Present:—Mr. Justice Teunon and
Mr. Justice Newbould.
NARENDRA NATH LAHIRI AND OTHERS—DEFENDANTS—PETITIONERS
versus
CHARU CHANDRA BOSE—PLAINTIFF—OPPOSITE PARTY.

Specific Relief Act (I of 1877), s. 9—Possession of Thakur Bari, *what constitutes.*

Where plaintiff appointed the *pujari* of a *Thakur Bari*, defrayed the expenses of worship, repaired the building and held the actual possession of the key by which the door of the *Thakurghar* was opened:

Held, that the possession of the plaintiff was such physical possession as the provisions of section 9 of the Specific Relief Act were intended to protect, notwithstanding that the *Thakur Bari*, as the residence of a deity was open to the public.

Rule against the order of the Subordinate Judge, Alipore.

FACTS appear from the judgment.

Sir *Rash Behari Ghose* (with him Babu *Hira Lal Sanyal*), for the Petitioners.—The question in this case is whether a suit under section 9 of the Specific Relief Act would lie for the recovery of possession of a temple when the petitioner (defendant) has not interfered with the right of the plaintiff to worship the idol in the temple. A suit under section 9 of the Specific Relief Act would lie when the plaintiff's physical possession has been interfered with. The main dispute in this case is as to who is entitled to worship the idol. In a suit under section 9 the plaintiff must show that he was in actual physical possession of the property and that he was dispossessed from it. See *Tarini Mohun Mazumdar* v. *Gunga Prasad Chuckerbutty* (1). In this case the plaintiff has not shown that he was in exclusive possession of the temple. Refers to section 5 of the Specific Relief Act, *Fadu Jhala* v. *Gour Mohan Jhala* (2), *Fuzlur Rahman* v. *Krishna Prasad* (3). The temple is a public temple, and the plaintiff is not entitled to recover exclusive possession of it.

Sir *B. C. Mitter* (with him Babu *Rupendra Kumar Mitra*), for the Opposite Party was not called upon.

(1) 14 C. 649 at p. 652; 7 Ind. Dec. (N. S.) 431.
(2) 19 C. 544 at p. 564; 9 Ind Dec. (N.S.) 806.
(3) 29 C. 614 at p. 627.

JUDGMENT.—This Rule is directed against an order made by the Subordinate Judge of Alipore under the provisions of section 9 of the Specific Relief Act. The litigation is between two rival claimants to the sole Shebaitship of a Thakur of the name of Siddeswari. The learned Subordinate Judge has found that the plaintiff in the suit brought in his Court was in possession of the Thakur Bari of this Thakur and of the site thereof, and has made an order directing that he do recover possession from the rival claimant. His order is attacked before us on the ground that the Thakur Bari as the residence of the deity or a house of god is open to the public and inasmuch as the defendant has not removed the image of the Thakur, it cannot be said that he has dispossessed the plaintiff from the Thakur within the meaning of section 9 of the Specific Relief Act. We are unable to accede to this contention. On this earth Thakurs and other deities must be represented and their interests protected by mundane persons. The learned Subordinate Judge has found that the plaintiff was in possession of this Thakur Bari by appointing the *pujari*, by defraying the expenses of the deity's worship, by repairing and in fact reconstructing the building, and by holding actual possession of the key by which the door of the Thakurghar is opened. In our view that is physical possession such as the provisions of section 9 of the Specific Relief Act are intended to protect.

We, therefore, discharge this Rule with costs, five gold *mohurs*.

Rule discharged.

CALCUTTA HIGH COURT.
APPEAL FROM APPELLATE DECREE No. 2465 OF 1915.
January 30, 1918.
Present:—Mr. Justice Richardson
and Mr. Justice Beachcroft.
LAKSHMI NARAYAN ROY AND OTHERS—PLAINTIFFS—APPELLANTS
versus
THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—RESPONDENT.

Bengal Tenancy Act (VIII B. C. of 1885), s. 74—

LAKSHMI NARAYAN ROY *v.* SECRETARY OF STATE.

Abwab—Peshkash, *whether* abwab—*Antiquity and purpose of payment, whether ground for inferring legitimate origin—Jalamutha and Majnamutha estates in Midnapore.*

The levy of *peshkash* by the proprietors of the two estates known as Jalamutha and Majnamutha in the District of Midnapore from the *nisfidars* (holders of resumed *lakheraj* lands) and *lakherajdars* of those estates is not illegal, as *peshkash* cannot be regarded as an imposition in the nature of an *abwab* but a right to it is an interest in the land to which a title may be made out by prescription. [p. 499, col. 2.]

From the peculiar situation and character of the lands of the estates and the antiquity and purpose of the payment of *peshkash*, it may be inferred that a right to levy it had a legitimate contractual foundation at its inception. [p. 499, col. 2.]

Appeal against the decree of the District Judge, Midnapore, dated the 4th of June 1915, confirming that of the Munsif at Contai, dated the 26th of August 1914.

FACTS appear from the judgment.

Babu *Jyotish Chandra Hazra*, for the Appellants.—Anything realised over and above rent is an *abwab* and not recoverable. See section 10 of Act X of 1859, the first Bengal Tenancy Act. Rs. 13 and odd was deducted as *peshkosh* from the rent previously payable. Even if it be revenue *peshkosh* is illegal. It was once realised by a certificate in 1912. Apart from that there is no other evidence of realisation. Even if *peshkosh* was paid down to 1844 the subsequent enactments would make it illegal. If the imposition is illegal, realisation for any number of years would not make it valid. See section 3 of Regulation V of 1793 and sections 54, 55 of Regulation VIII of 1793. Even if it be revenue the Tenancy Act would apply, if it is rent the tenancy law would forbid the realisation even if it is mentioned in the agreement. See section 74 of the present Bengal Tenancy Act. Is it open to Government to realise something in addition to revenue from the Zemindari? If it is not, it would be governed by the contract. Permanent Settlement was made to settle the revenue for ever. Having regard to the fact that it has fallen into disuse and not recorded in the settlement it is not realisable. If it is a public demand it would be realisable. But it is not so; it does not come in any of the items in the schedule of the Act.

Babu *Ram Charan Mitter*, for the Respondent.—What is the position of the *nisphidar* as tenant? He is not a tenant, he holds an estate, the area is 47 *bighas*. The question of *abwab* would not arise if he holds an estate. Government constructed the embankment and levied this.

[RICHARDSON, J.—This is a cess in addition to rent.]

Yes. If they are looked upon as tenants of former proprietors it is certainly an amount which their Zemindars could levy as consideration for certain improvements. It can't be said to be an *abwab* and the basis of the claim was long continued, payment being from time immemorial.

[RICHARDSON, J.—See the unreported decision of Sir Lawrence Jenkins, C. J., and Holmwood, J., in Second Appeal No. 44 of 1912, decided on 30th July 1915].

Here the question of *abwab* does not arise, the *lakherajdar* in his new position holds an estate.

Babu *Jyotish Chandra Hazra*, in reply.—Assuming it to be revenue there is no escape from Regulation V of 1812; in the absence of any specific agreement, length of time wo'nt give any legal origin under section 3 of the Regulation. *Peshkosh* initially was in the nature of an *abwab*.

JUDGMENT.—This appeal is preferred by the plaintiffs in a suit against the Secretary of State and relates to a charge described as *peshkosh*, which the Collector has levied from the plaintiffs in execution of a certificate issued under the Public Demands Recovery Act (Bengal Act I of 1895). The plaintiffs sue for a declaration that the levy of *peshkosh* is illegal and they further pray for the cancellation of the certificate, for the refund of the amount levied thereunder and for a perpetual injunction restraining the Secretary of State from levying *peshkosh* in future.

It appears that there are two estates, known as Jalamutha and Majnamutha in the District of Midnapore, the history of which is adverted to in the judgments of the Courts below.

At the time of the Permanent Settlement the proprietors refused to accept the settlements offered to them and the estates have ever since been temporarily settled. Their situation renders them liable to inundation and *grambheries* or village embankments are maintained to protect the cultivable lands. It is asserted for the Secretary of State that *peshkosh* is a fixed

annual sum payable by the *nisphidars* (holders of resumed *lakheraj* lands) and *lakherajdars* of these estates as a contribution towards the not inconsiderable expense which has to be incurred every year by the proprietors for the time being in repairing the embankments. As the estates are at the present time under direct management that expense is now met by the Government.

Both the Courts below have found as a fact that the practice of levying and paying *peshkosh* has existed from a very long time. The learned Munsif in the trial Court says that the proprietors from time out of memory have been realising *peshkosh* from *lakherajdars* and *nisphidars* and in some cases from the tenants of *lakherajdars* and *nisphidars*. The learned District Judge in the lower Appellate Court says similarly: "There can be no doubt from the oral and documentary evidence adduced for the defendant that *peshkosh*, although its actual origin is unknown, was being realised by the proprietors of the two estates from *lakherajdars* (whether their title was valid or not) and from *mal* tenants from 1207 (1800 A. D.) and that it was taken as a contribution by the aid of which the proprietors were to repair the village embankments within the estate." The inference which the District Judge has drawn from the evidence is that the practice has existed for so long that it must be referred to some legal origin, and he holds that there must at sometime have been an agreement between the proprietors of the two estates and those who hold land therein that the former should maintain and repair the *grambheries* in the estates with the aid of funds contributed by the latter. He refers to Mr. Bayley's report on the Settlement of Majnamutha in 1844 as authority for the statement that prior to that year, probably in 1827, in the case of *mal* tenants or tenants of rent paying lands, *peskkosh* was amalgamated with rent. In the case of the *lakherajdars* no such amalgamation could take place and when some of the *lakheraj* lands were afterwards resumed the *nisphidars* continued to pay under a separate head and apart from their rent the sum which they had previously paid on this account as *lakherajdars*.

The annual payment for which the plaintiffs have been found liable was fixed in 1844 or before at Rs. 13-1-8 *gandas*. The main contention of the learned Pleader for the plaintiffs is that *peshkosh* is an *abwab* and as such is prohibited by the tenancy law in this country. If that contention has any substance it is somewhat surprising that the fact was not discovered before this. The collection of *abwabs* has now been prohibited for a great number of years. So far as we are aware the objection taken on this ground has only once been taken before and then unsuccessfully in a case to which I shall shortly refer. We are satisfied that *peshkosh* cannot be regarded as an imposition in the nature of an *abwab* within the meaning of the various provisions which have been enacted from time to time on that subject. The plaintiffs' own *kabuliyat* of 1844 shows that the amount due on account of *peshkosh* was deducted from the assets of the land and that rent was assessed only on the balance of the assets after this deduction had been made. That indicates that the payment comes out of the land and that the right to it is an interest in the land to which a title may be made by prescription.

The peculiar situation and character of the land and the antiquity and purpose of the payment all point to its having a legitimate contractual foundation. If the statutory law governing the relations of landlord and tenant must be applied, the modern analogue is to be found, not in section 74 of the Bengal Tenancy Act relating to illegal cesses, but rather in the provisions of that Act relating to improvements [Chapter IX and section 30 (*c*)].

We are supported in the view we take by an unreported decision of Sir Lawrence Jenkins, C. J., and Holmwood, J., (Second Appeal No. 44 of 1912 decided on 30th July 1915). Sir Lawrence Jenkins, referring to a claim for *peshkosh* in the Majnamutha estate, said that the basis of the claim was long-continued payment beyond the memory of man, which was in itself a title in favour of the recipient of the payment. He referred to *Sambhoo Lal v. Collector of Surat* (1), where the pay-

(1) 8 M. I. A. 1 at p. 40; 4 W. R. P. C. 55; 1 Suth. P. C. J. 387; 1 Sar. P. C. J. 713; 19 E. R. 431.

ment in question might have had a vicious origin and added that there was no vice in the origin of *peshkosh*, the consideration for which on the contrary was most beneficent work.

It was suggested in the argument that in the case of the plaintiffs it has not been shown that they have regularly paid *peshkosh*. It is in evidence, however, that *peshkosh* was levied from them under the certificate procedure in the year 1904 and *peshkosh* is mentioned in their *kabuliyat* of 1844. We are satisfied that there are materials on the record upon which the Court below was entitled to come to the conclusion that *peshkosh* is payable in respect of the land held by the plaintiffs.

The learned Pleader for the appellant has not pressed the point taken in the Court below that the Public Demands Recovery Act was not applicable for the purpose of enforcing the payment. The terms of the Act of 1895 are sufficient to meet the point and it could not have been urged with success.

The appeal must accordingly be dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1133 AND 1134 OF 1916.

December 20, 1917.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Phillips.

DORAISWAMI MUTTIRIYAN AND ANOTHER—APPELLANTS

versus

MUTTACHI *alias* NAMBIYAPPA MUTHIRIYAN—RESPONDENT.

Easements Act (V of 1882), s. 22—Dominant and servient tenements—Upper owner draining rain or other water on to adjoining land—Easement—Natural, customary and prescriptive right—Injunction not to obstruct exercise of easement, form of.

An owner of land may have a customary or prescriptive right to drain water coming to his land by the falling of rain or drained from upper fields or brought by himself for purposes of irrigation on to adjoining land. [p. 501, col. 2; p. 502, col. 1.]

Per *Sadasiva Aiyar, J.*—An owner of land may have a *natural* right not only to drain rain water falling on his land on to neighbouring land where it is lower in level than his land, but also to drain water brought on his land by the custom and usages of the country along irrigation channels. [p. 501, cols. 1 & 2.]

An injunction as to easements which have been broken should be confined to a direction to the party breaking not to obstruct the exercise of the easement and should not descend into details, so as to prevent the servient owner from taking advantage of the privilege given to him by section 22 of the Easements Act. [p. 502, col. 1.]

Per *Phillips, J.* (*Obiter.*)—An owner of land can have no natural right to pass water, which has come on his land artificially, on to adjoining land. [p. 502, col. 1.]

Second appeals against the decrees of the Court of the Temporary Subordinate Judge, Trichinopoly, in Appeal Suits Nos. 54 and 57 of 1915 (Appeal Suits Nos. 288 and 292 of 1915 on the file of the District Court, Trichinopoly), preferred respectively against the decree of the Court of the Additional District Munsif, Trichinopoly, in Original Suits Nos. 169 and 212 of 1914 (Original Suits Nos. 309 of 1912 and 92 of 1914, on the file of the Court of the District Munsif, Srirangam).

Mr. *C. Mahadevan Nair*, for the Appellants.

Mr. *B. Sitaram Row*, for the Respondents.

These second appeals coming on for hearing on the 14th and 15th August 1917, the Court delivered the following

JUDGMENT.

SADASIVA AIYAR, J.—These two second appeals have arisen out of two cross-suits. In the earlier Suit No. 92 of 1914, the plaintiff is the owner of the upper western land and he sued for an injunction preventing the defendants from obstructing the draining of the surplus water of his upper land into the defendant's field, through a particular *madai* or opening which, after traversing the breadth of the eastern ridge of the plaintiff's field, passes through the breadth of the boundary ridge between the two villages of the plaintiff and the defendants respectively and then opens out into the defendants' field. He also prayed for the removal by the defendants of the *bund* which they had put up on their own land opposite to the *madai* so as to prevent water falling through the *madai* into the defendants' lower land. The 3rd relief claimed by the plaintiff was that he might be put in

possession of the site of the *madai* situated on his own *patta* land and its entrance. The plaintiff also prayed for further reliefs by way of damages caused by the defendants' acts. The cross-suit was for an injunction against the plaintiff in the first suit restraining him from discharging water through the *madai* into the defendants' field and for damages. I shall call the plaintiff in the first suit (who is the owner of the upper land) as plaintiff, hereafter. The first issue raised in that Suit No. 92 of 1914 was whether the plaintiff was entitled to discharge the surplus water of his land into 1st defendant's land through the *madai* marked A in his plan. Now the water which is collected on the plaintiff's land seems not to be merely the rain water which falls on that particular land, but also water brought on to the plaintiff's land from irrigation sources for the purpose of cultivation of sugarcane, besides the water which comes on to the plaintiff's land from fields which are still higher up and which are also cultivated for agricultural purposes. The judgments of the lower Courts consider the plaintiff's right as of the nature of a natural right in some places, as a customary right in other places and as a prescriptive right in yet other parts of the judgments. As regards a natural right strictly so called, it may be said that it covers only the right to allow the *rain water* falling upon a land which is naturally higher in level than its neighbouring land to drain by surface flow by gradually flowing over, wherever and along whatever lines the water could find its way on to that neighbouring land. But such a strict interpretation of the expression "natural right" seems not to have been adhered to always by Courts. Even if the owner of the upper field reclaims or improves portions of his land in course of ordinary agricultural operations, provided the water does come upon his land naturally and in draining it off to the lower field he does not cause more injury to that lower field than would have been caused if he had left his land in its natural unimproved condition, the right conferred on him by law to so drain off the water has also been described as a "natural right." I think also that even if the water was not merely rain water, but water that is brought according to the custom and usages of the country along irrigation channels upon the land, the right to pass it on to a land of a lower level may be spoken of as a "natural right" without much violence to language. In the present case the District Munsif finds a customary right on the part of the plaintiff's land and similar lands south and north of the plaintiff's land in the plaintiff's village to throw off the water coming on to those fields for purposes of agricultural irrigation on to the lower lands in the defendants' village to the respective fields in the plaintiff's village situated opposite to and south of the first mentioned lands. The Subordinate Judge in paragraph No. 7 of his judgment notices this finding of the District Munsif that the lands in the plaintiff's village of Pallevaram have been accustomed to drain their water through *madais* shown in the Commissioner's plan into the lower fields in the defendants' village of Velayudampatti, but he does not expressly find that a customary right of easement to so pass on the water through *madais*, even though the water was brought in for purposes of agriculture, has been established. He refers mainly to natural rights strictly so called, that is, those rights which relate only to the drainage of rain water and the passing on of water by surface flow to the lower land without a definite outlet. He might have intended to find a customary right of easement also. However, I think that it is better to request the lower Appellate Court to submit a definite and clear finding on this customary right and as to the extent of such customary right, though the defendants contented themselves in their written statement with denying the plaintiff's right altogether and did not in the alternative set up that the plaintiff has been trying to exceed his customary right.

I may also here refer to the fact that the District Munsif in drawing up the decree has not given sufficient consideration to the right given to a servient owner by section 22 of the Easements Act which says, "the dominant owner must exercise his right in the mode which is least onerous to the servient owner; and when the exercise of an easement can without detriment to the dominant owner be confined to a determinate part of the servient heritage, such exercise shall, at the request of the servient owner, be so confined." The

decree gives an injunction directing the defendants to remove the heap of mud put up by the defendants opposite to the *madai* A and to restore the original level of the defendants' lands. Injunctions as to such easements, when they have been broken, should, in my opinion, be confined to a direction to the defendants not to obstruct the exercise of the easement and should not descend into details, as that will prevent the defendants from taking advantage of the privilege given to them by section 22, Easements Act. As regards the site of the *madai*, though the defendants in paragraph No. 8 of their written statement denied the plaintiff's ownership of the *madai*, it is clear from the plan that between the defendans' *patta* land and the plaintiff's *patta* land there is the boundary ridge between the two villages and I take it that it does not belong to either party. The decree, when it restores possession of the site of the *madai* to the plaintiff, must be interpreted as confined to the ridge and opening in the survey boundary of his field No. 243 as shown in the Commissioner's plan, and not to the eastern *village boundary* ridge or to the ridge further east belonging to the defendants' field. The issue on which the lower Appellate Court has to find is:—"Is the plaintiff, by custom or prescription, entitled to drain the water coming on his land by the falling of rain or drained from upper fields or brought by himself for purposes of irrigation, to the defendents' land and, if so, in what mode and to what extent?" The finding will be submitted on the evidence on record in four weeks from the receipt of records. Ten days will be allowed for objections.

PHILLIPS, J.—I agree. I do not think it is necessary in this case to express a definite opinion as to the nature or extent of natural rights. For the purposes of this case it is sufficient to hold, as I do, that an owner of land can have no "natural" right to pass the water, which has come upon his land artificialy, to the adjoining land. In this case it is admitted that the upper field is watered from irrigation sources and, therefore, a right to pass such water away from the field cannot be a natural right. It is, therefore, necessary that the question as to whether the upper owner has a prescriptive right or a customary right to pass away that water should be decided.

In compliance with the order contained in the above judgment, the District Judge of Trichinopoly submitted the following

FINDING.

I am required to submit a finding on the following issue:—

"Is the plaintiff by custom or prescription entitled to drain the water coming on his land by the falling of rain or drained from upper fields or brought by himself for purposes of irrigation to the defendants' land and if so, in what mode and to what extent?"

2. The plaintiff in the issue is the plaintiff in Original Suit No. 212 of 1914, (Additional District Munsif's Court, Trichinopoly) and the owner of S. No. 243 (4) of Pallavaram. The defendants own S. No. 145 (2c) immediately east of the plaintiff's land and included in Velayuthampatti village. The plaintiff claims a right to discharge water coming on his land on to the defendants' field and the District Munsif has found that he is entitled to do so by custom and by prescriptive right (paragraph No. 19 of his judgment). The case of the defendants is that the water from the plaintiff's land is carried southwards through other fields of Pallavaram to a point where the Krishnapuram channel (shown on Commissioner's plan) approaches the village boundary and is there discharged into that channel. It is further the plaintiff's case that from other fields of Pallavaram situated similarly to his own, water is discharged on to the fields of Velayuthampatti lying immediately to the east of them. The water is said to be carried off in each case by means of a "Madai" in the ridge which forms the boundary between the two villages. The defendants do not state expressly how drainage is effected in the case of Pallavaram fields to the south of the bend in the channel but 1st defendant in his deposition denies the existence of *madais*.

3. The District Munsif has rightly pointed out that the evidence on both sides comes from interested sources. Ramaswami Chetti, however, who owns land adjoining that of 1st defendant in Velayuthampatti, supports the plaintiff's case. His statement is entitled to some weight as being against his interest, although he owes 1st defendant a grudge. Reference has been made to

statements by this witness and by Gurunatha Muthirian in cross-examination as indicating that the water discharged on to Vellayuthampatti fields is rain water only. I do not think that this is the right interpretation of the answers. I think they really refer to the irrigation season. It would be impossible to discriminate between rain water and other water and I do not believe the witnesses intended to draw any such distinction.

4. If the evidence for the plaintiff is accepted, I think it establishes a custom to discharge water from the Pallavaram lands in the block now in question on to the adjacent lands of Velayuthampatti and also that the plaintiff has in fact so discharged water from his field in a manner and for a time long enough to give him a prescriptive right.

5. Which version is to be accepted must depend in a great measure on a consideration of general probabilities. The Commissoner's report and the other evidence establish that the Pallavaram lands slope mainly towards the east. Their irrigation source is the channel on the west. It is admitted that water is discharged from some of these fields into the Krishnapuram channel in Velayuthampatti limits. The flow would naturally be in this direction and I think it is probable that each landholder did discharge water in this direction by the most direct method, *i.e.*, into the adjacent fields of Velayuthampatti. Until recently there was no reason why this method should have been objected to. I do not think that the fields being situate in different villages makes any difference. The Commissioner saw a number of *madais* in existence and it seems very unlikely that the defendants' party would have permitted these to have been formed simply for the occasion. If the defendants' story were true that the discharge is concentrated at one point, there would have been signs of this but nothing of the kind is referred to in the evidence nor does the Commissioner's attention appear to have been called to it.

6. I think the probabilities are in favour of the plaintiff's contentions and I accordingly accept the evidence on his side. I find that the plaintiff is entitled by custom and prescription to drain the water coming on his land in the ways mentioned in the issue on to the defendants' land. The mode authorised is through a *madai* in the ridge at the eastern limit of his land. All water coming on to the plaintiff's land by means of rainfall or drainage from fields between his land and the channel on the west may be discharged in this way as well as water brought on to plaintiff's land by himself for purposes of irrigation.

These second appeals coming on for final hearing after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.

IN S. A. No. 1133 OF 1916.

The second appeal is dismissed with costs.

IN S. A. No. 1134 OF 1916.

We accept the findings. In the result the decree of the District Munsif (confirmed by the lower Appellate Court) is modified in the following respects:—

Instead of clause (1), substitute "(1) That the defendants do restore the Madai A as shown in the plaint plan to its original condition and allow the flow of water in the *mamool* manner through the said opening."

Add at the end of clause (2) "A in the plaint plan."

For "the *madai*" at the end of clause (3) substitute "the site of the ridge and opening in the boundary of the field No. 243 as shown in the plaint plan so far as it is included in plaintiff's holding."

The appellants must pay the respondent's costs in this second appeal and bear their own.

Appeal No. 1133 *dismisssd;*
Decree in No. 1134 *modified.*

M. C. P.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 103 OF 1913.

May 11, 1916.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir Asutosh Mookerjee, KT.

AMJAD ALI HAZI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ISMAIL AND OTHERS—DEFENDANTS—RESPONDENTS.

Fraud, decree obtained by, suit to set aside—Burden of proof—Suspicious circumstances—"Ei qui affirmat non ei qui negat incumbit probatio."

Where a plaintiff seeks to set aside a decree as having been obtained by fraud, and fraud is not proved, the plaintiff fails, and if in the absence of direct proof the circumstances which are established are equally consistent with the allegation of the plaintiff as with the denial of the defendant, the plaintiff fails for the very simple reason that he is bound to establish the affirmative of the proposition; *ei qui affirmat non ei qui negat incumbit probatio.* [p. 506, cols. 1 & 2.]

Letters Patent appeal against the decision of Mr. Justice Beachcroft, in Appeal from Appellate Decree No. 2500 of 1911, dated the 31st July 1913, against the decree of the District Judge, Tipperah, dated the 15th May 1911, reversing that of the Munsif, 6th Court at Comilla, dated the 30th August 1910.

FACTS appear from the following judgment of

BEACHCROFT, J.—The plaintiffs brought the suit out of which this appeal arises for declaration of title and possession. They trace their title from one Daulat Gazi, being the heirs of Kamina, a deceased daughter of Daulat. Defendants Nos. 4 and 5 are sons and defendant No. 6 a daughter of Daulat. Defendant No. 1 is son and defendant No. 3 grandson of defendant No. 4 and defendant No. 2 is a son of defendant No. 6. Defendant No. 7 is the landlord.

Daulat died in 1893. Kamina died in 1906. Previous to her death Kamina had sued defendants Nos. 4 to 6 on the allegation that they had dispossessed her and got a decree in 1905. Subsequent to her death the plaintiffs got possession.

In August 1906 the landlord, defendant No. 7, got an *ex parte* rent-decree against defendant No. 4, and in execution bought the holding and settled it with defendant No. 1.

The plaintiffs in the present suit alleged that Daulat was an occupancy *raiyat* and that the rent-decree obtained by the landlord was obtained by fraud. They claimed that their title was not affected.

The only defendants who put in written statements were defendants Nos. 1, 3 and 7. The joint written statement of the first two, so far as it is material to this appeal, alleged that the property never belonged to Daulat or Kamina, that defendant No. 4 alone was in possession of the holding, that the decree and execution proceedings were not fraudulent and that they took settlement from defendant No. 7.

Defendant No. 7 alleged that Daulat, Kamina and the plaintiffs never had any interest in the land, that the decree and execution proceedings were not fraudulent, that defendant No. 4 alone was in possession of the holding, that if any other persons had rights in the holding, the name of defendant No. 4 had been registered with their knowledge and consent, in fact he represented the owners of the holding, and that he himself had settled the holding after the execution purchase with defendants Nos. 1 and 3.

The Munsif found that Daulat had an occupancy right in the holding and that the proceedings in the rent suit were fraudulent and collusive. He accordingly decreed the suit.

On appeal the District Judge found that Daulat was a non-occupancy *raiyat*, that he had no heritable interest in the holding, and consequently that plaintiffs had not made out any title. He also found that if Daulat had a heritable interest in the holding, defendant No. 4 represented the whole body of tenants in the holding at the time of the rent suit and that consequently if plaintiffs had had any interest in the holding it had passed by the execution sale. He accordingly dismissed the suit. He did not in terms come to any finding as to whether the proceedings in the rent suit were fraudulent.

The first point taken in this appeal is that the Judge ought not to have allowed the defendants to take up inconsistent positions, that in the first instance having denied that Daulat had any interest at all in the holding, they should not have been allowed to agree that his interest was not heritable. This really amounts to this proposition that the Court was bound to find that Daulat either had an occupancy right

as alleged by plaintiffs or no right at all as alleged by defendants. It is obvious that such a proposition is not maintainable. I know of no principle of law which says that if the Court believes the truth to lie midway between the allegations of the parties it is not to find in accordance with its belief. The first Court having found that Daulat had an interest, it was open to the defendants to argue that at any rate it was wrong in finding that that interest was a heritable one.

The learned District Judge has treated it as a settled proposition of law that a non-occupancy right is not heritable. On this point opinions are divided. That no doubt was the opinion expressed in the case of *Karim Chowkidar* v. *Sundar Bewa* (1), but of the three Judges who dealt with the question in the Full Bench case of *Lakhan Narain Das* v. *Jainath Panday* (2), two expressed a contrary view: one considered that non-occupancy rights were not heritable, and two held merely that the Bengal Tenancy Act had not affected those rights, without expressing any opinion whether they were heritable or not apart from the Tenancy Act.

Fortunately it is not necessary for me to express any opinion on this difficult question, as I am of opinion that the second finding of the learned Judge concludes this appeal.

It is argued that the defendants ought not to have been allowed to set up any plea of representation as the position that defendant No. 4 represented the other heirs of Daulat could only arise if Daulat had heritable rights, a position inconsistent with the other plea that defendant No. 4 was the owner of the holding, and it is also argued that the theory of representation was an impossible one in view of the fact that plaintiff had been fighting defendants Nos. 4 to 6 shortly before the rent suit.

There is no substance in the first point. The landlord defendant alleged in his written statement that defendant No. 4 had been in possession of the holding over 12 years and he was not aware of any other person having an interest in it, but that if it turned out that others were interested they had treated defendant No. 4 as their representative. There is no reason why a defence should not be taken in this alternative form, and in fact Daulat had been dead for 13 years at the time of the rent suit.

The second point taken is a pure question of fact, and as such the finding of the learned Judge is conclusive whether it be a reasonable finding or not, and I may remark that as 12 years had elapsed between the death of Daulat and the litigation of 1905, it is not necessarily an unreasonable one. On that finding the interests of the plaintiffs, if any, in the holding would pass by the sale: *Jagattara Dassya* v. *Daulati Bewa* (3).

Finally it is objected that the learned Judge did not decide the question whether the rent suit was fraudulent or not. It is true that he does not find in express terms one way or the other. But reading that part of his judgment which deals with the question as a whole, I think there can be no doubt that he meant to find that fraud was not proved. He states that the appellant (the present respondent) contended that it was not fraudulent, and that the holding passed by the sale. He then refers to the argument on behalf of the plaintiffs on the question of representation which was bound up with the question of the fraudulent nature of the proceedings, and he concludes by saying that the decree against defendant No. 4 passed the rights of all the parties. By this he clearly intended to find that fraud was not established, for on a contrary view of the facts he must have found that nothing passed by the fraudulent execution sale.

In these circumstances the appeal fails and is dismissed with costs.

Babu *Birendra Chandra Das*, for the Appellants.

Babus *Ram Charan Mitra* and *Biraj Mohan Mojumdar*, for the Respondents.

JUDGMENT.

SANDERSON, C J.—I do not think we can interfere in this case.

(1) 24 C. 207; 1 C. W. N. 89; 12 Ind. Dec. (N. S.) 804.

(2) 34 C. 516; 11 C. W. N. 265; 5 C. L. J. 457; 2 M. L. T. 219.

(3) 2 Ind. Cas. 695; 13 C. W. N. 1110; 37 C. 57.

It appears that the suit was brought for recovery of possession and for declaration that the decree in a certain rent suit was fraudulent.

The Court of first instance found that this decree was obtained fraudulently.

The learned District Judge in the first Appellate Court gave judgment in which he impliedly decided that the decree in the rent suit was obtained by fraud.

On appeal to this Court Mr. Justice Beachcroft acted upon that supposition.

When the matter came in appeal under the Letters Patent to the Bench consisting of the late Chief Justice and Mr. Justice N. R. Chatterjea, it was decided that the learned Judge of the first Appellate Court ought to have come to a distinct finding on this all-important question whether the decree in the rent suit had been obtained by fraud.

Therefore, the matter was sent down to the District Judge for a finding upon that point. As has been already pointed out by my learned brother Mr. Justice Mookerjee, the matter came before another District Judge, who investigated the matter and came to the conclusion that the plaintiff had failed to prove that the rent-decree was fraudulent or collusive. Now, an objection has been taken to that finding, and the learned Vakil has drawn our attention to the ground upon which he asks us to reverse that decision.

As I understand the learned Judge's finding, it is that the facts which have been proved before him are suspicious; that they are consistent with fraud; and on the other hand they are also consistent with there being no fraud: and, that being so, he has come to the conclusion that the plaintiff has failed to prove what he set out to prove.

In my opinion the principle which should be applied in such a case as this is laid down by Lord Halsbury in *Wakelin* v. *London and South Western Railway Co.* (4), where he says: "That is the fact to be proved"—in the present case the fact to be proved by the plaintiff is that the rent-decree was fraudulent and collusive. "If that fact is not proved the plaintiff fails, and if in the absence of direct proof the circumstances which are established are equally consistent with the allegation of the plaintiff as with the denial of the defendants, the plaintiff fails for the very simple reason that the plaintiff is bound to establish the affirmative of the proposition; *Ei qui affirmat non ei qui negat incumbit probatio.*"

I think the finding of the learned District Judge is one with which we cannot interfere; and, as it is admitted that if that finding stands the appeal must be dismissed, the consequence is that, in my judgment, this appeal should be dismissed with costs.

MOOKERJEE, J.—I agree.

Appeal dismissed.

(4) (1886) 12 A. C. 41 at p. 45; 56 L. J. Q. B. 229; 55 L. T. 709; 35 W. R. 141; 51 J. P. 404.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 75 OF 1916.

October 1, 1917.

Present:—Sir Henry Drake-Brockman, KT., J. C.

DILLI SINGH—DEFENDANT NO. 2—APPELLANT

versus

BINA—PLAINTIFF—RESPONDENT.

Hindu Law—Alienation by father—'Antecedent debt,' what is—Son, whether bound—Illegal and immoral debts—Burden of proof.

A cash advance does not constitute an "antecedent" debt if its payment and the transfer securing its repayment are in reality parts of the same transaction. [p. 508, col. 2.]

A mortgage of joint ancestral property will not be binding on the mortgagor's son after his death unless the debt secured thereby was either an antecedent debt or was justified by legal necessity. [p. 508, col. 2.]

Sahu Ram Chandra v. *Bhup Singh*, 39 Ind. Cas. 280; 44 I. A. 126; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 39 A. 437, followed.

A Hindu father can make a mortgage of the joint family estate in order to discharge an antecedent debt and such a mortgage can be enforced during his lifetime against his son. This is an exception to the general rule that the ancestral property cannot be alienated except with the consent of all the coparceners or for legal necessity. [p. 509, col. 2.]

DILLI SINGH *v.* BINA.

It is, however, open to the son to prove that the original debts were incurred for immoral purposes. [p. 509, col. 2.]

A son who seeks to avoid debts contracted by his father on the ground of their having been borrowed for an immoral or illegal purpose is not bound to show that the creditor had knowledge of the immoral or illegal purpose when the loans were advanced. [p. 510, col. 2.]

Appeal from the decree of the District Judge, Seoni, dated the 31st July 1917, in Civil Suit No. 51 of 1915.

Mr. *P. S. Kotwal*, for the Appellant.

Mr. *V. V. Chitale*, for the Respondent.

JUDGMENT.—This appeal arises out of a preliminary decree for foreclosure passed by the late District Judge of Seoni on foot of a mortgage executed by one Tikait Singh in favour of the plaintiff. The mortgaged property consists of an eight-annas share in Mauza Chhapara Khurd, which is separated from Mauza Chhapara where the plaintiff lives by the river Wainganga.

The present appellant Dilli Singh is Tikait Singh's son and being a minor was represented in the lower Court by his uncle. It is common ground that Tikait Singh and Dilli Singh are joint and that the mortgaged share is their ancestral property. The plaint alleges no ground for making Dilli Singh liable under the mortgage except that he is Tikait Singh's son and owns a share in the property.

The mortgage was executed by Tikait Singh alone on the 12th July 1911. The deed (Exhibit P-1) recites that the mortgagor borrowed Rs. 750 that day in cash but does not mention the purpose for which the money was taken. Rs. 2,250, the balance of the consideration, is described as the total amount due under four simple money bonds executed by Tikait Singh in the mortgagee's favour—

(1) on the 24th January 1909 for Rs. 500.

(2) on the 3rd June 1910 for Rs. 200.

(3) on the 6th May 1911 for Rs. 500.

(4) on the 25th May 1911 for Rs. 300.

The deed contains no reference to the mortgagor's son. It stipulates for repayment of the principal by three annual instalments of Rs. 1,000 each along with interest at Rs. 1-5-0 per cent. per mensem and for compound interest in case of default.

Tikait Singh filed a written statement and with it a receipt (Exhibit D-1) for Rs. 300 executed by the plaintiff on the 13th July 1911, the day on which the mortgage deed sued upon was registered. He pleaded that immediately after registration the plaintiff took back Rs. 300 out of the sum of Rs. 750 advanced in cash, promising to give credit for that amount against the mortgage-debt. He further alleged that all the money borrowed from the plaintiff from time to time was taken to the plaintiff's knowledge for gambling and spent in that manner. In a subsequent oral statement he admitted that no re-payment beyond this sum of Rs. 300 had been made.

The written statement for the minor defendant alleged the debts to have been incurred for gambling and other immoral purposes and that his share, therefore, could not be bound by the mortgage. The rate of interest was objected to as exorbitant and Tikait Singh's plea that Rs. 300 had been repaid was endorsed. In an oral reply the plaintiff's Pleader admitted receipt of Rs. 300 but alleged that this was taken as a separate loan and a month or two later was repaid to Tikait Singh in the presence of Jhanaklal (P. W. No. 4), the plaintiff's brother and agent. The old bonds were said to have been destroyed when the mortgage-deed was registered. Knowledge of Tikait Singh's gambling was denied. The only reason advanced for treating the mortgage as binding upon the minor's share in the property was that the consideration consisted in part of antecedent debts.

Tikait Singh having rejoined by denying return of his Rs. 300, the following issues among others were framed:—

Is the consideration for the mortgage such as to bind the minor defendant's interest in the mortgaged property? or

Was the debt in suit or were the previous debts of which it is a renewal borrowed for immoral purposes?

Was the Rs. 300 for which defendant Tikait Singh holds a receipt borrowed by the plaintiff independently of the transaction in suit?

Was it not a part payment of the debt in suit?

Has the plaintiff repaid the Rs. 300 to Tikait Singh?

With regard to the first of these the lower Court held as follows:—

"The consideration of the deed has been admitted and proved to have been antecedent debt and a cash (advance). This is a good and valid consideration. I find the consideration was such as to bind the interest of the minor defendant in the property."

The evidence adduced for the minor on the next issue was considered to be unconvincing and the Judge was not satisfied that the bond debts were taken for illegal or immoral purposes. He failed to distinguish between those debts and a cash advance and so came to the general conclusion that the mortgage-debt in suit was not borrowed for an illegal or immoral purpose. Lastly he held that the plaintiff did not repay Rs. 300 to Tikait Singh but that this sum was given in part payment of the mortgage-debt.

The present appeal has been preferred on behalf of the minor defendant. With regard to so much of the consideration as consisted of old debts, it is urged that the case not being one in which the property charged has passed out of the hands of the joint family, the appellant's evidence suffices to show that the debts were tainted with immorality, it being unnecessary to prove that when the debts were contracted the plaintiff was aware or might have been aware of the immoral purposes for which the money was borrowed. In this connection it is also urged that the same evidence suffices further to establish that the plaintiff was aware of the immoral purpose. With regard to the cash advance the contention is that this not being an antecedent debt and the plaintiff having failed either to plead or to prove legal necessity for the loan or benefit to the minor therefrom, the mortgage is to a corresponding extent invalid as against the minor's share in the property. Lastly it is said that compound interest at Re. 1-5-0 per cent. per mensem should not have been allowed, inasmuch as the mortgage requires interest on the entire consideration (Rs. 3,000) to be paid with each instalment and so includes a stipulation by way of penalty against which relief should be given.

It will be convenient to deal first with the contention that the cash advance of Rs. 750 not being an antecedent debt or taken for any recognised necessity, the appellant's share cannot be made liable for that part of the consideration for the mortgage.

Out of the said advance Rs. 300 was immediately returned to the plaintiff and has been treated by the Trial Judge as a repayment, so that we are practically concerned with Rs. 450 only out of the principal amount (Rs. 2,700) declared due.

In *Hira Ram* v. *Udhe Ram* (1) I held that an advance of cash does not constitute an "antecedent" debt if its payment and the transfer securing its repayment are in reality parts of the same transaction; and also that a mortgage of joint ancestral property will not be binding on the mortgagor's sons after his death, unless the debt secured thereby was either antecedent or justified by legal necessity. The correctness of this view as to what constitutes an antecedent debt must now be taken as settled by the very recent decision of the Judicial Committee of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* (2). Manifestly then the advance in the present case was not a debt antecedent to the mortgage sued upon. The decision just cited is further apposite in that it lays down the principle on which the effect of an alienation by the father is to be determined during his lifetime. Their Lordships' view is thus expressed:—

"While the father remains in life, the attempt to affect the sons' and grandsons' shares in the property in respect merely of their pious obligation to pay off their father's debts, and not in respect of the debt having been truly incurred for the interest of the estate itself, which they with their father jointly own, must fail; and the simplest of all reasons may be assigned for this, namely, that before the father's death he may pay off the debt, or after his death there may be ample personal estate belonging to the father himself out of which the debt may be discharged. In short, responsibility to meet the father's debts is one thing, and the validity of a

(1) 19 Ind. Cas. 861; 9 N. L. R. 74.

(2) 39 Ind. Cas. 280; 44 I. A. 126; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 218; 39 A. 437.

mortgage over the joint estate is quite another thing."

It is clear then that the mere circumstance of a pious obligation does not validate the mortgage as against the appellant's share.

I have already remarked that in his pleadings the plaintiff rested the liability of the son's share solely on the fact that the consideration for the mortgage consisted partly of antecedent debts. Some evidence, however, was adduced to show necessity for the cash advance and on that reliance is placed for the respondent in this Court. The only witnesses who have said anything in this connection are Chaitram (P. W. No. 2) and Jhanhia (P. W. No. 4). The former is Tikait Singh's second cousin and his creditor to the extent of Rs. 1000: he was examined on the 31st January 1916 and stated that Tikait Singh borrowed from the plaintiff for agricultural purposes and for the marriages of his three daughters. He must, however, be wrong in regard to the marriages, for he admitted in cross-examination that the eldest daughter was married 8 or 9 years back (1907 or 1908) and the other two together 5 or 6 years back (1910 or 1911). L. Jhanhia is the plaintiff's brother and though separated has long been his recognised agent for business in the law Courts: he stated generally that all money borrowed by Tikait Singh during his agency was taken "for purposes of cultivation, sometimes for seed, sometimes for oxen, sometimes for wages and sometimes for weeding." Neither of these witnesses directly makes out any connection between the advance of Rs. 750 made on the 12th July 1911 and a particular agricultural necessity. That Tikait Singh had no really immediate need for the whole sum is clear from his letting the plaintiff have Rs. 300 back at once. Tikait Singh's own story is that he borrowed the money to gamble with and actually lost the very next day all that he retained after letting the plaintiff take Rs. 300: his daughters were according to him married 1 eight years back (1908) and the other 2, six or seven years back (1909 or 1910). The plaintiff himself did not enter the witness-box, though he evidently settled the terms of the mortgage himself and certainly presented the deed for registration. There is nothing to show that he made any inquiry as to the purpose for which the cash was wanted, and that it was given without any sort of inquiry is strongly indicated by the absence of any explanatory recital or expression in the deed. In these circumstances I am not satisfied that there was any legal necessity for the cash portion of the consideration for the mortgage. The result will be that so far as the appellant's share in the mortgaged property is concerned, the amount of principal included in the decretal amount will be reduced from Rs. 2,700 to Rs. 2,250 and that there will be a corresponding reduction in the amount (Rs. 3,402) of interest.

Turning to the remaining portion of the consideration for the mortgage, it is clear that this consisted of antecedent debts. The law appears to be settled that a father can make a mortgage of the joint family estate in order to discharge an antecedent debt and that such a mortgage can be enforced as against his sons. This exception to the general rule that the ancestral property cannot be alienated except with the consent of all the co-parceners or for legal necessity was recognised in the recent decision of the Judicial Committee above cited, in the course of which their Lordships remarked as follows (pages 131 and 132* of the report):—

"Although the correct and general principle be that if the debt was not for the benefit of an estate then the manager should have no power either of mortgage or sale of that estate in order to meet such a debt, yet an exception has been made to cover the case of mortgage or sale by the father in consideration of an antecedent debt. This being an exception from a general and sound principle, their Lordships are of opinion that the exception should not be extended and should be very carefully guarded. They desire, in the first place, to make it clear that much if not all of the law upon this subject has arisen from the necessity of protecting the rights of third persons, say the purchasers of the property who have taken their title for onerous consideration and in good faith."

It is, however, open to the son to prove that the original debts were incurred for immoral purposes. The appellant's case in this Court is that he has succeeded in proving

*Pages of 44 I. A.—*Ed.*

the original debts to have been taken for gambling and that the respondent knew of this purpose when advancing the money. For the plaintiff-respondent it is contended that the lower Court was right in disbelieving the evidence adduced to establish the alleged immoral purpose and also that the appellant was bound and has failed to prove the respondent's knowledge of that purpose, if it be held to have existed.

Upon the question whether the appellant was or was not bound to show not only an immoral purpose on the part of his father but also knowledge of that purpose on the part of the respondent, the only case cited at the Bar is *Mahoraj Singh* v. *Balwant Singh* (3) in which Stanley, C. J., and Burkitt, J., declined to place upon the son, in a case somewhat similar to the present, the burden of showing that the lender knew of the immoral purpose for which the father contracted debts. In that case their Lordships remarked as follows:—

"The case would be different if the appellants were endeavouring to recover ancestral property which had already passed out of his possession either upon a sale in execution of a decree obtained against his father or a sale carried out by his father in satisfaction of an antecedent debt. In such a case we should be bound and prepared to give full effect to the propositions laid down in *Suraj Bansi Koer's case* (4)."

In *Suraj Bansi Koer* v. *Sheo Persad Singh* (4) their Lordships of the Judicial Committee, referring to the case of *Girdhari Lall* v. *Kantoo Lall* (5), observed that it was undoubtedly authority for the following propositions:—

"*Firstly*, that where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted; and *secondly*, that the purchasers at an execution sale, being strangers to the suit, if they have not notice that the debts were so contracted, are not bound to make inquiry beyond what appears on the face of the proceedings."

But in *Sahu Ram Chandra* v. *Bhup Singh* (2) their Lordships adopted as a correct and useful statement of the law the following comment made on the above pronouncement by Stanley, C. J., in *Chandrâdeo Singh* v. *Mata Prasad* (6):—

"The first of these propositions, it will be observed, deals with cases where joint ancestral property has passed out of a joint family either under a conveyance executed by a father in consideration of an antecedent debt or in order to raise money to pay off an antecedent debt or under a sale in execution of a decree for the father's debt. It deals with cases in which ancestral property has passed out of the family, and with no other cases, and the words 'antecedent debt' seem to have been used advisedly. Likewise the second proposition deals with the case of a purchase at an execution sale. Neither proposition touches a case in which a mortgagee of a Hindu father seeks to enforce his mortgage as against the sons."

I am aware of no reported decision in which it has been held that a son in the position of the present appellant is bound to prove the lender's knowledge of an immoral purpose on the part of the borrower, nor do the Sacred Texts appear to attach any importance to the knowledge of the creditor. Thus Narada (I, 10; Sacred Books of the East, Volume XXXIII, page 45) lays down merely that "a son must pay a debt contracted by his father, excepting those debts which have been contracted from love, anger, for spirituous liquor, games, or bailments," and Brihaspati (XI, 51; Sacred Books of the East, Volume XXXIII, page 329) exempts sons from paying any debt incurred by their father "for spirituous liquor, for losses at play, for idle gifts,

(3) 28 A. 508 at p. 541; 3 A. L. J. 274; A. W. N. (1906) 117.

(4) 5 C. 148 at p. 171; 6 I. A. 88; 4 Sar. P. C. J. 1; 3 Suth. P. C. J. 589; 4 C. L. R. 226; 2 Shome L. R. 242; 2 Ind. Dec. (N. S.) 705.

(5) 14 B. L. R. 187; 22 W. R. 56; 1 I. A. 321; 3 Sar. P. C. J. 380.

(6) 1 Ind. Cas. 479; 6 A.L.J. 263; 31 A. 176 at p. 196.

for promises made under the influence of love or wrath, or for suretyship." The character of the debt is good or bad apart from any knowledge which the creditor may have of the purposes for which it is incurred, and the son's liability should, therefore, be independent of any such knowledge. I agree with the view expressed in *Maharaj Singh* v. *Balwant Singh* (3) above cited that to require such proof would practically amount to barring the defence that the debts were immoral. I hold, therefore, that the appellant had to prove merely the purpose for which he alleged the original loans to have been contracted.

It is necessary now to consider the evidence regarding each individual loan. Tikait Singh's account of the first, taken in January 1909, is that having obtained money from the plaintiff at Chhapara he lost it the same night by gambling at the house of Chaitram (P. W. No. 2), his distant cousin, in Khairi. Chaitram himself does not support this story, but speaks of only one occasion, 12 or 13 years prior to January 1916, on which Tikait Singh gambled at his house. Kodu Khan (D. W. No. 2), a cultivator of Chhapara Khurd, and Babu, Kotwar of the same village (D. W. No. 3), both profess to have been present when the money was borrowed and when it was lost. Mr. Hance, who was District Judge when the plaintiff's witnesses and the first seven of the defendant's were examined, noted on the Kotwar's deposition that at one stage he appeared to be trying to remember a forgotten part and that at other times his demeanour was not entirely satisfactory. Nokhe Singh (D W. No. 14) is a caste-fellow but no relation of Tikait Singh and lives at Likari in the Amarwara Tahsil of the Chhindwara District. He professes to have been present at Khairi, which seems to be a mile or two from Chhapara, on the occasion when Tikait Singh lost Rs. 800 at Chaitram's house. He gambled himself on that occasion having taken Rs. 100 or Rs. 150 with him and won Rs. 200 or Rs. 250. Two years later he gambled again with Tikait Singh, this time at Chhapara about the middle of 1911 when Tikait Singh lost Rs. 400 or 500, which is apparently the occasion on which Tikait Singh is said to have lost at Naipal Singh's house the entire sum (Rs. 500) borrowed on the 6th May 1911.

The second loan is said by Tikait Singh to have been lost in *Jeth* (25th May to 22nd June) 1910 at Chhapara in the house of Dadu Shah Fakir on the very day the money was borrowed. His supporting witnesses are Balju Teli of Chhapara (D. W. No. 4) and Sumran Katia of Chhapara Khurd (D. W. No. 5), both of whom deposed that they were present when the money was taken and also when it was lost. Neither mentions that any bond was executed: On the contrary both say that they saw no document executed, Balju was a casual passer-by having just come from bathing.

The third loan, taken on the 6th May 1911, has already been referred to as lost at Naipal Singh's house in Chhapara the very day it was borrowed, so that its circumstances are suspiciously similar to those of the two earlier loans. The supporting witnesses are Sheolal Singh Rajput, a tenant of Chhapara Khurd (D. W. No. 6), Hemraj Katia, Kotwar of Partabgarh (D. W. No. 7), and Nokhe Singh (D. W. No. 14). On the deposition of Hemraj Mr. Hance has noted, 'This deposition speaks for itself", the remark evidently meaning that the story told is not true. To my mind also the story is false. Hemraj had allegedly come from his village five miles away to Chhapara Khurd to arrange a marriage for his son with the daughter of Sumran (D. W. No. 5). He was staying with Sumran and having arranged the marriage was on his way to the bazar to buy *pan* and cakes wherewith to entertain a *panchayat* the following day, yet he accompanied Tikait Singh and Sheolal Singh to the plaintiff's house, saw Tikait Singh execute a bond and receive Rs. 500 there and after making his purchases in the bazar returned to the plaintiff's house, went with Tikait Singh and Sheolal Singh to Naipal Singh's house and stayed there all night to watch the gambling. Surman, re-called immediately after Hemraj was examined, could not remember the all-night absence alleged and it seems to me most improbable that in the circumstances Hemraj would have absented himself from

his host's house all night merely to watch play in which he took no part. According to Sheolal Singh Hemraj made no purchases at all and was made to accompany Tikait Singh, who treated him just as he would have treated his own dependant Sumran.

The fourth loan of Rs. 300 was taken only 19 days after the third. What became of this money Tikait Singh's deposition does not show, but his own supporting witness Mukim Khan (D. W. No. 13), a tenant of his, deposed not only to seeing the money borrowed and the bond executed but also to accompanying Tikait Singh to the house of Naipal, where by midnight the entire money was lost at play.

Taking these four sets of evidence together it is impossible to avoid noticing their similarity and completeness. On each occasion Tikait Singh obtained a considerable sum of money without furnishing any sort of security, although the plaintiff knew perfectly well that it was to be used for gambling, and forthwith lost the whole. Not only so but Tikait Singh lost at Dadu Shah's house in Chhapara on the 13th July 1911 the Rs. 450 net cash which he had borrowed the previous day. His supporting witnesses are nearly all his dependants or practically such, while several of them habitually accompanied him on his gambling expeditions and some of them like Tikait Singh himself have been fined for gambling. That Tikait Singh has long been addicted to gambling is certainly established, but more than this must be shown and I am not satisfied that the required connection between the loans of 1909, 1910 and 1911 and the gambling has been made out. That such a connection must be proved was held in *Jawahirsing* v. *Mohanlal* (7) following *Chintamanrav Mehendale* v. *Kashinath* (8) and in *Dattatraya* v. *Vishnu Narayan Dhamankar* (9). In *Vasudev Morbhat Kale* v. *Krishnaji Ballal Gokhale* (10) it was further held that proof of immoral habits in the debtor does not suffice to shift the onus of proof to the creditor.

It remains to deal with the contention advanced upon the sixth ground of appeal which relates to the fourth issue framed by the lower Court. That issue runs as follows:

"Can the plaintiff claim *post diem* interest? Can it be a charge on the property?"

Upon this issue the lower Court found in accordance with the terms of the deed that compound interest was payable till the satisfaction of the debt and constituted a charge on the property; such interest was, therefore, allowed from the date of execution of the deed until the date fixed for payment of the decretal amount. The ground of appeal simply states that all this interest should not have been allowed. At the hearing an entirely new point was taken, namely, that part of the stipulation for interest in the mortgage deed (Exhibit P-1) amounts to a penalty and should be relieved against. The stipulation in question has been thus translated for the purposes of this appeal:

"I agree to pay interest at Re. 1-5-0 per cent. per mensem in this way—Rs. 1,000 and interest on the total amount in 12 months from to-day, Rs. 1,000 and interest on the total amount in 24 months from this day and Rs. 1,000 and interest on the total amount in 36 months from this day, the whole amount thus to be paid off."

It is urged that the mortgagor thus bound himself to pay interest on the entire principal (Rs. 3,000), even after it had been reduced first by Rs. 1,000 and again by a like amount, by payment of the first and second instalments respectively. The words "interest on the total amount" used by the translator represent the words "*kul ka sud*" in the original and in my opinion that expression cannot reasonably be interpreted as meaning the entire original principal. The word "*kul*" seems to signify nothing more than the balance of principal due for the time being and that the parties so understood it in the lower Court is strongly indicated by the fact that no plea of penalty was taken by the appellant's legal advisers. It was held in *Bhagwant Atmaram* v. *Ganpati Chowdhuri Kunhi* (11) that such a plea is one of fact rather than of law: it is, therefore, not one which can ordinarily be raised for the first time in appeal.

The result is that the decree of the lower Court will be modified by reducing

(7) 6 C. P. L. R. 140.
(8) 14 B. 320; 7 Ind. Dec. (N. S.) 674.
(9) 12 Ind. Cas. 949; 36 B. 68; 13 Bom. L. R. 1161.
(10) 20 B. 534; 10 Ind. Dec. (N. S.) 921.
(11) 1 N. L. R. 9 at p. 14.

as above indicated the amount of principal and interest for which the appellant's four-anna share of Mauza Chhapara Khurd is liable to be foreclosed. Costs in this Court will be apportioned on the assumption that the appellant has succeeded in respect of $\frac{1}{4}$th and failed in respect of $\frac{3}{4}$ths of his claim. In the lower Court the plaintiff will bear his own costs to the extent of Rs. 15 for Court-fees, Rs. 30 for Pleader's fee and Rs. 20 for diet money of witnesses and will also pay Rs. 30 on account of the appellant's Pleader's fee. The date fixed for payment is altered to the 30th November next and interest at the contract rate will be calculated up to that date.

Appeal partly allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 495 OF 1916.

January 19, 1918.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

JAHANGIRA—DEFENDANT—APPELLANT

versus

KARRAR HUSAIN—PLAINTIFF—RESPONDENT.

Landlord and tenant—Agreement to pay rent—Tenant, whether can question right of landlord to sue for rent—Estoppel—Agra Tenancy Act (II of 1901), s. 10—U. P. Land Revenue Act (III of 190), s. 36—Mortgage of sir *and* khudkasht *land—Ex-proprietary rights—Agreement of rent between mortgagor and mortgagee, whether can be accepted by Revenue Authorities.*

Defendant, a proprietor in a *mahal*, mortgaged his entire share, including his *sir* and *khudkasht* lands, to the plaintiff, and then entered into a contract of lease with the latter by which he undertook to hold the *sir* and *khudkasht* lands as tenant of the plaintiff and agreed to pay a certain rent therefor. The rent agreed upon between the parties was accepted by the Assistant Collector as a fair rent under section 36 of the U. P. Land Revenue Act. The plaintiff sued for rent on the basis of that agreement and the defendant resisted the claim on the grounds (1) that the right to sue vested in the entire body of co-sharers in the *mahal* to which the lands in suit appertained, (2) that the agreement to pay a certain rent contravened the provisions of section 10 of the Agra Tenancy Act:

Held, (1) that the defendant having admitted the plaintiff to have held the demised lands in severalty and having covenanted to occupy them as his tenant and to pay him rent therefor, it was not open to him to object that the other co-sharers should have joined in the suit; [p. 514, col. 1.]

(2) that it was competent to the Assistant Collector acting under section 36 of the U. P. Land Revenue Act to accept the agreement of rent come to between the parties. [p. 514, col. 2.]

Section 10 of the Agra Tenancy Act fixes a maximum rent and there is nothing to prevent the parties concerned from contracting for the payment of a lower rate, or from coming to an understanding amongst themselves as to what the prevailing rates of rent are and what advantages the ex-proprietary tenant is likely to get under the section. Such an agreement is not enforceable in itself and cannot be sued upon as it stands. What is wanted is an order under section 10 (5) fixing the rent to be paid by the ex-proprietary tenant, but the law does not lay down that this order cannot lawfully be based upon an agreement come to by the parties, still less that in passing it the Collector must not take into account the terms of such an agreement. [p. 514, col. 2; p. 515, col. 1.]

Second appeal from a decree of the District Judge, Meerut, reversing that of the Assistant Collector, First Class.

Mr. *Bhagwati Shankar*, for the Appellant.

Mr. *Sital Prasad Ghosh*, for the Respondent.

JUDGMENT.

PIGGOTT, J.—These are three connected appeals by a defendant in three connected suits for arrears of rent. It appears that the defendant, being a proprietor in a *mahal*, mortgaged his entire share with possession to the plaintiff. At the time of the mortgage the defendant was personally occupying certain plots of land in the *mahal* as his *sir* or *khudkasht*. The lands so occupied by him fell naturally into three classes. There were the *sir* lands strictly so called, there were *khudkasht* lands which the defendant had held for the full statutory period of twelve years, and to which, therefore, in law all the incidents of *sir* attached although they were not yet recorded as such, and finally there were *khudkasht* lands which the defendant had occupied for less than the statutory period. Having mortgaged his share with possession the defendant entered into a contract of lease with the plaintiff. By this contract he undertook to hold all the lands of each of the three descriptions referred to above as tenant of the plaintiff at a certain specified rent for each class of land. The present suit is to enforce the terms of that agreement. It has been resisted on

a variety of grounds; but we are concerned only with the points raised by the petitions of appeal before us. One of the pleas taken is that the decrees of the lower Appellate Court are not in accordance with the judgment, inasmuch as the total sum decreed in favour of the plaintiff in the three decrees is in excess of the total of Rs. 165 awarded by the judgment. We have looked into this point and are satisfied that there is no force in it. The judgment clearly intended to award interest, at least up to the date of the institution of the suit, at the statutory rate of twelve per cent. per annum on the sum of Rs. 165, and this interest is sufficient to account for the difference between Rs. 165 and Rs. 196-1-0, which is the total of the three decrees, including interest to date. Two other points have been argued in this case: one is that the plaintiff is not entitled to sue at all, because the right to collect the rents of these lands is not vested in the plaintiff alone but in the entire body of co-sharers in the *mahal* to which the lands in suit appertain. In our opinion the defendant is estopped from raising this plea. He entered into a rent-agreement with the plaintiff in respect to these particular lands. If the plaintiff in enforcing his rights under that agreement is trenching on the rights of the other proprietors in the *mahal*, the latter have their remedy, either by way of a suit for settlement of accounts or by way of an application for partition. At any rate this defendant has admitted this plaintiff to have held these particular lands in severalty and has covenanted to occupy them as his tenant and to pay him rent therefor. The defence that other co-sharers should have joined in this suit is not open to him. The next point argued, although it is not easy to see how it is raised by any specific plea taken in the petition of appeal to this Court, has been that the rent agreement between the parties, is unenforceable, being in contravention of the provisions of section 10 of the Local Tenancy Act (No. II of 1901). This contention, of course, affects two of the suits only, namely, those in which rent is claimed in respect of the *sir* and of the *khudkasht* of twelve years' standing or over. Under the provisions of section 10 aforesaid the defendant became an ex-proprietary tenant of these lands and entitled to the privileges of such tenant. The law required that his rent should be fixed by the Collector under section 36 of the N. W. P. and Oudh Land Revenue Act of 1901. When these appellants were first before this Court the facts were not as clear as they should have been made, but they are established now by the findings which have been returned on the issues remitted by this Court. It is certain that there was a proceeding purporting to be under section 36 aforesaid, by which the rent payable by the defendant to the plaintiff for these particular lands was fixed at the amounts specified in the agreement come to by the parties themselves. There is nothing in law to prevent the Revenue Court from accepting such an agreement. No doubt it is the duty of the Revenue Courts—and the reported decisions of the Board of Revenue show that that duty is jealously performed—to see that the provisions of section 10 of the Tenancy Act (No. II of 1901) are not evaded and that a reckless and improvident proprietor is not permitted to contract himself out of them. At the same time all that the law has said on this subject of rent is that the ex-proprietary tenant is entitled to hold at a rate which shall be four annas in the rupee less than the rate generally payable by the non-occupancy tenants for lands of similar quality and with similar advantages in the neighbourhood. To begin with, it is obvious enough that these provisions fix a maximum rent, and there is nothing to prevent the parties concerned from contracting for the payment of a lower rate. Then again, there is nothing in law to prevent the parties from coming to an understanding amongst themselves as to what the prevailing rates of rent are and what advantages the ex-proprietary tenant is likely to get under the statutory provisions in question. They may come to a conclusion of their own as to what a fair rent, fixed with regard to the provisions of section 10 aforesaid, is likely to be, and the law certainly does not forbid an agreement to pay the same. Such agreement is not enforceable in itself and could not be sued upon as it stands. What is wanted is an order under section 10, clause 5 aforesaid, fixing the rent to be paid by the ex-proprietary tenant; but the law

does not lay down that this order cannot lawfully be based upon an agreement come to by the parties, still less that in passing it the Collector must not take into account the terms of such an agreement. The contention before us, after the findings have been returned on the remanded issues, has been that the proceedings which terminated in the order fixing the rent under section 36 of the Land Revenue Act were irregular and that there was nothing to show that the question as to whether the agreement come to by the parties had given due effect to the provisions of section 10 of the Tenancy Act in favour of the ex-proprietary tenant, was present to the mind of the Collector or Assistant Collector and duly considered by him. On this there are two things to be said. One is that the presumption of law is in favour of validity and regularity in the proceedings of a Court of Justice, and not the contrary. We know that the Assistant Collector acted upon a report of the Tahsildar. That report is not before us; but there is no reason why we should presume that it did not contain an expression of the Tahsildar's opinion as to the suitability and propriety of the rent agreed upon between the parties. In the next place, it is at least open to argument whether in a suit like the present the Court can enquire into the materials upon which the Collector or the Assistant Collector proceeded when he passed his order fixing the rent under section 36 of the Land Revenue Act.

It so happens, however, that we are able to clinch this matter in the most satisfactory manner possible. The enquiry made under the orders of this Court shows that the rent agreed to be paid for the *sir* and *khudkasht* lands was a favourable rent and gave to the ex-proprietary tenant the full benefit of the statutory provisions. The Court below in enquiring into this point found that it was useless to take as exemplars the plots of land actually held by the few non-occupancy tenants (strictly so called) in this village, the fact being that all the best lands were included in the *sir* or *khudkasht*. It was inevitable, therefore, that the Court should enquire into the prevailing rates of rent paid for lands of similar quality and with similar advantages to those in suit, by a sub-tenant taking a lease of the same from the holder of the *sir* or the *khudkasht* rights. It has found that such lands are ordinarily let out for a rate of about Rs. 12 per *pucca bigha* and that the rent which the defendant covenanted to pay does not quite amount to Rs. 8 per *pucca bigha*. It is true that, when formally recording his finding on the issue remitted to him, the learned District Judge has expressed himself very clumsily and has fallen into what we have no reason to doubt is a clerical error. He says that the rent fixed on the defendant's *sir* and *khudkasht* land was "nearly equal" to that payable by other tenants for lands of similar quality and with similar advantages. If this finding be read in connection with the reasoning on which it proceeds, it is fairly clear that the Court intended to find that the rent so fixed was nearly equal, after the deduction of the statutory 25 per cent. It may be that in the absence of a petition of objections we might have felt compelled to hold the parties bound by the finding as recorded, if the case had turned upon this single point, but the really decisive issue in the case is the second issue as to the order of the Assistant Collector fixing the rent. And when we are asked to consider whether there is any ground for presuming that in passing that order the Collector had overlooked the provisions of section 10 of the Tenancy Act and had not allowed the ex-proprietary tenant the advantages secured to him by that section, we are clearly entitled to take into consideration, not merely the finding actually recorded on the first issue, but the reasoning upon which that finding proceeds and the conclusions actually arrived at by the Court below on the evidence considered by it. The result is that there is really no force either in law or in equity in any of these appeals and we dismiss them accordingly with costs.

WALSH, J.—I agree.

BY THE COURT.—The order of the Court is that this and the two connected appeals are dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1076 OF 1915.

January 31, 1918.

Present:—Mr. Justice Fletcher and Justice Sir Shamsul Huda, Kt.

BALIRAM KOCH—PLAINTIFF—APPELLANT

versus

SABHA SHEIKH—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), s. 20—Part-payment of principal, endorsement of, not signed by payer, whether saves limitation.

An endorsement of a part-payment of the principal written on the back of a bond on behalf of the person making the payment, but not signed by the payer or bearing his mark, does not operate to save limitation under section 20 of the Limitation Act. [p. 517, col. 1.]

Appeal against the decree of the Subordinate Judge, Gouhati, in Assam Valley Districts, dated the 16th February 1915, reversing that of the Munsif, Mangaldai, dated the 31st July 1913.

FACTS appear from the judgment.

Babu *Jogesh Chandra Roy* (with him Babu *Anilendranath Roy Choudhury*), for the Appellant.—Plaintiff brought this suit on a simple money-bond executed in his favour by the defendant on 8th February 1908. The suit was instituted on the 23rd January 1915. Part-payment of the principal money was made on 24th January 1910. Defendant denied payment of this sum. The 1st Court decreed the suit. The lower Appellate Court dismissed the suit on the ground of limitation.

The question is if an illiterate person requests another person to make payment on his behalf and the payment is accordingly made but without the signature and without any mark of the illiterate person, would that payment save limitation under section 20 of the Indian Limitation Act? The signature of him who can write must be in his handwriting. See *Mukhi Haji Rahmuttulla* v. *Cuverji Bhuja* (1), *Nivajkhan Nathankhan* v. *Dadabhai Musse Valli* (2) and *Lodd Govindass* v. *Rukmani Bhai* (3). As to illiterate persons reference may be made to *Madabhushi Seshacharlu* v. *Singara Seshaya* (4) and *Jamna* v. *Jaga Bhana* (5).

[FLETCHER, J.—There is no mark in this case.]

The question was never argued before the first Court. The only fact was the fact of payment. Marking is not writing. Had there been any mark the case would have come directly under the ruling reported as *Jamna* v. *Jaga Bhana* (5).

Babu *Lal Mohan Ghose* for Mr. *N. C. Burdalois*, for the Respondent, was not called upon.

JUDGMENT.

FLETCHER, J.—This is an appeal by the plaintiff against the decision of the learned Subordinate Judge of the Assam Valley Districts, dated the 16th February 1915, reversing the decision of the Munsif of Mangaldai. The plaintiff brought the suit to recover a certain sum of money said to be due on a simple money-bond dated the 8th February 1908. The suit was instituted on the 23rd January 1915. In order to show that his suit was not barred under the provisions of the Indian Limitation Act, the plaintiff relied upon a part-payment of the principal said to have been made on the 24th January 1910 and evidenced by an endorsement in writing on the back of the bond. The ground on which the learned Judge decided the case was that the endorsement of the fact of part-payment of the principal on the back of the bond was not signed by the person making the payment, that is, the defendant, nor did it bear his mark, he being illiterate. It is quite clear on the evidence that the defendant could not write and that the endorsement was written by another man for him. It is quite clear also that he did not make any mark on the back of the bond, because we have looked at the bond and the learned Judge was right in saying that there was no sign of any mark to the endorsement. The question what is a sufficient handwriting of the person making the payment within the meaning of the proviso to section 20, sub-section (1), of the Indian Limitation Act has formed the subject-matter of judicial decision and the latest case, so far as we have been referred to, is a decision of

(1) 23 C. 546 (F. B.); 12 Ind. Dec (N. S.) 363.
(2) 38 Ind. Cas. 359; 41 B. 166; 18 Bom. L. R. 973.
(3) 21 Ind. Cas. 302; 38 M. 438; 14 M. L. T. 310; 1 L. W. 529.
(4) 7 M. 55; 2 Ind. Dec. (N. S.) 623.
(5) 28 B. 262; 5 Bom. L. R. 1031.

Chief Justice Jenkins and Mr. Justice Aston of the Bombay High Court [*Jamna* v. *Jaga Bhana* (5)] and the view adopted by the learned Judges in that case was that, if the payer affixed his mark beneath the endorsement written for him in the case of an illiterate person, that was a sufficient handwriting to satisfy the proviso to section 20, sub-section (1), of the Indian Limitation Act. There is no case that has ever yet suggested that, in the absence of mark, the clear words of the section requiring the payment and the handwriting to be made by one and the same person are complied with. I think the learned Judge of the lower Appellate Court came to a correct conclusion when he held that, on the facts found, the fact of the payment did not appear in the handwriting of the defendant. In that view, the judgment appealed from is correct. The present appeal, therefore, fails and must be dismissed with costs.

SHAMSUL HUDA, J.—I agree.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 408 OF 1917.

November 28, 1917.

Present:—Mr. Mittra, A. J. C.

SAWAI SINGHAI NATHURAM
—PLAINTIFF—APPELLANT
versus
KALLOO AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Acquiescence—Tenant cultivating waste land without objection—Presumption of contract of tenancy.

Where a plea of acquiescence or of standing by has been raised by a tenant in order to resist the claim of the landlord to eject him and it is proved that the tenant has been encouraged to spend money, he can claim the protection given by a Court of Equity. In the absence of such a plea of "standing by" or acquiescence a Court of fact may, if the circumstances of the case justify, come to the conclusion that the landlord had expressly or impliedly contracted to lease the land to a tenant whose reclamation of waste land has not been objected to for some years. This, however, is not a presumption of law but a presumption of fact which may or may not arise in a case. [p. 517, col. 2; p. 518, col. 1.]

Appeal from the decree of the District Judge, Saugor, in Civil Appeal No. 79 of 1917, decided on the 8th May 1917.

Mr. *G. L. Subhedar*, for the Appellant.

JUDGMENT.—I think the case has been rightly decided by the Courts below, though there are certain passages in the judgments of the lower Appellate Court to which exception has been taken, and rightly taken, by the learned Counsel for the appellant. The defendants have been recorded at the recent Settlement in 1915 as ordinary tenants of field No. 628 to which Re. 1 has been assessed as rent. The case of the defendants was that the *banjar* land was leased to their predecessor some fifteen years ago on the understanding that rent will be fixed at a later date. The plaintiff *malguzar* sues to eject the defendants, but is met with the initial difficulty of establishing the incorrectness of the entry made at the recent Settlement. All that is pointed out is that the evidence of the Patwari, if accepted, shows that the defendants have not cultivated for more than seven years. Assuming that this is correct, it does not follow that the entry made in the settlement is incorrect. For it is by no means impossible that an agreement of the nature pleaded by the defendants did take place and which agreement is given effect to in the settlement record. The learned District Judge, however, without referring to any particular judgment has stated that it has been held by the Court of the Judicial Commissioner in several cases in the Bilaspur District that when a tenant is allowed to cultivate waste land by a *malguzar*, who knows about the cultivation, without objection for more than two years, a presumption of the existence of a contract of tenancy arises and the *malguzar* cannot be allowed to eject the tenant after the latter has spent money and labour in converting the waste land into a fertile holding. It is of course, clear that where a plea of acquiescence or of standing by has been raised, a tenant who is encouraged to spend money may claim the protection given by a Court of Equity on the principle laid down by Lord Kingsdown in *Ramsden* v. *Dyson* (1).

(1) (1866) 1 H. L. 129; 12 Jur. (N. S.) 506; 14 W. R. 926.

In the absence of such a plea of "standing by" or acquiescence a Court of fact may, if the circumstances of the case justify, come to the conclusion that the landlord had expressly or impliedly contracted to lease the land to a tenant whose reclamation of waste land has not been objected to for some years. This, however, is not a presumption of law but a presumption of fact, which may arise or may not arise in a case. I see, however, no foundation for the rule laid down by the District Judge of the limitation of two years. What length of possession without objection on the part of the landlord would justify a Court of fact in accepting a story of a lease depends upon the facts of each case. No rule can be laid down upon this point. The actual decision come to in the case, however, seems to be correct, and this appeal is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1826 OF 1915.

February 12, 1918.

Present:—Mr. Justice Richardson and Mr. Justice Walmsley.

KANDARPA NARAN MANDAL—PLAINTIFF—APPELLANT

versus

SRIDHAR ROY AND OTHERS—PRINCIPAL AND *Pro forma* DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 116, 120, 132—Mortgage for loan of paddy, suit on—Limitation.

A suit on a mortgage-bond executed for a loan not of money but of paddy is governed by Article 116 or Article 120 and not by Article 132 of the Limitation Act. [p. 519, col. 1.]

Appeal against the decree of the District Judge, Bankura, dated the 24th April 1915, affirming that of the Munsif, 1st Court of that District, dated the 4th April 1914.

FACTS appear from the judgment.

Babu *Dwarka Nath Chakrabarty* (with him Babus *Upendra Lal Roy* and *Gopal Chandra Chakrabarty*), for the Respondents, raised a preliminary objection that on the face of the facts on the record the suit out of which the appeal arose, was barred by limitation, as it was not brought within six years from the due date of the bond on which the paddy borrowed should have been repaid. As the bond was in respect of a loan not of money but of paddy, Article 132 of the Limitation Act did not apply and the suit was governed by Article 116 or Article 120.

Referred to *Rash Bihari Das* v. *Kunjabihari Patra* (1).

[RICHARDSON. J.—Was the question raised in the Court below ?]

Yes. The first Court found against the defendant on the question of limitation, but the lower Appellate Court having dismissed the suit on the ground that it was not maintainable in its present form did not enter into the question of limitation. However, if on the face of the record the suit was barred, then even if the plea of limitation was not expressly taken the Court could give effect to it.

Babu *Bejoy Kumar Bhattacharjee*, for the Appellant.—The *solenamah* (compromise) contains an admission of mortgage, and the suit is within time from the first date of default as contained in the *solenamah*.

The defendants have said in their written statement that they have made payments of interest up till 1316 B. S. and the suit is within time from that date. The defendants, having admitted that payments have been made up till 1316, cannot now turn round and say that the suit is time-barred. The time must be taken to have run from the date when the defendants admit to have made payments.

The law laid down in *Rash Bihari Das* v. *Kunjabihari Patra* (1) is, I submit, not good law, as it did not take into consideration the definition of mortgage as contained in section 58 of the Transfer of Property Act. Article 122 of the Limitation Act is applicable to this case. Refers to *Nilmony Singha* v. *Haradhan Dass* (2).

(1) 37 Ind. Cas. 805; 24 C. L. J. 348.
(2) 13 C. W. N. clxxxiv (184 *notes*.)

JUDGMENT.—This appeal is preferred by the plaintiff in a suit to enforce a mortgage security. The parties to the suit are not the original mortgagor and the original mortgagee. They are persons to whom the mortgage and the equity of redemption have respectively been transferred. The Courts below have concurred in dismissing the suit on the ground that it is not maintainable in its present form. Whatever may be said on that subject, on which we express no opinion, a preliminary point has been taken before us on behalf of the defendants that the suit is barred by limitation. The contention is that inasmuch as the mortgage-bond was executed by the respondent in respect of a loan, not of money but of paddy, Article 132 of the Limitation Act has no application and the suit is governed either by Article 116 or Article 120. This contention is founded on the ruling of the late Chief Justice Sir Lawrence Jenkins and Mr. Justice Holmwood in the case of *Rash Bihari Das* v. *Kunjabihari Patra* (1).

The learned Pleader for the plaintiff has argued that that decision cannot be supported, and that the word 'money' in Article 132 should be construed as including money's worth. We are bound, however, to follow the decision unless we are prepared to refer the matter to a Full Bench, and as at present advised we are not disposed to take that course. On the face of the plaint there can be no doubt that this suit was brought more than six years after the due date of the bond, the date on which the paddy borrowed should have been repaid. It is said that the defendants in their written statement pleaded payment of interest for several years, but that plea was negatived in that Court and the plaintiff has given no credit for any payment of interest such as might have saved the suit from the bar of limitation. Some reference has been made in the course of the argument to a consent decree made in a suit between the original mortgagor and the original mortgagee. The decree is not referred to in the plaint. And even if the compromise amounted to an admission of liability by the mortgagor, that admission was made more than six years before the date of the institution of this suit and cannot help the plaintiff. In our opinion the objection of the respondent that the suit is barred by limitation is an objection which on the face of the record must prevail.

The result is that this appeal must be dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 884 OF 1916.

September 25, 1917.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Oldfield.

APPU ROW—PLAINTIFF—APPELLANT

versus

KAVERI—DEFENDANT—RESPONDENT.

Madras Estates Land Act (I of 1908), s. 185, scope of —Private land of zemindar *—Evidence other than that specified in section, admissibility of—Presumption.*

Section 185 of the Madras Estates Land Act permits the landlord to produce any evidence other than that specified in the section to prove that the land in dispute is his private land, and not *ryoti* land. [p. 520, col. 2.]

The section raises a presumption in favour of the *ryot*, but the question to be considered is whether the evidence adduced by the landlord is sufficient to rebut that presumption. [p. 520, col. 2; p. 521, col. 1.]

Second appeal against the decree of the District Court, Salem, in Appeal Suit No. 130 of 1914, preferred against that of the Court of the District Munsif, Dharmapuri, in Original Suit No. 761 of 1913.

Mr. *K. R. Subramania Sastri*, for the Appellant.

Messrs. *S. Viswanadha Aiyar* and *P. N. Nageswara Aiyar*, for the Respondent.

JUDGMENT.—The suit was in ejectment, and one of the questions before the lower Appellate Court was whether the land in dispute was the private land of the plaintiff or the *ryoti* land of the defendant. The District Munsif held in favour of the plaintiff, but, in appeal, the learned District Judge was of opinion that section 185 of the Madras Estates Land Act permitted only a specific kind of evidence to be adduced in proof of the allegation whether certain land was the private land of the landholder. Taking that view of the section, he came to the conclusion that the plaintiff failed to adduce any proof that the land was his private

land. The learned Pleader for the appellant points out that there were at least two documents, Exhibits A and B, which contained an admission of the plaintiff's title. The statement which is said to amount to an admission is to the effect that the land belongs to the plaintiff's *patta*. He also points out that there was evidence of the plaintiff that the land was his private land. Further there was evidence furnished by the conduct of the defendant which supports the plaintiff's case. Section 185 says: "When in any suit or proceeding it becomes necessary to determine whether any land is the landholder's private land, regard shall be had to the local custom and to the question whether the land was before the first day of July 1898 specifically let as private land and to any other evidence that may be produced, but the land shall be presumed not to be private land until the contrary is shown. Provided that all land which is proved to have been cultivated as private land by the landholder himself, by his own servants or by hired labour with his own or hired stock for twelve years immediately before the commencement of this Act, shall be deemed to be the landholder's private land." The Legislature, whether it was necessary for it to mention certain classes of evidence or not, does lay down that evidence other than that mentioned may be produced in support of the landholder's allegation. With reference to Exhibit A, which is a *muchilika* executed by the defendant in 1904, that is, since 1st July 1898, it is urged that section 185 in mentioning that "regard shall be had to local custom and to the question whether the land was before the 1st day of July 1898 specifically let as private land", means to exclude any evidence of letting as private land after 1st July 1898. That seems to be the view taken by Sadasiva Aiyar. J., in *Mulpuru Lakshmayya* v. *Varadaraja Apparow* (1), while Mr. Justice Sundara Aiyar's view was to the contrary. In *Chintaman Reddi Sanyasi* v. *Rajasagi Appala Narasimha Raja Garu* (2) the learned Chief Justice and Ayling, J., had a similar question before them, and it is contended by the learned Pleader for the respondent that they took the same view of section 185 as Sadasiva Aiyar, J., but we do not think that this is correct. On the other hand, it seems to us that in two places they point out that, besides the classes of evidence mentioned in section 185, it is open to the landlord to produce any other evidence which may be relevant to his purpose. No doubt there is a sentence in that judgment which might perhaps be taken to lend some countenance to the argument of the learned Pleader for the respondent; it is to this effect:—"What the Court has to find is, with regard to the classes of evidence mentioned in the section, whether the land was private land at the passing of the Act". But if that sentence is read along with the rest of the judgment, it seems to us to be fairly evident that the learned Judges did not mean to lay down that, under section 185, only certain classes of evidence are admissible, for the result of that would be that they would not be giving effect to the words "any other evidence that may be produced". We do not see any reason why we should give such a narrow construction to section 185 as suggested by Sadasiva Aiyar, J. Besides, Exhibit A is sought to be used by the plaintiff not to prove the fact of letting but as containing an admission of his title to the land in question.

With reference to Exhibit B it is contended on behalf of the respondent that it is an agreement to lease for ten years and, therefore, inadmissible for want of registration. It is a *razinama* filed by the parties, the defendant and the plaintiff, containing several terms, one of which is a grant of lease for ten years. The passage upon which the plaintiff relies is "that this land belongs to the plaintiff's *patta*", which, he says, is an admission of his title.

We think that the learned District Judge was wrong in his construction of section 185 and there is evidence which has to be considered in connection with the question as to whether the plaintiff has proved that the land is his private land. We may point out that section 185 clearly raises a presumption in favour of the defendant, but the question that has to be considered is whether the evidence which has been

(1) 17 Ind. Cas. 353; 36 M. 168 at p. 185; 23 M. L. J. 624; (19 2) M. W. N. 1193; 12 M. L. T 561.
(2) 27 Ind. Cas. 50; (1914) M. W. N. 766.

adduced by the plaintiff is sufficient to rebut that presumption.

We set aside the decree of the lower Appellate Court and remand the appeal for disposal according to law. Costs will abide the result.

Appeal allowed.

M. C. P.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 585 OF 1915.

January 24, 1918.

Present:—Mr. Justice Richardson and Mr. Justice Beachcroft.

REBATI MOHAN DAS, MINOR, BY HIS MOTHER, NEXT FRIEND AND GUARDIAN *Srimati* NABA DURGA AND ANOTHER—DEFENDANTS NOS. 1 AND 2—APPELLANTS

versus

NADIABASHI DE AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Mortgage of holding—Purchaser of holding, whether can redeem—Suit on mortgage—Purchaser not made party, effect of.

Plaintiff, mortgagee of a *raiyati* holding, brought a suit on foot of his mortgage. Defendant, who was the purchaser of the holding and had been recognised by the landlord, applied to be made a party to the suit. He did not claim to redeem the mortgage, but set up a title paramount to the mortgagee and also questioned the *bona fides* of the mortgage transaction. His application was rejected. The plaintiff obtained a decree and purchased the holding in execution thereof. He then brought a suit to eject the defendant:

Held, that the defendant had a right to redeem the mortgage. [p. 523, col. 1.]

Appeal against the decree of the District Judge, Tipperah, dated the 16th of December 1914, affirming that of the Officiating Additional Munsif of that place, dated the 19th of September 1913.

Dr. *Sarat Chandra Bysack* and Babu *Bepin Chandra Bose*, for the Appellants

Babus *Jogesh Chandra Roy* and *Sasadhar Roy*, for the Respondents.

JUDGMENT.

RICHARDSON, J.—This second appeal is preferred by defendants Nos. 1 and 2 in a suit for recovery of possession of certain land. At the date of the suit the defendant No. 2 was a tenant of defendant No. 1. We are informed that there is reason to believe that defendant No. 2 has since purchased the rights of defendant No. 1. As to the facts found, it appears that on the 31st March 1895, one Jamaraddi mortgaged the property in suit with other properties to the plaintiffs. The property in suit is a *raiyati* holding.

On the 6th May 1896 Hara Chandra Das, the father of defendant No. 1, in execution of a money-decree obtained by him against the mortgagor purchased the property and subsequently in the same year obtained actual possession from the Court.

In 1907 the plaintiff brought a suit upon the mortgage of 1895 against the heirs of the mortgagor and others. To that suit he did not make the father of defendant No. 1 a party. Accordingly on the 29th May 1907 Hara Chandra Das applied by a petition to be joined as a party defendant. The plaintiff opposed the application, which was rejected by the Court. The mortgage suit proceeded and in the result the plaintiffs obtained a mortgage decree in the usual form and in execution purchased the property themselves on the 9th September 1908. On the 2nd March 1909 the plaintiffs obtained symbolical possession from Court. Their subsequent efforts to obtain actual possession led to a criminal proceeding under section 145, Criminal Procedure Code, which was decided on the 24th February 1909 in favour of defendant No. 1. The plaintiffs then instituted the present suit on the 18th June 1912. At this stage of the suit all that is claimed by the defendants-appellants is that the plaintiffs' title to eject them from the disputed land is subject to their right to redeem the plaintiffs—a right which the Courts below have by these decrees concurrently refused to recognise. In denying any right to redeem in the defendants-appellants the Courts below have acted on two grounds. The first ground appears to be that they were under the impression that the defendants did not claim the right to redeem in this suit and were unwilling to redeem. The second ground which is the more substantial ground is that the defendants, if they ever had any right to redeem, are precluded from exercising that right by reason of the application which Hara Chandra Das made in the mortgage suit

of 1895. I will deal first with the second of these two grounds.

The petition which Hara Chandra Das presented to the Court in that suit has not been produced by either of the parties to the present suit. But we have the order of the Court on the petition passed on the 30th May 1907. The order begins in this way: "I have heard the Pleader for the plaintiff and the Pleader for the person who prays to be added as a defendant. The plaintiff's Pleader objects to the third party being joined as a defendant." Then it goes on to say: "The plaintiffs sue on a mortgage of a *raiyati*. The third person who seeks to be made a defendant says he purchased the land at a money sale and got himself registered in the *sherista* of the landlord. He claims the land on the strength of such recognition also." He concludes with these words: "I do not think I should be justified in adding this person as a defendant against the will of the plaintiff, particularly when he claims a title which may be pleaded as defeating the plaintiff's right of mortgage." Now upon the terms of that order it is clear that Hara Chandra Das's application to be made a party was rejected at the instance of the mortgagee plaintiffs. The grounds on which the Munsif based his order are not very clear. It may be that Hara Chandra Das indeed set up a title which was paramount to the mortgage title of the plaintiffs. His plea may have been of the same nature as the plea which was put forward by the purchaser of a part of the mortgaged property in the case of *Radha Kant Chakravarti* v. *Ramananda Shaha* (1). If that was the plea of Hara Chandra Das, it is possible that if he had been made a party and the plea had been tried it would have proved unsuccessful in the event as it did in the case cited. But, apart from that plea, it is not at all clear. Hara Chandra Das did not also set up the case on which the defendant No. 1 now relies. The pleadings in the present suit lend some support to the view that Hara Chandra Das also put forward the contention that the plaintiffs' mortgage was not a *bona fide* transaction. If, therefore, Hara Chandra Das had been permitted at his own instance to become a party defendant in the suit, he might have filed a written statement putting forward both defences to the plaintiffs' claim. As a matter of fact, however, he was not made a party, he had no opportunity of filing a written statement or of stating his case in a formal way. In that state of things, in my opinion, the Courts below were wrong in holding, on the authority of such cases as *Nilkant Banerji* v. *Suresh Chandra Mullick* (2) and *Jaggeswar Dutt* v. *Bhuban Mohan Mitra* (3), that the defendant-appellants are precluded in the present suit from asserting any right to redeem. In the case of *Nilkant Banerji* v. *Suresh Chandra Mullick* (2) decided by the Privy Council the defendant who claimed the right to redeem had been made a party to the mortgagee's suit. In that suit he had set up the paramount title which he claimed and he had said nothing about his right to redeem. Having been a party to the suit and the suit having been dismissed as against him on the ground that as he claimed a paramount title he was not a proper party to the suit, it was held that in the subsequent suit brought by the mortgagee for possession of the property, it was too late for him then to set up a new title under which he would have the right of redemption. The present case is almost the converse of that case. Hara Chandra Das was not permitted to become a party to the mortgage suit; and, as I have said he had no opportunity in that suit to put forward the case that even if he failed to establish a paramount title he had at least a right which would entitle him to redeem the plaintiffs. In my opinion, therefore, the Courts below are wrong in their conclusion that in the present suit the defendant-appellants are debarred from setting up a right of redemption.

Coming next to the first ground I find it somewhat difficult to reconcile the statements in the judgment of the Courts below that the appellant claims no right to redeem with the fact that this question

(1) 13 Ind. Cas. 698; 39 C. 513; 16 C. W. N. 475; 15 C. L. J. 369.

(2) 12 C. 414; 12 I. A. 171; 9 Ind Jur. 439; 4 Sar. P. C. J 685; 6 Ind. Dec. (N. S.) 281 (P. C.).

(3) 33 C. 425; 3 C. L. J. 205.

is discussed in both the Courts in connection with issues Nos. 2 and 9 framed by the first Court. As regards the lower Appellate Court, it appears that the right to redeem was expressly asserted and insisted upon in paragraph 4 of the grounds of appeal filed in that Court. As to the plaintiffs' pleadings paragraphs 6 and 8 of the plaint embody an admission of the right of the defendants to redeem, should they be able to prove that the decree under which Hara Chandra Das obtained possession was not a decree founded upon a collusive transaction. In paragraph 6 of the plaint the plaintiffs say: "Particularly, even if the defendant No. 1 or his predecessor Hara Chandra Das had any decree, still the plaintiffs' mortgage being preferential, they had no right to retain the land of the schedule in their possession without redeeming the same." In paragraph 8 the plaintiffs say again: "If it is held that defendant No. 1 has any right to redeem any mortgage, then he may be given the opportunity to pay what is justly due to the plaintiffs on account of their mortgage; and if that opportunity be not availed, then a decree for possession may be awarded to the plaintiffs." Each party was, as usual, disputing the validity of the transaction under which the other claimed title. The plaintiffs said that Hara Chandra Das's money-decree was based on a collusive deed without consideration. The defendants impugned the mortgage of the plaintiffs on very much the same ground. What the Courts below have found is that both the transactions were *bona fide* and real transactions. It would seem to follow from the admissions in paragraphs 6 and 8 of the plaint that the plaintiffs' right to eject the defendants must be subject to the defendants' right to redeem the plaintiffs. There is nothing, so far as I can see, in what happened in the previous suit or in the conduct of the present suit by the defendants to debar them from this right of redemption, to which on the facts found they are clearly entitled. In that view, in my opinion, the decree of the Court below must be modified and the right of the defendants to redeem the plaintiffs declared.

The result, therefore, is that this appeal is allowed, the right of the defendants-appellants to redeem the plaintiffs in respect of the property in dispute is declared and the case remitted to the Court of first instance for that Court to take the proper accounts, determine the amount which the defendants should pay the plaintiffs for the purpose and make a decree accordingly. The appellants are entitled to their costs of this appeal. We make no order as to the costs in the Courts below. The costs of the further enquiry as to accounts now directed will be in the discretion of the Court of first instance.

Let the record be sent down as soon as possible.

BEACHCROFT, J.—I agree.

Appeal allowed

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 929 OF 1916.

November 22, 1917.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Phillips

KRISTNASWAMI IYENGAR AND ANOTHER—DEFENDANTS NOS. 1 AND 7—APPELLANTS

versus

SUBRAMANIA GANAPATHIGAL AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 55—Vendor and purchaser—Promissory note, execution of, for part of consideration—Suit on pro-note—Lien for unpaid purchase-money, enforceability of—Intention of parties—Co-vendors not impleaded, effect of—Appeal, second—Construction of document—Question of law.

Where a pro-note is executed by a vendee of immoveable property for part of the sale consideration, it is a question in each case whether the parties intended that the security was to be in lieu of the actual cash and whether the vendor was thereby to abandon his lien for unpaid purchase-money. [p 524, col. 1.]

The lien created by section 55 (4) of the Transfer of Property Act is different from the equitable lien known to English Law, for under the latter though the legal estate passes at the time of sale, the equitable estate does not pass until the purchase-money has been completely discharged. [p. 524, col. 2.]

Jersey (Earl) v. *Briton Ferry Floating Dock Co.*, (1869) 7 Eq. 409, *Winter v. Lord Anson*, (1823) 57 E. R. 174; 1 Sim. & St. 434; 24 R. R 205, *Dixon* v. *Gayfere*, (1857) 44 E. R. 878, 1 De G. & J. 655; 21 Beav. 118; 27 L. J. Ch. 148; 3 Jur. (N. S.) 1157; 6 W. R. 52, 118 R. R. 279, *Parrott* v. *Sweetland*, (1835) 40 E. R. 250; 3 My & K. 655; 41 R. R. 164 and *Brentwood Brick & Coal Co., In re*, (1877) 4 Ch. D. 562; 46 L. J. Ch. 554, 36 L. T. 343, 25 W. R. 481, distinguished.

KRISTNASWAMI IYENGAR *v.* SUBRAMANIA GANAPATHIGAL.

Ordinarily one of several vendors of immoveable property cannot enforce his charge on the property without making his co-vendors parties to the suit, save where the share of the party seeking enforcement thereof has been definitely fixed.[p. 525, col. 2.]

The interpretation of a document is a point of law which can be taken in second appeal and that, taken with the intention of the parties, is a mixed question of law and fact which the High Court can itself deal with in second appeal. [p. 526, col. 1.]

Where one of two vendees executed a pro-note for part of the sale price in favour of one of two vendors and amounts in discharge thereof were entered on the pro-note and the vendor in whose favour the note was executed sued on it without impleading his co-vendor:

Held, that the above circumstances indicated an intention to abandon the lien allowed by section 55 of the Transfer of Property Act. [p. 525, col. 1.]

Second appeal against the decree of the District Court, Trichinopoly, in Appeal Suit No. 356 of 1915, preferred against that of the District Munsif, Ariyalur, in Original Suit No. 717 of 1914.

Messrs. *C. Madhavan Nair* and *A. Krishnaswami Aiyar* for the Appellants.

Messrs. *T. V. Venkatrama Aiyar* and *R. Rajagopala Aiyar*, for the Respondents.

JUDGMENT.

PHILLIPS, J.—In this case the plaintiff and another jointly sold certain lands to defendants Nos. 1 and 4 for Rs. 10,000 under Exhibit A. The document recites the receipt of Rs. 10,000 in cash and at the end of the document the particulars for the receipt of Rs. 10,000 are given as follows :— Rs. 8,650 received in cash,—Rs. 1,350 received as per two bonds executed separately in our favour by the aforesaid T. Kristnaswami Iyengar (the 1st defendant). One bond was executed in favour of the present plaintiff and the other in favour of his co-vendor Srinivasavaradachariar. The plaintiff now sues to recover the amount due to him on account of his sale, namely, Rs. 675 with interest. He also makes other claims with which we are not concerned now. The lower Courts have given him a decree for the amount due and have also given him a charge on the plaint property treating the amount as unpaid purchase-money.

It is now contended in appeal that this charge ought not to be given because the whole of the purchase-money had been paid. This plea is based on two grounds, (1) that the two promissory notes constituted part of the consideration to be paid for the land and were not merely collateral security for the unpaid purchase-money, and (2) that the vendors accepted the sole liability of the first defendant in respect of these two promissory notes and exonerated the other vendee, the 4th defendant.

The appellant has quoted a large number of English cases in support of his plea, but it must be observed that the vendor's lien for unpaid purchase-money is of a somewhat different nature in English Law from the statutory lien granted under section 55 (4) of the Transfer of Property Act. for in England the lien is an equitable lien and is based on the assumption that although the legal estate passes at the time of sale, the equitable estate does not pass until the purchase-money has been completely discharged.

For this reason the two cases quoted, *viz.*, *Jersey (Earl)* v. *Briton Ferry Floating Dock Co.* (1) and *Winter* v. *Lord Anson* (2), have no application here. Three other cases have been cited, *viz.*, *Dixon* v. *Gayfere* (3), *Parrott* v. *Sweetland* (4) and *Brentwood Brick and Coal Company, In re* (5). In two of those cases the consideration for the sale was the payment of an annuity to the vendor or his relations, and it was held that the vendor had no lien on the property in respect of the amount so secured. The third case was one where a consideration of £ 6,000 was agreed to be paid out of shares which were to be subsequently allotted by the vendee company. It was there held that the consideration had actually passed and that the balance which was due was secured by an agreement which was accepted in lieu of cash. The details of cases are not of very much importance here except as authority for the proposition that it is open to a vendor to accept security from vendee for part of the purchase-money in lieu of the actual cash and thus to lose his lien for unpaid purchase-money. But whether he actually does so or whether he accepts the agree-

(1) (1869) 7 Eq. 409.

(2) (1823, 57 E. R. 174; 1 Sim. & St. 434; 24 R. R. 205.

(3) (1857) 44 E. R. 878; 1 De G. & J. 655; 21 Beav. 118; 27 L. J. Ch. 148; 3 Jur. (N. S.) 1157; 6 W. R 52; 118 R. R. 279.

(4) (1835) 40 E. R. 250; 3 My. & K. 655; 41 R. R. 164.

(5) (1877) 4 Ch. D. 562; 46 L. J. Ch. 554; 36 L. T. 343; 25 W. R. 481.

ment merely as collateral security for future payment is a question of the intention of the parties. Similarly in other English cases where a creditor accepted the liability of one of two or more joint debtors, it was held to discharge the other debtors in respect of the original debt due. [*Vide*, *Lyth* v. *Ault* (6) and *Thompson* v. *Percival* (7)].

We, therefore, have to consider in this case what was the intention of the parties when the sale was made. When a vendor takes a promissory note from the vendee it does not necessarily follow that he has given up his statutory lien under section 55 of the Transfer of Property Act. *Vide*, *Vellayappa Chettiar* v. *Narayanan Chettyar* (8). And even when the promissory note is given by a third person it has been held in *Kampiah Pillai* v. *Hari Row* (9) that that fact raises no presumption that the lien has been abandoned.

After a careful consideration of all these cases, it appears to me that we are thrown back upon the facts of each particular case and must infer the intention of the parties from the document itself and the surrounding circumstances, giving due weight to the fact that the vendor has a statutory lien for unpaid purchase-money which he can enforce in the absence of an agreement to the contrary. In the present case both Courts have found that the plaintiff had not lost his lien. But the District Judge has not discussed the circumstance of the case in any way than by merely saying that it has been repeatedly held that a vendor does not lose his lien by taking a promissory note as part of his purchase-money. But he omits to add that if he takes a security as part of the consideration there is no unpaid purchase-money for which he can have a lien. The language of the document supports the appellants' plea that the promissory notes were taken as part of the consideration for the sale-deed and expressly recites receipt of the whole purchase-money. It is also significant that the promissory notes were executed by only one vendee in favour of the two vendors separately, one promissory note in favour of each and in the notes there is a stipulation for a fixed rate of interest. It also appears that money has been paid towards the discharge of these promissory notes and the payments endorsed on the notes. It is also significant that the plaintiff has brought this suit without impleading his co-vendor. He does not allege in the plaint to what share of the property sold he is entitled. But it is alleged now on his behalf that inasmuch as one promissory note was executed in his favour for one half of the purchase-money not paid in cash, he must be deemed to be entitled to one-half of the property. There is, however, no evidence that the actual cash was received by the two vendors in equal shares and consequently there can be no presumption that the plaintiff is entitled to a lien for one-half of the unpaid purchase-money. In the absence of the co vendor it would be inequitable to determine the shares to which he and the plaintiff are respectively entitled, for possibly the co-vendor might have owned a very large fraction of the property sold, in which case the plaintiff would not be entitled to a lien for one-half of the unpaid consideration.

No doubt the plaintiff is entitled to the amount specified in the promissory note. But I am of opinion that he cannot enforce his lien without impleading his co-vendor. No doubt in clause (2) of section 55, Transfer of Property Act, the benefit of a contract of a sale "is annexed to and goes with the interest of the transferee as such and may be enforced by every person in whom that interest is for the whole *or any part thereof* from time to time vested," and it has been held in *Chidambaram Pillai* v. *Sivathasamy Thever* (10) that one of the two co-vendees can bring a suit without impleading the other. But in that case it was found as a fact that each of the purchasers had contributed half of the purchase-money. There is no provision in clause 4 of section 55 similar to that in clause (2) and I have not been referred to any case in which it has been held that one of several vendors of immoveable property is entitled to enforce his charge upon the property without making his co-vendor a party to the suit. Objection as to the non-joinder of the plaint.

(6) (1852) 7 Ex. 669; 21 L. J. Ex. 217; 19 L. T. 124; 86 R. R. 785; 155 E. R. 1117.

(7) (1834) 110 E. R. 1033; 5 B. & Ad. 925; 3 N. & M. 167; 3 L. J. K. B. 98; 53 R. R. 187.

(8) 18 Ind. Cas. 81; (1913) M. W. N. 826.

(9) 11 Ind. Cas. 890; 21 M. L. J. 849; 10 M. L. T. 189.

(10) 15 M. L. J. 396.

iff's co-vendor was taken in the 1st defendant's written statement and an issue was framed as to whether the plaintiff was entitled to claim a charge.

In a case of this kind where the meaning of the parties is not exactly obvious, I should be reluctant to interfere with the concurrent finding of two Courts, if it were not for the fact that the lower Appellate Court has not at all discussed the question on which the case really turns. I am of opinion, on consideration of the language of the document, of the subsequent payments upon the promissory notes and of the plaintiff's action in bringing this suit separately from his co-vendor, that it was the intention of the parties that the two promissory-notes should form part of the consideration of the sale. In that view there is no unpaid purchase-money for which the plaintiff can have a lien. Put in this way the question at issue would seem to be one of fact as is often the case when a document has to be interpreted, but it has always been held by this Court that the interpretation of a document is a point of law which can be taken in second appeal. In this case, moreover, the District Judge has altogether failed to take into consideration the law on the subject when determining what was the intention of the parties and, therefore, I think, the question is one of mixed law and fact which can be dealt with here, and I may add that the learned Vakil for the respondents has not taken any objection.

I would, therefore, allow this appeal with costs and modify the lower Courts' decree by disallowing the plaintiffs' charge upon the land.

AYLING, J.—I agree.

Appeal allowed;
Decree modified.

M.C.P.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 3168 OF 1913.

December 19, 1917.

Present:—Mr. Justice Teunon and Mr. Justice Newbould.

NAFAR CHANDRA CHANDRA—PLAINTIFF—APPELLANT

versus

Maharajadhiraj SIR BEJOY CHAND MAHATAB BAHADUR AND OTHERS—DEFENDANTS—RESPONDENTS.

Putni, *construction of*—Chowkidari chakran *lands, whether included in* putni.

Where a *putni* is granted in respect of a whole *mouza*, unless there is a provision to the contrary in the terms of the *putni* lease, the *chowkidari chakran* lands which form part of the Zemindar's estate in the *mouza* must be held to be included in the *putni*. [p. 527, col. 2.]

A clause in the *putni* lease of a whole *mouza* which reserves to or confers upon the Zemindar the right to appoint or dismiss *chowkidars*, has not the effect of reserving to the Zemindar and of excluding from the *putni* the *chowkidari chakran* lands in the *mouza*. [p. 527, col. 2.]

Appeal against the decree of the District Judge, Murshidabad, dated the 4th August 1913, affirming that of the Subordinate Judge of that District, dated the 12th August 1911.

Babus *Mohendra Nath Roy* and *Monmatha Nath Roy*, for the Appellant.

Sir *Rash Behari Ghose* and Babus *Basanta Kumar Bose*, *Dwarka Nath Chakrabarty*, *Bepin Behari Ghosh* (Junior), *Broja Lal Chakrabarty* and *Gurudas Sinha*, for the Respondents.

JUDGMENT.—In this appeal we are concerned with the *chowkidari chakran* lands of Mouza Someparah.

These lands were resumed by Government in 1898, and were thereafter transferred to the Zemindar (the Maharajah of Burdwan) subject to an annual assessment of Rs. 51-5-0. By a lease, dated 10th *Chait* 1308, the Maharajah next let out the lands to respondent No. 2 at a yearly rent of Rs. 77, and he in his turn has settled upon portions thereof cultivating tenants who in this appeal are respondents Nos. 3 to 26.

The plaintiff-appellant is the owner of an eight-anna share in the Putni of Mouza Someparah and the only question argued before us is whether the *chowkidari chakran* lands of the Mouza were excluded from the Putni.

It is now common ground that the terms upon which the grant of the Putni was made are embodied in a *kabuliyat* (Exhibit B) executed by one Radharaman Thakur in favour of the Zemindar on the 21st *Ashar* 1216, corresponding with the 3rd of July 1809.

The grant is in respect of the whole Mouza and unless we find provision to the contrary the *chowkidari chakran* lands, being part of the Zemindar's estate in the Mouza, we must hold to be included.

The *kabuliyat* expressly reserves or excepts certain lands falling under three descriptions, namely, (1) the house, garden and tank in the Zemindar's *khas* possession, (2) tanks and the like covered by *sanads* granted prior to the date of the Putni, and (3) *aymahs* antecedent to the Zemindari.

Between the provisions relating to the 2nd and 3rd of these three classes we find a clause which has been properly translated thus :—

"If any *chowkidar* attached to the Police Cutchery die or go away ..... and if it be necessary to make a change (*i.e.*, appoint or dismiss), you (*i. e.*, the Zemindar) shall make the same and with that I shall have no concern."

With this clause the Judges of both Courts below have considered the question whether the services expected of *chowkidars* in addition to the performance of their duties as village watchmen were rendered to the Zemindar, or to the Putnidar. Their findings, as we read them, appear to be that such services were rendered neither to Zemindar nor to Putnidar and, in any event, that of the rendering of such services to the Putnidar no satisfactory evidence has been given. Even then if such evidence be admissible the findings arrived at are of no assistance to us in the present case.

The contention of the respondents which found favour in both the lower Courts is that the clause set out above imports the exclusion of the *chowkidari chakran* lands.

In at least three cases *kabuliyats* of about the same period, and in terms very similar to those contained in the one now under consideration, and all executed in favour of the Burdwan Raj have been construed by this Court. Of these cases one reported as *Nitya Nund Hazra* v. *Maharajadhiraj Bejoy Chand Mohatab* (1) lends support to the contention of the respondents, while in two, the decisions, namely, the first in an unreported case Second Appeal No. 2114 of 1903 and the second in the case reported as *Girish Chandra Roy* v. *Hem Chandra Roy* (2) assist the contrary contention of the appellant.

These decisions not being between the same parties and the documents also being different are not of course binding upon us in the present case.

We, however, agree with the view taken in *Girish Chandra Roy* v. *Hem Chandra Roy* (2) that the clause which reserves to or confers upon the Zemindar the right to appoint or dismiss *chowkidars* has not the effect of reserving to the Zemindar and of excluding from the Putni the *chowkidari chakran* lands.

In the result this appeal succeeds. The decrees of the lower Courts are set aside and there will be a decree declaring that to the extent and in respect of his 8-annas share plaintiff-appellant is entitled in Putni right to the lands in suit subject to the annual assessment fixed or approved by the Collector. To the same extent he will recover possession from and jointly with respondents Nos. 2, 27 and 28. The decree will not authorize him to disturb the possession of tenant respondents Nos. 3 to 26, but will entitle him to receive rent from the said defendants in respect of his share. He will further recover mesne profits for the 3 years prior to suit from respondents Nos. 1 and 2, such profits to be ascertained in the manner provided in the Civil Procedure Code, Order XX, rule 12 (1), clause (*b*). The plaintiff appellant will further have his costs throughout from respondents Nos. 1, 2 and 28. The decree for costs in favour of original respondent No. 27 who has not been made a party to this appeal remains unaffected by this decision.

Appeal allowed.

(1) 7 C. L. J. 593.

(2) 5 C. L. J. 28.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 3080 OF 1916.

November 1, 1917.

Present:—Sir Henry Rattigan, KT., Chief Judge, and Mr. Justice Chevis.

LAL CHAND—DECREE-HOLDER—APPELLANT

versus

ALLAH DAD—JUDGMENT-DEBTOR—RESPONDENT.

Punjab Alienation of Land Act (XIII of 1900), s. 16—Mortgage—Debt, whether can be separated from security—Execution—Mortgage-debt, whether can be sold apart from security.

A mortgage-debt cannot be separated from the security and sold in execution of a decree, where the mortgage itself is not liable to sale. The sale of the debt would carry with it the security.

Where, therefore, the provisions of section 16 of the Punjab Alienation of Land Act prevent a decree-holder from selling up his judgment-debtor's mortgage rights, he cannot sell up either the debt or the security.

Second Appeal from the order of the Additional District Judge, Sialkot, dated the 14th August 1916.

Mr. *Manohar Lal*, for the Appellant.

Mr. *Mehr Chand*, for the Respondent.

JUDGMENT.—The judgment-debtor holds certain land in mortgage. It is admitted that the provisions of section 16 of the Punjab Alienation of Land Act prevent the decree-holder from selling up the mortgagee's rights, but he wishes to sell the mortgage-debt, separating the debt from the security. The lower Appellate Court having held that he cannot do so, the decree-holder appeals to this Court.

Mr. Manohar Lal admits that he is unable to quote any authority in his favour. On the contrary, he frankly admits that there is an authority, *Tarvadi Bholanath* v. *Bai Kashi* (1), to the effect that the sale of the debt carries with it the security. The same view is also expressed in *Karam Ilahi* v. *Gulab Rai* (2).

We note that in this case the mortgage is with possession and under the terms of the mortgage-deed the mortgagor cannot redeem till the end of 18 years, a few only of which have as yet elapsed. So even if the debt were to be sold apart from security, the auction-purchaser would have to wait till redemption before he could realize anything. At the end of

(1) 26 B. 305; 4 Bom. L. R. 18.

(2) 33 Ind. Cas. 960; 39 P. R. 1916; 102 P. W. R. 1916.

the 18 years the mortgagor might not care to redeem. If he did not redeem till limitation had expired the mortgagee would apparently retain possession for ever, the auction-purchaser having no remedy, not being the mortgagee he could not recover his money in any way. But if the mortgagor wished to redeem he would find that the curious situation was that the mortgagee in possession was no longer the mortgage creditor. What the real legal effects of such a peculiar state of affairs would be we are not prepared to say. It is sufficient for us to say that we agree with the Bombay ruling that the debt and the security should not be divorced.

We, therefore, dismiss this appeal with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 463 OF 1916.

December 31, 1917.

Present:—Mr. Prideaux, A. J. C.

NANHU AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MALLOO AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 63—Objection dismissed without evidence being recorded, whether bars declaratory suit—Limitation Act (IX of 1908), Sch. I, Art. 11.

Plaintiff filed an objection to the attachment of a share in a village in respect of which he held two registered mortgages. On the date fixed for evidence the scribe of one of the mortgage-deeds was the only witness present for the objector, who, however, did not examine him. An adjournment was refused and the case was closed with the result that the objection was dismissed. Plaintiff instituted a suit for a declaration more than one year after the dismissal of the objection. It was urged that the suit was barred under Article 11 of the Limitation Act:

Held, that as there was really no investigation under the objection the case did not fall within the one year period laid down by Article 11 of the Limitation Act and that the suit was, therefore, within time. [p. 529, col. 2.]

Appeal from the decree of the Court of the Divisional Judge, Nerbudda Division, dated the 28th July 1916, in Civil Appeal No. 37 of 1916.

NANHU *v.* MALLOO.

Mr. *V. D. Sathaye*, for the Appellants.

Mr. *M. Gupta*, for Respondent No. 2.

JUDGMENT.—The plaint on which this case commences recites that the plaintiffs are mortgagees under a registered mortgage executed by the 1st defendant on 14th June 1906, whereby he mortgaged a 7·1/9-annas share of Mouza Harnkhedi with *sir khudkasht* and cultivating rights in the same. The amount claimed is Rs. 1,027-4-0. The 2nd defendant Sheoram is said to have attached the mortgaged property and had it sold, therefore he has a right to redeem. The 1st defendant the mortgagor admits the mortgage-bond and the claim. The 2nd defendant is the decree-holder who having obtained a money-decree has purchased the mortgaged property in execution of that decree. He denied the claim. He contends that the suit is not maintainable, on the ground that the plaintiff had filed an objection under Order XXI, rule 62, Civil Procedure Code, which objection was dismissed and the plaintiff not having brought a suit to set aside that order within the period of limitation he cannot bring this case. The case went to trial, *inter alia*, on the following issues:

(1) Whether the plaintiff No. 1 and the plaintiff No. 2's father Bhagwan had preferred objections to the attachment by defendant No. 2 in execution of his money-decree and was the objection disallowed?

(2) Is the present suit to enforce the mortgage barred under Order XXI, rule 63, of Schedule I of the Civil Procedure Code and Article 11 of the Limitation Act?

The first Court found the first issue in favour of the 2nd defendant. On the 2nd issue the first Court came to the conclusion that the objection petition in Miscellaneous Case No. 160 of 1908 purported to have been preferred under Order XXI, rule 62, and in that application what was sought for was an order to sell the property subject to the two encumbrances of the plaintiff, *viz*, dated 14th June 1906 and 28th January 1908, and that objection was disallowed on 5th January 1909, as the objector gave no evidence in support of his case. It held that the order became conclusive against the plaintiff on 6th January 1910 and as no suit was filed to set aside that order within one year as prescribed by Article 11 of he Limitation Act, the plaintiff's encumbrances must be held to be extinguished. The suit was dismissed. On appeal the lower Appellate Court upheld the decision of the first Court. The order passed on the plaintiff's objection runs as follows:—

"The objector alleges that the property under attachment has been mortgaged to him by two documents, dated 14th June 1906 and 28th January 1908, respectively. He accordingly asks that the attachment may be raised. The decree-holder remained absent though personally served. Case proceeded *ex parte* against him. Time was given to the objector to produce his evidence. He has not summoned any of the four attesting witnesses but says that only one of the scribes is present. He assigns no reason for the default except mistake and asks for an adjournment. I refuse to grant any adjournment and close the case. The documents remain unproved. The objection is accordingly disallowed with costs on objector."

The order is dated 5th January 1909. It is pressed for the appellants that as the order was not passed on the merits it cannot be held conclusive, nor one to which Article 11 of the Limitation Act applies. *Sarala Subba Rau* v. *Kamsala Timmayya* (1), *Kallar Singh* v. *Toril Mahton* (2) and *Nandlal Brahmin* v. *Krishnaji* (3) are quoted in support of this proposition. On the other hand the respondent's learned Counsel relies on *Rahim Bux* v. *Abdul Kader* (4), *Sardhari Lal* v. *Ambika Pershad* (5). In my opinion the objection before the Munsif is not sufficient to bring the case within Order XXI, rule 63 of the Code. There was really no investigation at all. At least the scribe of one of the documents who was present should have been examined. I, therefore, hold that the case does not fall within the one year period laid down by Article 11 of the Limitation Act and I set aside the orders of the Courts below and hold that the suit is within time and remand the case for a decision on the merits A refund certificate will issue and other costs will abide the result.

Case remanded.

(1) 31 M. 5; 3 M. L. T. 106; 17 M. L. J. 554.
(2) 1 C. W. N. 24.
(3) 13 C. P. L. R. 69 at p. 70.
(4) 32 C 537.
(5) 15 C. 521; 15 I. A 123 (P. C.); 5 Sar. P. C. J. 172; 12 Ind. Jur. 210; 7 Ind. Dec. (N. s) 931.

KHWAJA MAHMUD *v.* GHULAM RASUL.

PUNJAB CHIEF COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 872 OF 1916.

January 8, 1918.

Present:—Mr. Justice Chevis.

KHWAJA MAHMUD—DECREE-HOLDER—APPELLANT

versus

GHULAM RASUL - JUDGMENT-DEBTOR—RESPONDENT.

Execution—Duty of executing Court—Decree to be executed literally—Subject-matter of decree altered materially—Decree, whether capable of execution.

An executing Court cannot tamper with decrees which must be executed literally. [p. 531, col. 1.]

When a decree cannot be executed literally it cannot be executed at all. [p 531, col. 1.]

Plaintiff obtained a decree that he was entitled to share the water flowing through a certain *rajbaha* equally with the defendant. Subsequently the canal authorities made certain alterations, as a result of which the volume of water flowing through the *rajbaha* was increased and many other persons besides the plaintiff and the defendant became entitled to share in the water:

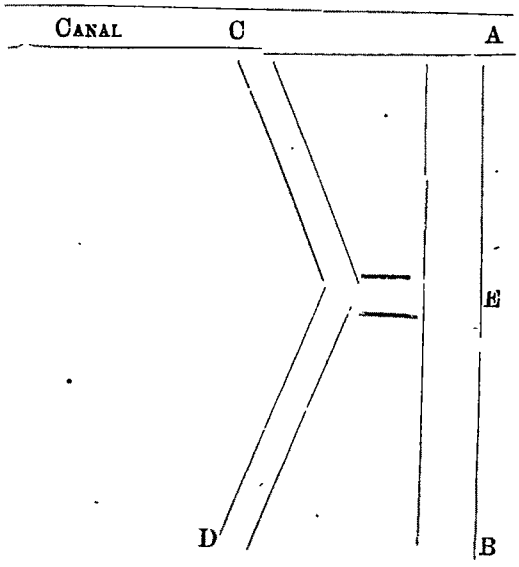
Held, that the decree in favour of the plaintiff was no longer capable of execution. [p. 530, col. 2.]

Miscellaneous second appeal from the order of the District Judge, Multan, dated the 22nd February 1916, confirming that of the Munsif, 1st Class, Multan, dated the 21st July 1915, rejecting an application for execution.

The Hon'ble Mr. *Muhammad Shafi* and Mr. *Shah Nawaz*, for the Appellant

Mr. *C. Bevan Petman* and the Hon'ble Mr. *Fazl-i-Hussain*, for the Respondent.

JUDGMENT.—The following rough plan will assist.



There were originally two *rajbahas* C D and A B. Now the upper part of C D has been closed and a cross cut E F has been made so that water now flows from A to D *via* E F.

While both *rajbahas* were separate, plaintiff and defendant had a dispute and plaintiff sued and got a decree declaring that he and defendant were entitled to share equally in the water of the A B *rajbaha*.

Since that decree was passed the canal authorities have, as above described, remodelled the *rajbahas* and water for both of them now passes down A E. The canal authorities having refused to recognise plaintiff's claim to share equally with defendant, plaintiff now applies to the Court asking that the decree may be enforced by attachment of property (*vide* Order XXI, rule 32). The first Court holds that the *kassi* (or water cut) having been changed the decree is practically inoperative. The District Judge upholds this order, remarking that there are several other persons now interested in the supply of water who were not parties to the decree (this refers to those persons who got water along F D) and that if the decree-holder wants to enforce his decree regarding the *kassi* at a point lower down the Sarla Branch he can ask the Civil Court for the necessary civil relief. I am now inclined to think that the District Judge means that if plaintiff wants to demand one-half share of the water which passes down E B he should bring a fresh suit for it. Whether such a suit would lie I cannot now decide. What I have to decide is whether the old decree can be enforced. On consideration I am of opinion that it cannot be enforced. That decree was for one-half of the water which came down from A. Now plaintiff obviously is not entitled to $\frac{1}{2}$ of it, for other persons who formerly got water from C are now entitled to a share. So the old decree dividing equally between plaintiff and defendant the whole of the water which came from A cannot now be regarded as in full force. It might be said that the spirit of the decree should be carried out, and that defendant should be made to share equally with plaintiff the water which flows down E B after some has been taken off at F for the use of persons who for-

merly got their water from C. But an executing Court cannot tamper with decrees. Decrees must be executed literally. Here the decree cannot be executed literally, owing to change of circumstances, and so I do not think it can be executed at all.

The appeal is dismissed, but I pass no order as to costs as I think it hard that plaintiff should have lost the benefit of his decree.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 230B OF 1917.

February 22, 1918.

Present:—Mr. Kotwal, Offg. A. J. C.

ABDULLAKHAN DEFENDANT—APPELLANT

versus

ABHIMAN AND OTHERS—PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

Berar Land Revenue Code, s. 78 (2)—*Anti-ijara tenancy—Presumption—Burden of proof.*

It is the tenant who wants to remain on the land in spite of the landlord's wishes to the contrary that has to prove the circumstances which entitle him to do so. He has, therefore, to prove, in the case of an *anti-ijara* tenancy in Berar, that no satisfactory evidence of the commencement of his tenancy and of the period agreed upon between the landlord and tenant for its duration is forthcoming.

If he fails to do so no presumption under section 78 (2) of the Berar Land Revenue Code can be made in his favour.

Appeal from the decree of the Court of the District Judge, Amraoti, dated the 30th April 1917, in Appeal No. 193 of 1916.

Mr. *M. R. Bobde*, for the Appellant.

Mr. *M. V. Joshi*, for Respondents Nos. 1 to 3.

JUDGMENT.—The plaintiffs sue, after service of notice to quit, the defendant No. 2 whom they allege to be an annual tenant. Defendant No., 2 pleads that he purchased his field orally from one Raoo, who was an *anti-ijara* tenant, and is not liable to ejectment.

In this Court it is argued that the defendant No. 2 is a tenant of antiquity and is entitled to remain on the land under the provisions of section 78 (2) of the Berar Land Revenue Code.

The lower Appellate Court has found that the origin of Raoo's tenancy is not obscure, but that it commenced somewhere about 1872. This finding is not challenged, but it is argued that the defendant having carried back his tenancy to that year a presumption should be made that he was a tenant of antiquity and the burden should have been held to have shifted to the plaintiffs to prove that the defendant is not a tenant of antiquity but only an annual tenant. I do not think any such presumption can be raised and the burden shifted in consequence to the plaintiffs.

It is the tenant who wants to remain on the land in spite of the landlord's wishes to the contrary that has to prove the circumstances which entitle him to do so. He has, therefore, to prove that no satisfactory evidence of the commencement of his tenancy and of the period agreed upon between the landlord and tenant for its duration is forthcoming.

If he fails to do so the presumption under section 78 (2) will not be made in his favour.

Apart from this, however, the lower Appellate Court has found that the defendant has not shown that he can claim under Raoo, so as to take advantage of the period of Raoo's tenancy, as he has failed to prove his alleged purchase from Raoo 25 or 30 years ago.

The notice given in this case is dated 12th November 1913 and asks the defendant to vacate by 31st March 1914, and appears to be quite proper and legal. It is to be noted that in his pleadings the defendant No. 2 only denied that any notice was given to him. He did not plead that it was not a valid notice.

The appeal fails and is dismissed with costs.

Appeal dismissed.

GOLAB CHAND RAY *v.* FEDA HUSSAIN.

PATNA HIGH COURT.

LETTERS PATENT APPEAL No. 65 OF 1917.

August 3, 1917.

Present:—Sir Edward Chamier, KT., Chief Justice, and Mr. Justice Roe.

GOLAB CHAND RAY—APPELLANT

versus

Sheikh FEDA HUSSAIN—RESPONDENT.

Bengal Tenancy Act (VIII B. C. of 1885), s. 174—Sale, order setting aside—Suit for declaration, maintainability of.

Where a sale in execution of a rent-decree is set aside under section 174 of the Bengal Tenancy Act, the purchaser is entitled to bring a suit for a declaration that the defendant had no right to make the deposit. [p. 533, col. 1.]

Letters Patent Appeal against the decree of Mr. Justice Chapman, dated the 21st March 1917, in Second Appeal No. 387 of 1916, reversing the decree of the Officiating District Judge, Darbhanga, dated the 22nd December 1915, affirming that of the Additional Munsif, Samastipore, dated the 31st March 1915.

Mr. *Mahammad Mustafa Khan*, for the Appellant.

Mr. *Muhammad Hasan Jan*, for the Respondent.

JUDGMENT.

CHAMIER, C. J.—In execution of a decree for arrears of rent obtained by one Umdan Bibi against Nazrul Hossain and others certain property was put up for sale on March 9th, 1914, and was purchased by the appellant. A few days before the date fixed for the confirmation of the sale the respondent's father Baijnath Rai, alleging that he had purchased the property at an execution sale held after the sale of March 9th, 1914, deposited the amount due to Umdan Bibi. The Munsif thereupon set aside the sale, purporting to act under section 174 of the Bengal Tenancy Act. The appellant objected but his objection was overruled. He then brought the present suit for a declaration that Baijnath had no right to deposit the money and had acquired no title to the property. The Munsif gave him a decree which was affirmed by the District Judge. On second appeal a learned Judge of this Court dismissed the suit, holding that it was not maintainable. The learned Judge referred to the decision in *Kabilaso Koer* v. *Raghu Nath Sakan Singh* (1). That was a case in which a judgment-debtor sued to set aside a sale. Her suit was barred by section 244 of the Code of Civil Procedure notwithstanding the fact that the auction-purchaser was interested in the matter and was a party to the case [see *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (2)].

Section 174 of the Bengal Tenancy Act corresponds to section 310A of the Code of Civil Procedure, 1882 (Order XXI, rule 89 of the present Code). Under the Code of 1882 it was well settled that the auction-purchaser was entitled to sue to set aside an order under section 311 setting aside or refusing to confirm a sale [see *Azim-ud-din* v. *Baldeo* (3), *Mathuradas* v. *Panahlal* (4), *Shiam Behari Lal* v. *Rup Kishore* (5), and the notes of Messrs. Woodroffe and Amir Ali to Order XXI, rule 92]. It follows that a similar suit could have been maintained in respect of an order passed under section 310A. There does not appear to be any reported Calcutta case directly in point. This may be due to the fact that erroneous orders of the kind now in question were generally taken up to the High Court on the revision side. But the reasoning on which the Allahabad and Bombay cases rest was accepted by the Calcutta High Court in many cases. Under the Code of 1882 the only ground for negativing the right to bring a suit to confirm or set aside an execution sale, after an order had been passed on the subject by the Court executing the decree, was that the suit was barred by section 244 [see *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (2)]. A suit like the one now before us could not have been held to be barred by section 244. Before 1908, so far as I know, no Court ever doubted that a suit of this kind would lie. It is within my knowledge that many such suits were brought.

(1) 18 C. 481; 9 Ind. Dec. (N. S.) 321.
(2) 19 C. 683; 19 I. A. 166; 6 Sar. P. C. J. 20; 9 Ind. Dec. (N. S.) 898.
(3) 3 A. 554; A. W. N. (1881) 31; 2 Ind. Dec. (N. S.) 318
(4) 19 B. 216; 10 Ind. Dec. (N. S.) 147.
(5) 20 A. 379; A. W. N. (1898) 81; 9 Ind. Dec. (N. S.) 603.

RAJESWARI DASI *v.* BENODA SUNDARI DASI.

The Code of 1908 allows an appeal by a person aggrieved by an order under Order XXI, rule 92, and bars a suit like the one now before us. [See Order XXI, rule 92 (3), which prohibits a suit by a person against whom an order is passed under Order XXI, rules 89, 90 or 91]. But no such provision has been inserted in the Bengal Tenancy Act and it is impossible to hold that an order passed under section 174 of that Act is an order passed under Order XXI, rule 89, and attracts the operation of Order XXI, rule 92 (3).

The omission is, I think, unfortunate but with that we are not concerned.

I would allow this appeal and dismiss the appeal to this Court with costs of both hearings.

ROE, J.—I agree. I have sought in vain for any bar to the suit. Under section 9, Civil Procedure Code, the Courts had jurisdiction to try the suit and on the merits were required to give a decree.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 3011 OF 1914.

December 21, 1916.

Present:—Mr. Justice D. Chatterjee and Mr. Justice Walmsley.

RAJESWARI DASI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

BENODA SUNDARI DASI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), *s.* 20—*Acknowledgment by judgment-debtor, whether saves limitation against auction-purchaser—Evidence Act (I of* 1872), *s.* 69—*Proof of document where all attesting witnesses are dead.*

An auction-purchaser of a property in execution of a money-decree is entitled to have the property purchased by him in the condition in which it was at the time of attachment. Therefore, an acknowledgment of a lien on the property made by the judgment-debtor after its attachment cannot prevail against the auction-purchaser although such acknowledgment if made before attachment may save limitation as against the auction-purchaser. [p. 534, col. 1.]

Where all the attesting witnesses of a mortgage-bond including the scribe were dead and a witness was called who proved the handwriting of the attesting witnesses and who said that he was present at the execution of the document, but did not say that he saw the mortgagor signing his name nor did he say that the signature on the document was the signature of the mortgagor:

Held, that there was a defect in the proof of the mortgage-bond under section 69 of the Evidence Act. [p. 533, col. 2.]

Appeal against the decree of the Subordinate Judge, Jessore, dated the 4th June 1914, modifying that of the Munsif, 2nd Court, Bongaon, dated the 1st of May 1913.

Babu *Sashi Sekhar Bose*, for the Appellants.

Babu *Surendra Chandra Sen*, for the Respondents.

JUDGMENT.—This is a suit upon a mortgage bond Exhibit I said to have been executed by Bhim Karmakar, the deceased father of defendant No. 1, in favour of Jadumandal the husband of plaintiff No. 1, on the 9th August 1891. On the 18th of March 1898 defendant No. 1 executed a *kobala* in respect of some lands in favour of Jadumandal and in this document marked Exhibit II made an admission of the earlier mortgage of the 9th August 1891. On the 21st March 1898 one Basant purchased property No. 1 in execution of a money-decree against defendant No. 1 and sold the same to defendant No. 2 on the 12th August 1898. The suit giving rise to this appeal was brought on the 16th March 1910 and would be barred by limitation unless the acknowledgment by defendant No 1 in Exhibit II can save it. Then arises the question whether Exhibit I has been proved in accordance with law. All the attesting witnesses including the scribe are dead. One witness Hazarilal has proved the handwriting of the attesting witnesses: he says he was present at the execution but does not say that he saw Bhim signing his name, nor does he say that the signature of Bhim on the document is the signature of Bhim. There is, therefore, a defect in the proof of the document under section 69 of the Evidence Act. Does the admission in Ex-

hibit II cure this defect? Defendant No. 2 claims under a purchase from Basant, who purchased at an auction sale the right, title and interest of defendant No. 1. Is the admission of defendant No. 1 binding on defendant No. 2, that is to say, is the auction-purchaser or his transferee bound by the admission of the judgment-debtor made before his purchase? It was said by the Judicial Committee of the Privy Council in the case of *Dinendronath Sannial* v. *Ramkumar Ghose* (1) that the auction-purchaser "derives title by operation of law adversely to the judgment-debtor" but their Lordships held in a later case, *Mahomed Mozuffer Hossein* v. *Kishori Mohun Roy* (2), that the auction-purchaser is bound by an estoppel binding upon the judgment debtor. Sir Charles Sargent, C. J., in the case of *Ali Sahib* v. *Kaji Ahmed* (3), held after reference to the former case, that "although the title is derived from the judgment-debtor against his will, the purchaser's liability to be ejected nonetheless arises from the title which he has derived from the judgment-debtor." The auction-purchaser was held to have derived his liability through the judgment-debtor. An acknowledgment, therefore, by a judgment-debtor may save limitation against the auction-purchaser. There is a further question, however, that arises in this case, and that is that the acknowledgment was made only three days before the auction-sale and must, therefore, have been made after attachment; does that make any difference? I think it does. The auction-purchaser is entitled to have the property purchased by him in the condition in which it was at the time of the attachment. The judgment-debtor is debarred by section 64, Civil Procedure Code, from making any private transfer of any interest in the property after attachment. But for the acknowledgment the lien on the property attached would have expired before the present suit: the effect of allowing the acknowledgment to prevail would be to give a longer life to the lien, that is, to place a larger burden on the property than it bore at the time of the attachment. I think that the acknowledgment in this case, made as it was after attachment, cannot prevail against the auction-purchaser defendant No. 2.

In this view of the case the appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 8 I. A. 65 at p. 75; 7 C. 107; 4 Shome L. R. 236; 10 C. L. R. 281; 4 Sar. P. C. J. 213; 5 Ind. Jur. 376; 3 Ind. Dec. (N. S.) 619 (P. C.).

(2) 22 C. 909; 22 I. A. 129; 5 M. L. J. 101; 6 Sar. P. C. J. 583; 11 Ind. Dec. (N. S.) 602 (P. C.).

(3) 16 B. 197; 8 Ind. Dec. (N. S.) 609.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 2761 of 1914.

January 28, 1918.

Present:—Mr. Justice Scott-Smith and Mr. Justice Shadi Lal.

AHMAD YAR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MUHAMMAD KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Ala *and* adna *maliks—Right to share of produce—Declaratory suit to establish right as* adna *maliks—Burden of proof.*

Plaintiffs sued for a declaration that they were the *adna* proprietors and in possession of the land in suit and that the defendants were merely *ala* proprietors entitled to receive *malikana* dues at 25 per cent of the land revenue. It appeared that the land in dispute had been entered in the successive settlement records as the property of the defendants whose names were written across both the columns relating to *ala* and *adna maliks*:

Held, (1) that the onus was on the plaintiffs to establish their claim to inferior proprietorship and to prove that the defendants were merely superior proprietors entitled to recover only 25 per cent. on the land revenue; [p. 535, col. 2.]

(2) that the mere fact that tenants had been located by the village officers was no adequate ground for depriving the defendants of their right of ownership when the entries with regard to that matter had all along been in their favour; [p. 537, col. 2.]

(3) that the plaintiffs having failed to discharge the onus that lay on them, the defendants were entitled to the ownership both *ala* and *adna*, of the land in suit [p. 537, col. 1]

First appeal from the decree of the Senior Subordinate Judge, Mianwali, dated the 25th August 1914, dismissing the suit with costs to defendants Nos. 1 to 85.

The Hon'ble Mr. *Muhammad Shafi*, for the Appellants.

The Hon'ble Mr. *Fazl-i-Hussain* and Mr. *B. R. Puri*, for the Respondents.

AHMAD YAR *v.* MUHAMMAD KHAN.

JUDGMENT.—The dispute in this case relates to the respective rights of the parties in a large plot of land, nearly 84,756 *kanals* in area, situate in the village Kundal of the Isa Khel Tahsil in the Mianwali District. Plaintiffs claim that they along with defendants Nos. 162 to 211 are the *adna maliks* of the land and that the defendants Nos. 1 to 85 are merely *ala maliks* and entitled as such to receive only 25 per cent on the land revenue assessed on the land This claim is resisted by defendants Nos. 1 to 85, who deny these allegations and assert that they are full proprietors, and have the right to recover from the tenants one-tenth share of the produce. The remaining defendants who are occupancy tenants and tenants-at-will are not interested in the result of the litigation, and may consequently be regarded as merely *pro forma* defendants.

Upon the pleadings of the parties the Subordinate Judge framed four issues, which are set out in the judgment appealed against, and after recording his opinion thereon against the plaintiffs has dismissed their suit. Against this decree the plaintiffs have preferred a first appeal to this Court; and we have listened to lengthy arguments advanced by learned Counsel on both sides, and given our long and careful consideration to the points raised by them and to the evidence upon the record.

The decision of the appeal depends mainly upon the documentary evidence on the record, and it is necessary to give a brief historical retrospect of the village Kundal. It appears that prior to the present settlement, the operations of which continued up to 1907 and even later, the village was divided into two distinct sub divisions, one consisting of land near the river Indus and thus liable to be submerged, and the other comprising the high land. These two sub-divisions were styled respectively Kacha Kundal and Pacca Kundal or Thal Kundal, and have in the present settlement been assessed as two separate estates. The land in dispute is situate in Thal Kundal, and was entered in the Settlement Record of 1878 as the property of the defendants, whose names are written across both the columns Nos. 5 and 6 relating to *ala malik* and *adna malik*. This entry is clearly in favour of the defendants and so are the entries in the Summary Settlements of 1854 and 1865, which show that the defendants were proprietors of not only the land in dispute but of the entire village. The onus is, therefore, upon the plaintiffs to establish their claim to inferior proprietorship and to prove that the defendants are merely superior proprietors entitled to recover only 25 per cent. on the land revenue.

The plaintiffs claim that the judgment of the Settlement Superintendent, Mian Ghulam Farid, passed in 1876 conferred upon them the rights of *adna maliks* in the land in dispute. Now, that judgment dealt with the particular case of one Waryam, who claimed inferior proprietorship in a plot of land as against the Isa Khel proprietors (the contesting defendants or their predecessors); and the Settlement Superintendent, while adjudicating upon that claim, laid down certain general principles determining the status of the different settlers in the village, which principles received the approval of the Settlement Officer. It is beyond dispute that prior to that judgment the only owners shown in the Revenue Records were the defendants or their ancestors, and that all other right-holders were shown as tenants. The latter were divided by the Superintendent into three classes according to the length of their occupation. 1) Those who settled in the village before the Settlement of 1853-54 A. D. They were given the status of *adna maliks*. (2) Those who settled between the Summary Settlement of 1853-54 and the year 1865. They were given the status of occupancy tenants. (3) Lastly, those persons who settled after 1856. They were regarded as tenants-at-will. The Superintendent further directed that the right-holders belonging to classes (1) and (2) should pay one-tenth of the produce of the land to the Isa Khel proprietors, but on appeal by Waryam, who was conceded the status of an inferior proprietor, Mr. Thorburn, the Settlement Officer, declared that Waryam should in future pay 25 per cent. on the land revenue in cash instead of *khutti* in kind.

Now it is contended that this order governs the land in dispute, and that the connection of the Isa Khel proprietors with the land is confined to the receipt of 25 per cent. on the land revenue. This contention was accepted by Pandit Hari Kishen Kaul, who carried out the recent Settlement of the district, but his order was set aside by the Financial Commissioner. Upon a careful consideration

of the *pros* and *cons*, and upon an examination of all the relevant evidence on the record, we are of opinion that the plaintiffs' claim cannot be entertained. In the first place, there can be no doubt whatsoever that the status of the persons occupying the different plots of land was determined in accordance with the duration of their possession and that the classification referred to above could have no possible application to a plot of land which was not in the occupation of the plaintiffs. It appears that out of the total area of nearly 85,000 *kanals*, only 152 *kanals* was cultivated at the time of the Settlement of 1377 78, and that even that small area had been reclaimed only two or three years before the Settlement. It is obvious that in accordance with the aforesaid general principles only the plot of 152 *kanals* could come under the third category and to this the Isa Khel proprietors have no objection even now.

It is, however, argued that the decision of the Superintendent was applied, as a matter of fact, to the property in dispute and that consequently plaintiffs have since then located tenants, realised *khutti* from them, and paid only 25 per cent. on the land revenue to the defendants. In this connection our attention is invited to an entry in the remarks column of the *khewat* of 1878 relating to the land in dispute, stating that "this land was declared to be as held by the tenants and the *adna maliks*;" and also to an entry in column 7 relating to possession. This entry states that "the conditions of possession and cultivation are entered at *khata* No. 109:" and upon a reference to that *khata* we find it recorded that both the tenants and *adna maliks* "are, according to the old practice, empowered to cultivate this land with the permission of the proprietors . . . . . If any of the occupants wishes to make the land *abad* he can do so with the permission of *lambardars* and *warhidars*. At the time the land is made *abad* occupant shall give one-tenth share of the produce to the *ala maliks* as *khutti*."

Now, taking these entries at their face value, the only thing they show is that the *adna maliks* and tenants were regarded as being in possession of the land, and were entitled to locate tenants. But it is quite clear that the tenants, when located, were to pay *khutti* or one-tenth share of the produce to the *ala maliks* and not to the plaintiffs. There is nothing whatever in the Settlement entries to show that the plaintiffs were ever regarded as *adna* proprietors of this large area, and that the original owners were deprived of their rights *pro tanto*. Indeed, as pointed out above, it is the defendants whose names are written across both the columns relating to *adna* and *ala* proprietors; and it is unlikely that if the Revenue Authorities held the plaintiffs to be *adna* proprietors of the area in dispute, they would not have recorded them as such in the Settlement records, considering that the orders passed in 1876 were given full effect to in respect of other holdings by means of separate entries in the columns for superior and inferior proprietors.

Coming now to the different clauses of the *wajib-ul arz* we observe that paragraph 7, upon which the appellants place their main reliance, is couched in ambiguous language, but taking it in the most favourable light for the plaintiffs, we find that it deals only with possession in terms similar to the entry in the remarks column of the *khata* referred to above, and has absolutely no bearing upon *ala* or *adna* proprietorship. It recites that according to the judgment of the Superintendent passed in 1876, the land was declared to be in the possession of the tenants and *adna maliks*, and that the *lambardars* and *warhidars* were to make arrangements for cultivation. Now, we have already pointed out that the aforesaid judgment does not *proprio vigore* apply to the land in dispute, nor do the principles enunciated therein, and our attention has not been invited to any order passed by any competent authority which made the judgment applicable to the property in dispute and determined the question of the possession and the location of tenants in the manner described in that paragraph. It is clear that the rights of ownership, whether superior or inferior, are not affected thereby; and, indeed the other clauses of the *wajib-ul-arz* place the question of defendants' full ownership beyond all reasonable doubt. For instance, the latter portion of paragraph 5 clearly states that the *adna maliks* are the owners of the area actually possessed by them, and even the earlier portion, with the exception o

the words "*siwae wasuli khutti*," which words are meaningless, and, as pointed out by the Financial Commissioner, appear to have been introduced by mistake from a similar clause in the *wajib ul-arz* of the other villages, shows that the Isa Khel proprietors were the persons who located all the tenants. Further, paragraph 1 states that the *adna* proprietors have no claim of ownership to lands other than those held by them, and paragraph 21, which deals with the village *abadi*, provides that the land in possession of the non-proprietors is owned by the proprietors (the contesting defendants), and the *malikan kabza* and the *adna* proprietors are the owners of the sites of their respective houses, and have no concern whatsoever with the sites other than those possessed by them. Lastly, paragraph 27 declares that the contesting defendants or their predecessors were owners of the land under the cultivation of the tenants and received one-tenth share as *khutti*.

A perusal of all the relevant entries in the Settlement Record of 1878 leads us to the conclusion that the ownership both *ala* and *adna* of the land in dispute vests in the defendants and the plaintiffs, upon whom the burden of establishing their claim rested, have failed to discharge that onus. As regards the entry relating to possession and location of tenants, we have already remarked that there was no justification for making it in 1878; and though the oral evidence adduced by the plaintiffs shows that the Isa Khel proprietors have not been taking interest in making arrangements for cultivation and in assigning the different plots of land to the tenants, it cannot be said that they have not dealt directly with the tenants at all. Indeed Pandit Hari Kishen Kaul, who directed entries to be made in favour of the plaintiffs, says that "*butemar* tenants do not at present pay any rent to *adna maliks*, but they give *khutti* to *ala maliks* only. The above mentioned decision will not affect the said rights. The only difference will be this that *adna maliks* and not *ala maliks* will have a right to eject the *butemar* tenants." The Financial Commissioner, who reversed that order, also refers to the fact that the result of the enquiry ordered by him established that "between 1878 and the present Settlement there are nine cases in which *ala maliks* recovered rent or *haq malikana* through the Courts."

It may be that the *lambardars* and *warhidars* were acting on behalf of the proprietors who do not reside in the village: but whatever the real state of affairs may be, we do not think that the mere fact that the tenants have been located by the village officers is any adequate ground for depriving the Isa Khel proprietors of their right of ownership, when the entries with respect to that matter have all along been in their favour. It is to be remembered that the land was not valuable, and this fact coupled with their absence from the village fully explains their indifference in the matter of locating tenants.

The findings of the Subordinate Judge on the question of limitation and the applicability of Order II, rule 2, are obviously wrong; and are admitted to be so by Mr. Fazl-i-Hussain; but the decision on the merits is correct. Accordingly we uphold the decree, and dismiss the appeal with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 10 B OF 1917.

August 21, 1917.

Present:—Sir Henry Stanyon, KT., A. J. C.

GANPAT WANJARI—APPELLANT

versus

AMRITA AND OTHERS—RESPONDENTS.

Provincial Insolvency Act (III of 1907), ss. 16, 18, 20, 23—Petition for adjudication—Court, power of, to call upon debtor of insolvent to pay money into Court.

Where a debtor presents a petition for adjudication as an insolvent, the Court has no power, without making an order for adjudication or appointing a Receiver, to order a debtor of the insolvent to pay into Court any money which he owes to the insolvent. [p 538, col 2.]

Appeal from the order of the Additional District Judge, Buldhana, dated the 17th January 1917.

Mr. *D. T. Mangalmoorti*, for the Appellant.

Mr. *Atmaram Bhagwant*, for Respondent No. 1.

JUDGMENT.—This is an appeal from an order made under the Provincial Insolvency Act. That order was *ultra vires* of the lower Court and must be set aside. One Krishnaji applied to be declared an insolvent on the ground that his debts amounted to Rs. 1,808 and his assets to Rs. 6-8-0 The petition was opposed by five of his creditors, who alleged *inter alia* that the petitioner, was the owner of a field which he had pretended to sell to his uncle one Ganpat for Rs. 900. The petitioner replied that he had in truth sold the field for the said amount and used the money in satisfying some of his creditors. The contesting creditors gave no evidence whatever in support of their allegations as to the legality and force of a deed executed one year before these proceedings began, but the lower Court, having accepted evidence tendered by the petitioner for the purpose of proving that the sale was a real transaction, held:

(1) that the sale was in fact a real transaction; and

(2) that Ganpat had paid Rs. 450 out of the price of Rs. 900 to the petitioner.

Thereupon, the lower Court, without making any order of adjudication under section 16 of the Insolvency Act, 1907, or for the appointment of a Receiver under section 18 of that enactment, directed that Ganpat should pay Rs. 450 into Court for the benefit of the general body of the petitioner's creditors. The learned Judge does not enlighten us as to the section of the Insolvency Act under which he passed this order upon Ganpat and I have been unable to find any such section. Ganpat has appealed from the order, and there is no doubt that the appeal must succeed. The question, whether or not Ganpat owes any money to the petitioner for insolvency is not a question to be decided in these proceedings, to which Ganpat is no party. If the lower Court is satisfied that the petitioner has fraudulently concealed the existence of assets belonging to him, that may be good ground for dismissing the petition. But if the Court decides to proceed with the administration of the petitioner's affairs, it must first make an order of adjudication under section 16. Thereafter, unless it elects to carry on the administration itself under the powers given to it by section 23 of the Act, it should appoint a Receiver under section 18 of the Act. Then, under section 20 of the Act, steps can be taken according to law to release the property of the debtor. The learned Judge will avoid such errors as he has made in this case if he proceeds with the Insolvency Act, 1907, open before him, and follows the procedure laid down for him in proper order by section after section.

The appeal is allowed, the order of the lower Court directing Ganpat to pay Rs. 450 into Court is set aside and that Court is directed to proceed with the case according to law. I make no order as to costs of this appeal. Costs in Courts below all be disposed of as that Court may think proper.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 519 OF 1915.

December 21, 1916.

Present:—Mr. Justice D. Chatterjee and Mr. Justice Walmsley.

PANCHANON MAJUMDAR—PLAINTIFF—APPELLANT

versus

BINOY KRISHNA BANERJEE—DEFENDANT—RESPONDENT.

Hindu Law—Adoption—Adoptee, whether bound by anti-adoption contract made by natural father restricting adoptee's rights.

An anti-adoption agreement by the adoptive mother with the natural father of the adopted son, if it amounts only to a fair and reasonable arrangement for the enjoyment of her husband's property by the widow during her lifetime, is valid and binding on the adopted son, especially where there is authority from the husband in that connection. [p. 540, col. 1.]

Neither the adoptive mother nor the natural father of the adopted son has, however, any legal authority to impose a personal contract upon the minor adoptee. Such an agreement between the adoptive mother and the natural father is void unless ratified by the minor. [p. 540, col. 1.]

PANCHANON MAJUMDAR *v.* BINOY KRISHNA BANERJEE.

A Hindu widow before making an adoption made an agreement with the natural father of her prospective adopted son that a certain monthly allowance was to be paid to her brother's son during his lifetime:

Held, that the agreement being in restriction of the adopted son's rights was not binding upon him. [p. 540, col. 1.]

Appeal against the decision of the District Judge, Murshidabad, dated the 14th January 1915, affirming that of the Subordinate Judge, Murshidabad, dated the 22nd January 1914.

Dr. *Sarat Chandra Basack* and Babu *Bankim Chandra Mukherjee*, for the Appellant.

Babu *Tarakeswar Pal Choudhury*, for the Respondents.

JUDGMENT.

D. CHATTERJEE, J.—A Hindu widow before making an adoption made an agreement with the natural father of her prospective adopted son that she was to receive a certain amount for her maintenance and a certain amount for the marriage of her relations: and Rs. 25 per mensem each was to be paid to her brother's son and grandson during their lifetime. These amounts were regularly paid so long as the widow was alive but on her death payment was stopped by the guardian appointed by the District Judge. The present appeal arises out of a suit by the brother's grandson of the widow for enforcing the contract against the adopted son. Both the Courts below have dismissed the suit. Hence this appeal.

The plaintiff's case was that the allowance was sanctioned by the Will of the defendant's adoptive father—that he and his uncle were receiving their allowances from before the adoption and the giving of the allowance was the condition on which the adoption was made and would not have been made but for it.

The defendant's plea was that he was not bound by the contract of his father.

The alleged Will of adoptive father has not been proved to be genuine and even if it were, its terms cannot be read as sanctioning the allowance to the plaintiff. Plaintiff's case, therefore, must stand or fall by the contract of the natural father with the adoptive mother. There is some divergence of judicial opinion on the general question whether anti-adoption agreements entered into by the natural father of an adopted son and operating in restriction of his legal rights as an adopted son are binding on him. Their Lordships of the Privy Council have expressed a leaning against the binding nature of these agreements: see *Bhaiya Rabidat Singh* v. *Indar Kunwar* (1). This was a case, however, of an agreement made in violation of the terms of the Will of the husband by which the authority to adopt was given and the real question for decision before their Lordships was the validity of the adoption, the contention being that the adoption was invalid by reason of the agreement which restricted the rights of the adopted son. In the case of *Visalakshi Ammal* v. *Sivaramien* (2) a Full Bench of the Madras High Court held that, an agreement with the adoptive mother by which the natural father agreed before adoption that in case of a difference she would enjoy half the estate of her husband for life, the adopted son getting it on her death, was valid and binding: the real test in these cases being whether the arrangement was fair and reasonable.

In the case of *Vyasacharya Narayanacharya* v. *Venkubai Rangacharya Upadya* (3) a Full Bench of the Bombay High Court has held that a gift by the widow of a portion of her husband's estate to her daughter and assented to by the natural father of a subsequently adopted son at the time of the adoption, is not binding on the adopted son. This was a case of an alienation by the widow which would not bind reversioners if there were no adoption, as she was dealing with more than her life-interest. There is no case exactly in point in Bengal. The case of *Bepin Behari Bundopadhya* v. *Brojo Nath Mookhopadhya* (4) was that of an adoptive father authorising his widow to hold possession for her life and the natural father giving away his son with the knowledge of the restriction. The case of *Harendra Nath Avasti* v. *Shibo Sundari Debi Chowdhurani* (5) is also of the same nature, as the

(1) 16 C. 556; 16 I. A. 53; 13 Ind. Jur. 98; 5 Sar. P. C. J. 505; Rafique & Jackson's P. C. No. 110; 8 Ind. Dec. (N. S.) 367.

(2) 27 M. 577; 14 M. L. J. 310 (F. B.).

(3) 17 Ind. Cas. 741; 37 B. 251; 14 Bom. L. R. 1109 (F. B.).

(4) 8 C. 357; 6 Ind. Jur. 523; 4 Ind. Dec. (N. S.) 228.

(5) 3 Ind. Cas. 378.

adoptive father made a similar restriction by his Will.

These cases do not seem to take the case further than validating fair and reasonable arrangements for the enjoyment of her husband's property by the widow during her lifetime, especially when there is authority from the husband in that connection. The broad proposition, therefore, that all anti-adoption agreements by the adoptive mother with the natural father and operating in the restriction of the rights of the adopted son are valid cannot be supported, and it is hardly necessary in this case to go into further detail in this matter. The allowance in dispute was paid during the lifetime of the widow and the objection is made after her death There is no alienation by her of her husband's property. She has with the consent of the natural father tried to impose a personal contract upon the minor. Neither she nor the natural father had any legal authority to do so. It is true that the contract is not absolutely void and could have been ratified by the minor but he has not. In this view of the case we dismiss the appeal with costs.

WALMSLEY, J.—I agree.

Appeal dismissed.

PUNJAB CHIEF COURT.

CIVIL APPEAL No. 833 OF 1914.

November 10, 1917.

Present:—Mr. Justice Chevis and Mr. Justice Leslie Jones.

KARM ILAHI—DEFENDANT—APPELLANT

versus

BINDRA BAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Regulation XVII of 1806, s. 8—Mortgage—Foreclosure—Notice misdescribing land, validity of.

Where land is mortgaged with a share in the *shamilat*, a foreclosure notice issued under Regulation XVII of 1806 which specifies the land but omits to mention the *shamilat*, is altogether invalid. [p. 541, col. 1.]

A foreclosure notice cannot be held to be valid as regards one part of the mortgaged land and invalid as regards the other part. [p. 540, col. 2.]

Where a foreclosure notice misdescribes the mortgaged property, the mortgagor is very likely to be misled by the misdescription. [p. 541, col. 1.]

Second appeal from the decree of the Divisional Judge, Gujranwala, dated the 6th January 1914.

Mr. *Abdul Razaq*, for the Appellant.

Mr. *G. C. Narang*, for the Respondents.

JUDGMENT.—This is a suit by a mortgagee for possession by foreclosure, and the question is whether the foreclosure notice, issued under the Regulation of 1806, is valid.

The mortgage was without possession. The land mortgaged was 8 *ghumaos* 5 *kanals* 11 *marlas* 6 *sarsahis* with share in *shamilat*. The notice specifies the 8 *ghumaos* 5 *kanals* 11 *marlas* 6 *sarsahis* but omits to mention the *shamilat*. The original area has now been increased by an addition of *shamilat* from 69 *kanals* to 227 *kanals*.

The first Court, relying on *Wazir Chand* v. *Makhan* (1), held that as the notice omitted to mention the *shamilat* the notice was invalid, and dismissed the suit.

The learned Divisional Judge on appeal followed an unpublished ruling of this Court, Civil Appeal No. 492 of 1908, and held that the notice was valid to the extent of the land specified and gave plaintiffs a decree for 8 *ghumaos* 5 *kanals* 11 *marlas* 6 *sarsahis*.

Defendant appeals to this Court.

On referring to the above unpublished ruling we find that it professes to follow the line taken in *Wazir Chand* v. *Makhan* (1). This, however, is clearly a mistake, for on referring to the records of the 1901 case we find that the plaintiff's suit was dismissed *in toto*. Apart from this unpublished ruling, which was clearly based on a misapprehension of the real facts of the reported case of 1901, we know of no authority for holding that a foreclosure notice can be held to be valid as regards one part of the mortgaged land and invalid as regards the other part.

In *Wazir Chand* v. *Makhan* (1) the suit was dismissed because the foreclosure notice specified a part only of the mortgaged land, omitting to refer to the

(1) 109 P. R. 1901.

shamilat. The case seems exactly on all fours with the present case. This ruling was approved and followed by a Division Bench in Civil Appeal No. 1031 of 1912 [published as *Shambu Ram* v. *Jamita* (2)], though there the flaw in the notice was that it *overstated* the area of the mortgaged land.

Following *Wazir Chand* v. *Makhan* (1) we hold that the notice is altogether invalid and that the suit should be dismissed.

It is urged that the misdescription cannot have misled the mortgagor, but we are of opinion, as was held in *Shambu Ram* v. *Jamita* (2), that where the notice misdescribes the mortgaged property the mortgagor is very likely to be misled by the misdescription.

Finally defendant's Counsel urged that his client should at least get a decree for possession as mortgagee. But we note that the mortgage-deed does not provide for the mortgagee taking possession except by foreclosure.

We accept this appeal and, reversing the decree of the lower Appellate Court, we dismiss the suit with costs throughout.

Appeal accepted.

(2) 23 Ind. Cas. 97; 43 P. R. 1914; 85 P. W. R. 1914.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 3-B OF 1917.

September 22, 1917.

Present:—Mr. Mittra, A. J. C.

GADADHAR—PLAINTIFF—APPELLANT

versus

CHUNNILAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Berar Land Revenue Code, Ch. VIII (a), *s.* 96 (j) —*Officer in charge of Record of Rights, powers of*—*Recognised Sub-Division, what is.*

The officer-in-charge of a Record of Rights is not an officer who is authorised to recognise a Sub-Division of a Survey number or to form two recognised Sub-Divisions into one Survey number. [p. 541, col. 2.]

Surya Bhan v. *Renai*, 42 Ind. Cas. 447, followed.

A recognised Sub-Division of a Survey number is a holding which has a separate assessment fixed for it. [p. 541, col. 2.]

Appeal from the decree of the Court of the Additional District Judge, Akola, dated the 17th August 1916, in Appeal No. 24 of 1916.

Messrs. *M. V. Joshi*, *W. R. Puranik* and *V. V. Chitale*, for the Appellant.

Dr. *H. S. Gour*, for the Respondents.

JUDGMENT.—The plaintiff sues for pre-emption. He is the holder of a recognised Sub-Division of a Survey number. The defendant No. 2 was the holder of another recognised Sub-Division of the same Survey number and sold his rights to the other defendant. It is conceded by the plaintiff on the authority of *Musammat Gangu* v. *Chandu* (1) that he would have no right of pre-emption if the two plots remained recognised Sub-Divisions of a Survey number; but it is argued that at the recent Record of Rights the holdings have been described as *pot hissas*, the term used in the vernacular for recognised Sub-Division being *pakti*. The argument for the plaintiff-appellant is that he has now become a co-occupant with the defendant No. 1, since 1913 the two plots having been made into one holding. In *Surya Bhan* v. *Renai* (2) I had occasion to discuss the powers of the officer-in-charge of the Record of Rights. I have given my reasons for holding that the officer is not such an officer as is authorised to recognise a Sub Division of a Survey number or to form two recognised Sub-Divisions into one Survey number. The recognised Sub-Division of a Survey number is a holding which has a separate assessment fixed for it. Chapter VIII (*a*) of the Berar Land Revenue Code shows that the officer-in-charge of the Record of Rights is merely to ascertain and record existing facts and, amongst other things, the revenue paid by each of the holders in accordance with the arrangements come to between them. Section 96 (*j*) points out that such entries made in the Record of Rights shall not affect the liability of any person to pay the land revenue. If the plaintiff's holding was a separate holding and was liable solely for the revenue in respect of it, this holding cannot

(1) 18 Ind. Cas. 862; 9 N. L. R. 16.
(2) 42 Ind. Cas. 447.

be made part of a larger holding so as to make him responsible jointly with another for the entire revenue. Such a procedure can only be adopted when there is a Survey Settlement as provided for in section 85. I may point out that in the remarks column the plots are noted also as *paiki* numbers. No change, therefore, has been made in the rights of the parties as regards pre-emption by reason of anything done in the course of the enquiry for the preparation of the Record of Rights. The Courts below are, therefore, right in holding that the plaintiff has no right of pre-emption in this case.

The appeal is, therefore, dismissed.

Appeal dismissed.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 88 OF 1916.

December 7, 1917.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

ANGAD SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

ZORAWAR SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 164—Suit for profits—Profits, mode of calculation of—Sir *and* khudkasht, *profits of.*

If different co-sharers in a *mahal* are entitled to different portions of the *mahal* as their *sir* or *khudkasht*, each co-sharer would be entitled to the profits of his own *sir* and *khudkasht* and would not be obliged to account for those profits to the other co-sharers. On the other hand, if any co-sharer has in his hands and in his own cultivation an excess of land, over and above his proper share of *sir* and *khudkasht*, he must account for the excess. The share of each co-sharer need not necessarily be identical in area, because a larger share of inferior land might be given to one co-sharer where the others have land of superior quality. If some co-sharers neglect to cultivate their shares of *sir* and *khudkasht*, they are not entitled to call upon the other co-sharers to account for the profits of their *sir* or *khudkasht* unless the latter are cultivating an area in excess of their shares. [p. 543, col. 1.]

Letters Patent Appeal from a judgment of Mr. Justice Rafique, confirming a decree of the District Judge of Aligarh.

Messrs. *M. L. Agarwala* and *Peary Lal Banerji*, for the Appellants.

Dr. *Tej Bahadur Sapru*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought in the Revenue Court for profits. One of the plaintiffs happened to be the Lambardar, but we think that this fact ought to be left out of consideration for the purposes of the case. The plaintiff is not suing as Lambardar. He is suing as one of the co-sharers. The learned Assistant Collector at the commencement of his judgment says:—"The peculiarity of this case is that one of the plaintiffs is the Lambardar; and the defendants being only *pattidars* have so much land as *sir* and *khudkasht* that the Lambardar instead of distributing profits has been reduced to the position of a sharer claiming profits." The defence to the suit was that the defendants were not in the habit of making any collections, and that any profits that they had in their hands were the profits from their own *sir* and *khudkasht*, and that they had not more *sir* and *khudkasht* than represented their share in the village. Another defendant pleaded much the same thing but also alleged that the plaintiffs, particularly the Lambardar plaintiff, had purposely allowed land to go out of cultivation. The Court of first instance gave a decree in the plaintiffs' favour for the following sums, for

1317	*Fasli*	Rs.	63-7-10
1318	„	„	109-7-11
1319	„	„	129-3-8.

The lower Appellate Court dismissed the appeal of the defendants. In the course of his judgment the learned District Judge says, "The first point for determination is on what basis the liability, if any, of the defendants-appellants should be calculated. I decide that the calculation ought to be made on the basis of actual collections made, including of course nominal rental of *sir* and *khudkasht*." The defendants have appealed and it is urged on their behalf that in a general way the real issue between the parties has not been decided. It would rather seem as if the expression "basis of actual collections" was not very appropriate, because the defendants have all along

alleged that they make no collections at all and there is nothing in the finding of either the Court of first instance or the lower Appellate Court to show that they did. So far as we can gather from the findings arrived at in the Court below, the defendants have been in possession of a considerable amount of land and such profits as they have in their hands are the profits derived from land which they have been cultivating themselves or by sub-tenants. We think that if the different co-sharers are entitled to different portions of the *mahal* as their *sir* and *khudkasht*, each co-sharer would be entitled to the profits of his own *sir* and *khudkasht* and he would not be obliged to account for those profits to the other co-sharers. It would seem to be only common justice that if one co-sharer was industrious and made a considerable profit out of his *sir* and *khudkasht*, he should not be obliged to share that profit with another co-sharer, who neglected or was less fortunate with his *sir* and *khudkasht*. On the other hand if any co-sharer had in his hands and in his own cultivation an excess of land, over and above his proper share of *sir* and *khudkasht*, he should certainly account for the excess. The share of each co-sharer in *sir* and *khudkasht* need not necessarily be identical in area, because a larger share of inferior land might be given to one co-sharer where the others had land of superior quality. We must also point out that if the plaintiffs were entitled to certain land as their *sir* and *khudkasht* and for any reason they neglected to cultivate it, they would not be entitled to call upon the defendant to account for the profits of his *sir* and *khudkasht* unless the latter was in excess of what the plaintiffs were to cultivate. After these general remarks we think it advisable to refer certain issues to the Court below before deciding the appeal:—

(1) Was the land divided between the co-sharers as *sir* and *khudkasht*?

(2) Was the *sir* and *khudkasht* of each co-sharer in proportion to his share in the village?

(3) Were the defendants in possession by themselves or through sub-tenants of *sir* and *khudkasht* in excess of their share, and if so, to what extent? In considering this issue the Court will have regard to the quality of the land.

(4) Having regard to the findings on the above issues, have the defendants realised anything, and, if so, how much in excess of what they were entitled to?

The parties may adduce further evidence relevant to the above issues. On return of the findings the usual ten days will be allowed for filing objections.

On return of the findings the Court delivered the following

JUDGMENT.—Having regard to the findings we think this appeal must fail. We accordingly dismiss it with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1883 OF 1912.

August 28, 1917.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Richardson.

LAKHI CHARAN SAHA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

HAMID ALI AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Revenue Sales Act (XI of 1859), s. 37—Occupancy tenant at fixed rent, whether liable to ejectment.

A *raiyat* who has acquired a right of occupancy before the passing of the Bengal Tenancy Act can retain the privileges of an occupancy *raiyat*, although his rent has been fixed in perpetuity by reason of which he becomes a *raiyat* holding at fixed rates according to the classification of *raiyats* in the Bengal Tenancy Act. [p. 545, col. 1.]

A person who has already acquired an occupancy right does not by obtaining a grant of fixed rent lose that occupancy right, and such a person is protected from ejectment under section 37 of the Bengal Revenue Sales Act. [p. 546, col. 1.]

Appeal against the decree of the District Judge, Chittagong, dated the 1st April 1912, affirming that of the Officiating Additional Munsif, Hathazari, dated the 31st January 1911.

Babus *Dhirendra Lal Kastgir* and *Jogesh Chandra Bose*, for the Appellants.

Babus *Mohendra Nath Ray*, *Monmatha Nath Ray* and *Kshitis Chandra Sen*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit by the plaintiff-appellant, who is the purchaser of an entire estate under Act XI of 1859, to eject the defendants. The defendants and their predecessors-in-interest, it is found, had been holding the lands at any rate from 1838 as Raiyats, and had acquired a right of occupancy in the lands in suit, but the defendant Chunnu Miah and another in 1881 executed a *daimi kaimi chirasthai* (permanent Raiyati Kabuliyat). The Courts below have held that the interest of the defendants was protected under section 37 of Act XI of 1859, and the plaintiff was not, therefore, entitled to *khas* possession, but was entitled to fair and equitable rent for the lands. The plaintiff has appealed to this Court.

Under section 37 of Act XI of 1859, the purchaser at a revenue sale is not entitled to eject any Raiyat *having a right of occupancy at a fixed rent or at a rent assessable according to fixed rules under the laws in force.* On the facts stated, the defendants' interest *prima facie* is that of a "Raiyat having a right of occupancy at a fixed rent."

At the time when the Revenue Sale Law (Act XI of 1859) was passed, the law relating to landlord and tenant in force was Act X of 859, and under section 6 of that Act every Raiyat who cultivated or held land for 12 years acquired a right of occupancy in such land. Under that Act there were two classes of occupancy Raiyats *viz.*, Raiyats at *fixed rates of rent*, and occupancy Raiyats who did not hold at fixed rates of rent (see sections 3, 4, 5 and 6). Both these classes of occupancy Raiyats are protected under the proviso to section 37 of Act XI, which provides that the purchaser shall not be entitled to eject any Raiyat having a right of occupancy at a fixed rent, or at a rent assessable according to fixed rules under the laws in force. "Occupancy Raiyats at fixed rates of rent" do not find any place in the classification of "Raiyats" under the Bengal Tenancy Act Under that Act there are occupancy Raiyats and Raiyats holding at fixed rates. But if a Raiyat had a right of occupancy at a fixed rent under Act X of 1859 (as the defendants in the present case had), we do not think that he lost his right of occupancy and the privileges attaching to it after the passing of the Bengal Tenancy Act, merely because occupancy Raiyats holding at fixed rates of rent are not separately mentioned in the classification of Raiyats under the Bengal Tenancy Act.

It is contended on behalf of the appellant, on the authority of the case of *Bhutnath Naskar* v. *Monmotho Nath Mitra* (1), that a Raiyat at fixed rates cannot have a right of occupancy. The question which had to be considered in that case was, whether the interest of the defendants was a protected interest within the meaning of section 160, clause (*d*) of the Bengal Tenancy Act. Doss, J., held upon a construction of the lease in that case that the interest of the defendants was a tenure, and that if the defendants were treated as Raiyats holding at fixed rates, their interest was not protected under section 160 of the Act. On appeal under the Letters Patent, the learned Chief Justice affirmed the judgment of Doss, J., on the ground that the interet of the defendants was a tenure and therefore not protected under section 160, and did not express any opinion on the other question. Mookerjee, J., confirmed the judgment of Doss, J. not only on that ground, but also on the ground that a Raiyat holding at fixed rates is not protected under section 160 of the Bengal Tenancy Act.

It is necessary to consider in the present case, whether a Raiyat holding at fixed rates is protected under section 160 of the Bengal Tenancy Act, as the present case has to be considered with reference to section 37 of Act XI of 1859, the wording of which differs materially from that of section 160, clause (*d*), of the Bengal Tenancy Act. Reliance, however, is placed on behalf of the appellants on the observations of Mookerjee, J., in that case, in support of the proposition that a Raiyat holding at fixed rates cannot have a right of occupancy. No doubt, the mere fact that a holding is held at fixed rates, does not

(1) 2 Ind. Cas. 675; 13 C. W. N. 1025; 11 C. L. J. 98.

make it an occupancy holding, for a Raiyati holding at a fixed rent may be created only a month before the revenue sale, and the Raiyat, in such a case, cannot certainly be called a Raiyat having a right of occupancy. The defendants in the present case had acquired a right of occupancy before their rent was fixed in perpetuity, which again was before the passing of the Bengal Tenancy Act. It is unnecessary, therefore, to consider, in the present case, whether a Raiyat holding at fixed rates after he has held the land for 12 years in a village can become a settled Raiyat of the village and acquire a right of occupancy—a question upon which there is divergence of judicial opinion. [See the unreported cases, Second Appeal No. 1115 of 1915 decided on the 15th February 1917 and Second Appeal No. 847 of 1913 decided on the 26th May 1915 (*Akhil Chandra Sen* v. *Tripura Charan*) (2).] The only question for consideration is whether a Raiyat who has acquired a right of occupancy before the passing of the Bengal Tenancy Act can retain the privileges of an occupancy Raiyat although his rent has been fixed in perpetuity, by reason of which he becomes a Raiyat holding at fixed rates according to the classification of Raiyats in the Bengal Tenancy Act. Section 19 provides that every Raiyat who immediately before the commencement of the Act has a right of occupancy in any land shall, when the Act comes into force, have a right of occupancy in that land, and section 178 (1), clause (*b*), of the Bengal Tenancy Act provides that nothing in any contract between a landlord and tenant made before or after the passing of the Act shall take away an occupancy right in existence at the date of the contract. In the present case the Kabuliyat executed in 1881, by which the rent of the defendants was fixed, did not even purport to take away any right which the defendants had at the date of the Kabuliyat. The right of occupancy, therefore, which the defendants had, was not affected by the Kabuliyat by which the rent was fixed.

Mookerjee, J., in referring to the omission of 'a raiyat holding at fixed rates' from section 160, suggests that "the policy of the Legislature was to protect the Raiyat, but not necessarily to the complete detriment of the purchaser of a tenure at a sale for arrears of rent. If a Raiyat holding at a fixed rate of rent were protected from ejectment, the purchaser would acquire the property in an incumbered condition; for he would be unable, not only to eject the Raiyat, but also to enhance the rent. On the other hand, if occupancy Raiyats and non-occupancy Raiyats alone were protected from ejectment, while their possession would be maintained, they would be liable to have their rent enhanced from time to time, at the instance and for the benefit of the purchaser of the tenure."

Those considerations, however, do not arise in connection with the proviso to section 37 of Act XI of 1859. That proviso expressly lays down that the purchaser shall not be entitled to enhance the rent of an occupancy Raiyat otherwise than in the manner prescribed by law or otherwise than the former proprietor, irrespectively of all engagements made since the time of settlement, may have been entitled to do. Now the rent of an occupancy Raiyat, who holds at a fixed rate of rent from the time of the Permanent Settlement, could not be enhanced under Act X of 1859, nor can the rent of such a Raiyat be enhanced under the Bengal Tenancy Act. Section 37 of Act XI of 1859 having expressly laid down that the purchaser at a revenue sale is not entitled to enhance the rent of such Raiyats, no question arises as to the "detriment of the purchaser" under that section. Where, however, the occupancy Raiyat holds at a fixed rent not from the time of the Permanent Settlement, but only under an engagement made since the time of settlement he is not protected from enhancement, because the former proprietor would have been, irrespectively of the engagement, entitled in a proper case to raise the rent of such a Raiyat. The purchaser, however, is not entitled to eject occupancy Raiyats of either of the two classes. The rights of the purchaser as regards *enhancement* of rent having been clearly laid down by section 37 of Act XI of 1859, the considerations relied upon by Mookerjee, J., do not arise in connection with cases coming under section 37 of the Revenue Sale Law. The case of *Abdul Gani* v. *Makbul Ali* (3), in so

(2) 29 Ind. Cas. 563.

(3) 31 Ind. Cas. 19; 22 C. L. J. 223; 42 C. 745; 20 C. W. N. 185.

far as it holds that a person who has already acquired an occupancy right does not by obtaining a grant of fixed rent lose that occupancy right and that such a person is protected from ejectment under section 37, supports the view we take and to that extent we agree with that decision. If the opposite view were taken, Raiyats who might be holding lands for generations and who might have acquired rights of occupancy would be liable to be ejected by a purchaser at a revenue sale, simply because they may come under the description of Raiyats holding at fixed rates under the Bengal Tenancy Act, by reason of their rent being fixed in perpetuity by contract, or by reason of their holding at the same rent from the time of the Permanent Settlement or by reason of a presumption arising under section 50 of the Bengal Tenancy Act that they have been so holding, when the clear intention of the Legislature is to protect such Raiyats from ejectment at the hands of a purchaser at a revenue sale.

We are of opinion that as the defendants had acquired rights of occupancy they were protected from ejectment under the proviso to section 37 of Act XI of 1859, although they held at a fixed rent. The appeal is accordingly dismissed with costs.

Appeal dismissed.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 508 OF 1914.

May 9, 1917.

Present:—Mr. Justice Sharfuddin and Mr. Justice Roe.

BISHESWAR DAYAL SAHU AND OTHERS—APPELLANTS

versus

BANSROPAN SAHU AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11, *Expl.* (iv)—Res judicata *against* pro forma *defendant.*

Where one of several persons interested in a property brings a suit in respect of it, and the other persons interested therein being unwilling to join themselves as plaintiffs in the suit are made *pro forma* defendants, they cannot, upon the failure of the plaintiff, harass the defendant upon the same cause of action. [p. 547, col. 1.]

Appeal from a decision of the Subordinate Judge, First Court, Arrah, dated the 11th June 1914.

JUDGMENT.—The facts of this case have been stated at length in the judgment of the lower Court. They are briefly that the family of the plaintiffs settled in 1863 two villages Ichri and Ayar upon a widow of their family Chamela Kuer as maintenance for her lifetime, with the proviso that on her death the property should revert to the family together with all accretions made thereto by her. One of these properties, Ichri, was brought to sale for arrears of revenue and ostensibly purchased by Kolaishar Pande defendant No. 3 and subsequently transferred by him to Bansropan Sahu, the daughter's grandson of Chamela's co-widow. The other property, Ayar, had been mortgaged and in execution of the mortgage decree purchased by Togan Sahu in 1904. Chamela had instituted a suit against Togan Sahu to set aside the decree and sale as inoperative against her. That suit was withdrawn and simultaneously with the withdrawal of the suit the property was conveyed by Togan Sahu to the same Bansropan. Upon the death of Chamela Bansropan claimed to remain in possession of these properties. The plaintiffs, therefore, brought this suit for a declaration, firstly, that the purchase by Kolaishar Pande was a fraudulent transaction; that the money with which the property was purchased came from the pocket of Chamela Kuer and that the subsequent ostensible transfer to Bansropan was without consideration; also that the purchase by Togan Sahu was with the money of Chamela and that Bansropan was only her *benamidar*; and on these declarations to recover possession of the properties.

The defendants resisted the suit on the ground that it was *res judicata* that Kolaishar Pande was not a *benamdar* and that the purchase by Bansropan of the interest of Togan Sahu was a genuine transaction.

The lower Court found that the suit with regard to the village Ichri was barred by the rule of *res judicata*, but that it was clear that the village Ayar had been purchased by Togan Sahu with the widow's money and that, therefore, it must revert to the family on her death.

Against the decree made upon these findings the plaintiffs appeal and the defendants have filed a cross-appeal.

With regard to the plaintiffs' appeal it is clear that the question whether Kolaishar was a *benamdar* has been already settled in litigation to which all the plaintiffs in the present suit were either parties or representatives-in-interest of parties. It is contended in this respect that Chuni Sahu who is the father of one set of plaintiffs was not a plaintiff in the former suit and that, therefore, the decision is not binding upon that branch of the family. Chuni Sahu was *pro forma* defendant in that suit and had he wished to contest the position of Kolaishar with regard to this property, it was his clear duty to apply to be transferred from the category of defendants to that of plaintiffs and within the meaning of Explanation IV of section 11 he might have made the allegation that Kolaishar was not the real purchaser of the property a ground of attack; having failed to do so his representatives cannot be heard now to raise the same claim.

It is clearly an idle proposition that where *A* brings a suit against *B*, and *C* and *D* being equally interested with *A* in the property have been made defendants but have refused to join themselves as plaintiffs in the suit, *C* may, upon the failure of *A*, come forward and harass *B* upon the same cause of action and on his failure *D* in his turn may also come forward. We have no doubt that Explanation IV to section 11 was designed to meet a plea of this description. It is *res judicata* that the purchase of Kolaishar Pande was a *bona fide* purchase and that property in the estate passed to him by virtue of the revenue sale. Seeing that failure was unavoidable upon this point, Mr. Gangadhar Das suggests that the real fact was that Kolaishar purchased the property in good faith but that thereafter *Musammat* Chameli Kuer re-purchased the property from him with her own money in the name of Bansropan. He asks to be allowed to amend his plaint in this Court and to fight the case upon this issue in the lower Court once more.

The plaintiffs were undoubtedly badly advised in putting up a plea which had already been decided against them, but having elected that ground of attack in the lower Court they cannot be allowed in this Court to choose a fresh ground of attack. Upon their pleadings it is idle for them to say in the same breath that no money was paid to Kolaishar under the bond by which the transfer was made in the name of Bansropan and that the money that was paid to Kolaishar came from the pocket of the lady. The suit with regard to village Ichri was rightly dismissed.

The position with regard to village Ayar has been fully set forth in the judgment of the learned Subordinate Judge. The defendant Bansropan was challenged to show that he was the real purchaser of this village. It was shown that he was living at the time of the purchase with his great-grandmother. It was suggested that he had no means; that he was a mere boy without any occupation. The consideration passed was Rs. 425. There had been no ostensible change in the ownership of the property since the purchase. Chameli Kuer had apparently been in possession up to the time of her death. All these considerations threw upon Bansropan the burden of proof of showing that he obtained the money either from his own pocket or from his father's pocket. He gave no evidence of any description of the source from which the money was drawn. In these circumstances it was rightly found that Bansropan was an ostensible purchaser only and that Chameli Kuer was the real purchaser. The suit with regard to village Ayar was rightly decreed. The appeal and the cross-appeal are dismissed with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 51 OF 1916.

February 24, 1917.

Present:—Mr. Mittra, A. J. C.

PANDURANG SHAMJI—APPELLANT

versus

NARAYAN RAO—RESPONDENT No. 1.

Evidence Act (*I of* 1872), *s.* 115—*Estoppel—Mort.*

PANDURANG SHAMJI *v.* NARAYAN RAO.

gage—Co-mortgagees, agreement between, to pay off prior mortgage—Failure by one mortgagee to inform co-mortgagee of his charge, effect of.

One *S.* executed a mortgage in favour of *A* and *B.* Some payments were made by *S.* towards the satisfaction of the mortgage debt which were admittedly taken by *B.* alone. Subsequently *S.* executed another mortgage in favour of *B* and *C* in order to pay off the prior mortgage. *B* and *C* foreclosed the property. *B* sold his half share in the foreclosed property to the plaintiff and he also sold his right under the prior mortgage, alleging that it had not been fully satisfied. Plaintiff sued to foreclose *C's* share of the property on the basis of the first mortgage, alleging that it had not been completely satisfied:

Held, that in view of the implied terms of the contract between *B* and *C*, that contract being that they embarked upon a joint adventure for the purpose of extinguishing the prior mortgage and taking a first charge on the property, it was the legal duty of *B* to inform his co-mortgagee within a reasonable time that he had still an outstanding claim under the prior mortgage and that *B's* omission to give the information amounted to such an omission as is contemplated by section 115 of the Evidence Act and operated as an estoppel against *A* under that section. [p. 549, col. 1.]

Appeal against the decree of the Divisional Judge, Nagpur Division, dated the 15th October 1915.

Messrs. *M. B. Kinkhede* and *W. R. Puranik*, for the Appellant.

Mr. *K. K. Gandhe*, for Respondent No. 1.

JUDGMENT.—One Sitaram executed a mortgage for Rs. 2,000 on 16th September 1886 in favour of Naik and Pingle. Two payments aggregating Rs. 850 were made to Naik and it is admitted that Pingle had received his half share of this amount. On the 11th March 1891 he executed a fresh mortgage for Rs. 2,000 of the same property in favour of Pingle and one Nandurkar in order to pay off the prior mortgage. Pingle credited Rs. 999 towards the former mortgage and Rs. 1,000 was paid by Nandurkar to the mortgagor for satisfaction of the prior mortgage. Out of this Rs. 745 was paid to Naik. Naik admits that his share of the mortgage debt has been fully satisfied. On the 11th June 1904 Pingle and Nandurkar foreclosed the mortgaged property. On the 13th April 1908 Pingle sold his half share in the foreclosed village to the plaintiff and he also sold his rights under the prior mortgage, alleging that it had not been fully satisfied. The plaintiff now sues to foreclose Nandurkar's share of the village on the basis of the first mortgage. Both the Courts below have dismissed the suit on the ground that the first mortgage has been satisfied. According to a calculation made by the first Court, Rs. 1,978-8-0 was due on the date when the joint mortgage in favour of Pingle and Nandurkar was executed; it is clear from the recitals in that document that the intention of the parties was to extinguish the prior mortgage and each of the co-mortgagees advanced his share of the mortgage money. The plaintiff's case is that his vendor did not receive his share of Rs. 625 paid to Naik. He, therefore, claims half that amount with interest thereon. The suit was filed on the last day of the period of grace given by section 31, Act IX of 1908. The lower Appellate Court has presumed satisfaction from a long delay in enforcing the claim under the mortgage of 1886. It is contended that the burden of proof as regards satisfaction was wrongly placed upon the plaintiff and in support of this an unreported ruling of the learned Judicial Commissioner in Second Appeal No. 245 of 1915 has been cited.

There is a finding by the Courts below, which I think enables me to dispose of the case on the ground of estoppel. The finding is to the effect that Pingle never asserted a claim till 1908 for the short payment said to have been made to him under the first mortgage. The view taken by the first Court is that the estoppel so far as it is based upon the recitals in the document, is correct as far as it goes. The lower Appellate Court has not discussed the question of estoppel at all. But there is an aspect of the case not considered by the Court below, though Pingle's silence for many years has been pleaded as a ground for holding that he is estopped. Let us now look at the facts. Pingle and Nandurkar found that about Rs. 2,000 was due on the prior mortgage. Their intention, as would appear from the recitals in their mortgage, was to extinguish the prior mortgage and to obtain a first charge upon the property. They agreed to advance half the sum each. It is not suggested that Nandurkar acted improperly in paying over his share to Sitaram. Pingle had no doubt a right to an account from Naik. Pingle may have equally a claim against Sitaram, the

mortgagor, for not paying the amount due to Pingle. The intention of the two mortgagees was to extinguish the title, and in the absence of a complaint made by Pingle, Nandurkar was justified in assuming that it had been duly satisfied so far any claim on the part of his co-mortgagee was concerned. It is, however, urged that Nandurkar represents the mortgagor after the foreclosure decree, and is, therefore, bound to the same extent as the mortgagor. This is so far correct. The question arises whether there was not a duty cast upon Pingle to inform within a reasonable time that he had still an outstanding claim under the prior mortgage, which was meant to be extinguished by this joint adventure. That there was a moral duty on his part to so inform Nandurkar does not admit of any doubt. I think also that there was a legal duty in view of the implied terms of the contract, that contract being that they have embarked upon a joint adventure for the purpose of extinguishing the prior mortgage and taking a first charge on the property. If it was a legal duty, then Pingle's omission to inform him was such an omission as is contemplated by section 115 of the Evidence Act. Nandurkar was lulled into a belief that the property had ceased to be encumbered. Any claim upon that mortgage ought to have been made long ago. The joint mortgage was, in consequence of this belief, not enforced by Nandurkar till the debt reached near the full value of the property, for it is obvious that it was foreclosed because it reached that value. If Nandurkar had been so informed within a reasonable time, he would have enforced his mortgage at a time when the alleged outstanding claims on the prior mortgage and the mortgage money due under the joint mortgage had not reached the full value of the property. His position, therefore, has been altered for the worse by reason of the unreasonable delay in asserting the claim. Pingle and his representative, the plaintiff, are, therefore, estopped from saying that the claim under the prior mortgage has not been fully satisfied. On the whole, the suit has been rightly dismissed and I dismiss the appeal with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 521 OF 1917.

January 12, 1918.

Present:—Mr. Justice Leslie Jones.

LAL CHAND AND OTHERS—PLAINTIFFS—PETITIONERS

versus

Musammat MANOHRI AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. I, r. 3—Misjoinder of parties—Suit for possession by heir against several alienees, whether competent—Separate trial of issues affecting different defendants.

A suit for possession on the ground of inheritance can proceed against a number of different alienees. The question is purely one of convenience. [p. 550, col. 2.]

Tufail Mahomed v. *Hira Singh*, 10 Ind. Cas. 48; 167 P. L. R. 1911; 120 P. W. R. 1911, *Umabai* v. *Vithal Vasudev*, 1 Ind. Cas. 120; 33 B. 293; 11 Bom. L. R. 34; 5 M. L. T. 230, *Nundo Kumar Nasker* v. *Binomali Gayan*, 29 C. 871, *Musammat Rattan Kaur* v. *Badna*, 24 P. R. 1899, followed.

B. the last male owner, died leaving a widow who gifted her late husband's property to her daughters *N.* and *S.* Both these made certain alienations and then gifted their properties to their respective husbands. *S.* was, on her death, succeeded by her daughter's daughter *M.* On the death of *N.* her sons sued for possession of the whole of the property alienated by *N.* and *S.* and that held by *M*, alleging that they were the heirs of *B.* the last male owner and that all alienations were unauthorized. They impleaded all the various alienees—the mortgagees and vendees from *S.* and *N.* jointly and severally—as defendants:

Held, that there was no misjoinder of parties and that the suit could proceed against all the defendants jointly and that any varieties of defences which arose could easily be cured by the successive trial of the issues separately affecting different defendants. [p. 550, col. 2.]

Petition, under section 44 of Act III of 1914, for revision of the order of the Senior Subordinate Judge, Ambala, dated the 20th April 1917, returning the plaint for filing separate suits.

Pir *Taj-ud-din*, Mr. *Badr-ud-din Kureshi* and Lala *Moti Sagar*, R. S., for the Petitioners.

Messrs. *Jai Gopal Sethi*, *N. C. Mehra* and Lala *Duni Chand*, for the Respondents.

JUDGMENT.—Bullu Mal died in 1857 leaving a widow *Musammat* Dhan Kaur, who gifted her late husband's property to her daughters, *Musammat* Naraini and *Musammat* Sobhi. Both *Musammat* Naraini and *Musammat* Sobhi made certain alienations and then gifted their properties to their respective husbands, Basant Rai and Bishambar Das. *Musammat* Sobhi had a

daughter named *Musammat* Tulsa by whom she was predeceased. *Musammat* Tulsa again had a daughter, *Musammat* Manohri, who is in possession of property gifted by *Musammat* Sobhi to Bishambar Das.

Musammat Sobhi died in 1911 and *Musammat* Naraini in 1912. The plaintiffs, who are the sons of *Musammat* Naraini by Basant Rai, have sued for possession of the whole of the property alienated by *Musammat* Naraini and *Musammat* Sobhi, and also that held by *Musammat* Manohri. Their position is that they are the heirs of Bullu Mal; that all the alienations were unauthorised; and that their cause of action has arisen on the death of *Musammat* Naraini.

Defendant No. 1 is *Musammat* Manohri. defendants Nos. 2 to 7 are mortgagees from *Musammat* Sobhi. Defendants Nos. 10 to 14 are vendees from a mortgagee of *Musammat* Sobhi and *Musammat* Naraini. Defendant No. 15 is a vendee from Bishambar Das. All these defendants are represented in this Court by Mr. Duni Chand.

Defendants Nos. 8 and 9 are vendees from a mortgagee of *Musammat* Sobhi and *Musammat* Naraini. They are represented here by Mr. N. C. Mehra.

Defendants Nos. 16 to 18 are vendees from *Musammat* Naraini and *Musammat* Sobhi. They are represented by Mr. Jai Gopal Sethi.

In the Court of the Senior Subordinate Judge in which the suit was filed it was contended that there was misjoinder of parties. This view was accepted by the Senior Subordinate Judge, who returned the plaint to the plaintiffs with a direction that they should continue the suit against any one set of defendants they may select. The sets of defendants were not specified and the various Counsels engaged in this Court are not agreed as to what was meant. One view is that each group of alienees should be considered to be a set. Another is that all the alienees from the same alienor or alienors should be so regarded.

The case has come before this Court as a petition for revision. An objection has been raised that such a petition ought not to be entertained. That is a view which I am not able to accept and *Tufail Mahomed* v. *Hira Singh* (1) is an authority in point.

(1) 10 Ind. Cas. 48; 167 P. L. R. 1911; 120 P. W. R. 1911.

There are a great many rulings, *e. g.*, *Umbai* v. *Vithal Vasudev* (2), *Nundo Kumar Nasker* v. *Banomali Gayan* (3), *Musammat Rattan Kaur* v. *Badna* (4) and *Tufail Mahomed* v. *Hira Singh* (1), to the effect that a suit for possession on the ground of inheritance can proceed against a number of different alienees. The only ruling to the contrary which has been cited before me is *Hari Ballabh Rai* v. *Gopal Lal Singh* (5), which was considered but not approved in *Tufail Mahomed* v. *Hira Singh* (1).

In *Hari Ballabh Rai* v. *Gopal Lal Singh* (5) there was, however, a further question whether the same suit could proceed in the case of alienations by different alienors. The decision was that in the circumstances of that case it could not so proceed and this point is not covered by any of the other rulings to which I have referred.

The question is purely one of convenience and after examination of the facts alleged it appears to me that any varieties of defences which can arise can easily be cured by the successive trial of the issues separately affecting different defendants. In the case of alienations by *Musammat* Sobhi and *Musammat* Naraini there will probably be two main lines of defence (1) absolute title, and (2) valid necessity. There are at least three cases in which joint alienations have been effected by *Musammat* Sobhi and *Musammat* Naraini and consequently the question of the title of *Musammat* Sobhi will have to be decided in all those cases as well as in the case of the alienation by *Musammat* Sobhi alone. The case against the alienee from Bishambar Das will again depend on the title of *Musammat* Sobhi and so apparently will be the position of *Musammat* Manohri.

It appears to me, therefore, that the balance of convenience lies on the side of allowing the suit to proceed against all the defendants jointly. The Court should, of course, decide the questions of title first and should not require any set of defendants who are not interested in

(2) 1 Ind. Cas. 120; 33 B. 293; 11 Bom. L. R. 34; 5 M. L. T. 230.
(3) 29 C. 871.
(4) 24 P. R. 1899.
(5) 6 Ind. Cas. 577.

questions of necessity to appear when those questions are being dealt with.

I, therefore, allow the petition and remand the suit to the Court of the Senior Subordinate Judge for disposal according to law.

The petitioners will get costs on this petition.

Revision allowed; Case remanded.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1859 OF 1915.

November 14, 1917.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Phillips.

VENKATESWARA AIYAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

A. P. RI. EXECUTOR, A. R. A. R. SOMASUNDRAM CHETTIAR THROUGH HIS AUTHORISED AGENT MAYANDI CHETTIAR—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 11, 29, 120—Civil Procedure Code (Act V of 1908), O. XXI, r. 63—Claim proceedings—Order releasing attachment—Suit by decree-holder to declare alienation fraudulent—Limitation, commencement of—Cause of action—Transfer of Property Act (IV of 1882), s. 53, scope of.

A suit by the holder of a decree to declare an alienation as fraudulent, based on an order passed under Order XXI, rule 63, Civil Procedure Code, is governed by Article 11 of the Limitation Act and should be filed within one year from the date of the order. [p. 552, col. 2.]

Order XXI, rule 63, Civil Procedure Code, gives a right of suit whether the order in the claim petition is correct or not. [p. 552, col. 2.]

Subramania Ayyar v. Muthia Chettiar, 43 Ind. Cas. 651; 33 M. L. J. 705; 6 L. W. 750, explained and distinguished.

Obiter.—Even if Article 120 be held to apply, the cause of action for a suit based on fraud does not arise on the date of the alienation, but on the date when the creditor seeking to set aside the alienation knows that he has been defrauded, defeated or delayed. [p 552, col 2.]

Section 53 of the Transfer of Property Act does not expressly give a right to sue, but gives to a creditor an option to avoid certain transactions, and the right to sue does not accrue until he exercises that option. [p. 552, col. 2.]

Second appeal against the decree of the District Court of the Tinnevelly, in Appeal Suit No. 331 of 1913, preferred against that of the Court of the District Munsif, Ambasamudram, in Original Suit No. 100 of 1912, (Original Suit No. 546 of 1911, on the Tinnevelly District Munsif's Court).

Messrs. *A. Krishnaswami Aiyar* and *S. Ramaswami Aiyar*, for the Appellants.

Mr. *C. S. Venkatachariar*, for the Respondent.

JUDGMENT.

PHILLIPS, J.—Plaintiff obtained a decree against 1st defendant and attached his property, but the attachment was released on the application of 1st defendant's alienees, the 1st defendant having alienated the property to 2nd defendant just over 6 years before the present suit was filed. The suit now is for a declaration that the alienations are not binding on plaintiff, and that he can proceed against the property in execution of the decree against 1st defendant. Defendants Nos. 3, 4 and 9, alienees from 2nd defendant, are appellants here.

The first contention raised is that plaintiff cannot bring this suit on his own behalf, but must sue on behalf of all the creditors for a declaration that the alienation is invalid as against all of them.

This plea was not taken in either of the lower Courts and is one which might have been met, if necessary, in the first Court by an amendment of the plaint.

Whether the plea can be supported is doubtful [*Smith* v. *Hurst* (1) and *Blenkinsopp* v. *Blenkinsopp* (2)], but without expressing an opinion on it, we cannot allow it to be taken at this late stage.

Another plea that appellants are entitled to a charge on the property must also be disallowed, because it has not been taken before, and its decision would involve a fresh consideration of the evidence.

The chief ground of appeal is on the question of limitation, the contention being that the suit is governed by Article 120 and that more than six years have elapsed since the alienation by 1st defendant to 2nd defendant. The subsequent alienations to appellants need not be considered, as there is no finding that the alienation to 2nd defendant was merely a sham transaction—

(1) (1852) 10 Hare 30 22 L J. Ch. 289; 17 Jur. 30; 68 E R. 826; 20 L. T. (o. s) 304; 90 R. R 263.

(2) (1852) 1 De G. M. & G. 495; 21 Beav. 568; 21 L. J. Ch. 401; 16 Jur. 787; 42 E. R. 644; 18 L. T. (o. s.) 324; 91 R. R. 147.

the finding being only that that it was effected in fraud of creditors. It has been held by this Court that a suit for a declaration that an alienation is not binding on a creditor under section 53, Transfer of Property Act, is governed by Article 120 [*Authikesavaloo Naicker* v. *Shah Abdulla* (3) and *Pachamuthu* v. *Chinnappan* (4)], but it is contended for respondent that the present suit is one brought under Order XXI, rule 63, and that consequently Article 11 is applicable. The plaint gives as the date of the cause of action the date of the order setting aside plaintiff's attachment and the suit is evidently intended to be one under Order XXI, rule 63. Objection is, however, taken that the order setting aside the attachment was correct in view of a recent decision of a Bench of three Judges of this Court in Second Appeal No. 691 of 1916 [*Subramania Ayyar* v. *Muthia Chettiar* (5)] that an alienation in fraud of creditors is valid until set aside and cannot be pleaded as a defence by a creditor in a suit by an alienee and that a suit under Order XXI, rule 63, is really in the nature of an appeal [*vide*, *Phul Kumari* v. *Ghanshyam Misra* (6) and *Krishnappa Chetty* v. *Abdul Khader Saheb* (7)] and that consequently the present suit cannot be treated as one under Order XXI, rule 63, as it goes beyond the scope of the order in the claim petition, and asks for a relief which would be barred by limitation if the suit for that relief were brought in the ordinary course. The former case, a decision of the Privy Council upon which for this purpose the later case is based, was considered by a Full Bench of this Court in *Kovouri Basivireddi* v. *Nidumoori Ramayya* (8) and it was held that a suit in respect of moveable property, a claim to which had been dismissed in execution proceedings, was governed by Article 11 and not by Article 29 and that although one of the reliefs sought would be barred under Article 29, it could be granted as the whole suit was governed by Article 11 which applies to suits under Order XXI, rule 63. In the present suit plaintiff seeks to establish his right to proceed against the property of the 1st defendant, and incidentally to have it declared that the alienation to 2nd defendant is not binding on him. This right was negatived in the order on the claim petition, and consequently following *Kovouri Basivireddi* v. *Nidumoori Ramayya* (8), I would hold that the present suit is one under Order XXI, rule 63, being, as it is, one to establish the right which plaintiff claims to the property in dispute and is within the time allowed by Article 11.

The fact that the decision in Second Appeal No 691 of 1916 [*Subramania Ayyar* v. *Muthia Chettiar* (5)] shows that the order in the claim petition, if worded differently, was correct, cannot affect the question of limitation, for Order XXI, rule 63, gives a right to sue whether the order in the claim petition is correct or not.

In this view it is not necessary to decide whether, if Article 120 were applicable, the suit would be barred by limitation, but I am inclined to hold that the cause of action does not arise on the date of alienation, but on the date when the creditor seeking to set aside the alienation knows that he has been defrauded, defeated or delayed. Section 53, Transfer of Property Act, does not expressly give a right to sue, but gives to a creditor an option to avoid certain transactions, and it is in the exercise of his option that he obtains a right to sue. It is not until he obtains the option that the right to sue accrues, and I do not see how it can be said that he has a right of option at a time when he is unaware of the circumstances which give him such right. In all cases of fraud, misconduct, etc., the period of limitation for a suit begins to run from the time when the fraud, misconduct, etc., becomes known (*vide* Articles 90, 91, 95, 96, etc.), but no such provision could be inserted in Article 120, for it is a residuary Article and thus applicable to every variety of suit not otherwise provided for and is not confined to suits based on fraud. If such a suit coming within Article 120 is based on fraud, the time when the right to sue accrues must, I

(3) 29 Ind. Cas. 62; (1915) M. W. N. 337; 2 L. W. 479.
(4) 10 M. 213; 3 Ind. Dec. (N. S.) 901.
(5) 43 Ind. Cas. 651; 33 M. L. J. 705; 6 L. W. 750.
(6) 35 C. 202; 7 C. L. J. 36; 12 C. W. N. 169; 10 Bom. L. R. 1; 5 A. L. J. 10; 17 M. L. J. 618; 2 M. L. T. 506; 14 Bur. L. R. 41; 35 I. A. 22 (P. C.).
(7) 25 Ind. Cas. 1; 38 M. 535; 26 M. L. J. 449.
(8) 36 Ind Cas. 445; 31 M. L. J. 394; (1916) 2 M. W. N. 107; 4 L. W. 300; 20 M. L. T. 353; 40 M. 733.

think, be determined in consonance with the principle governing the other specific suits based on fraud, and that is that the time, when the fraud becomes known, becomes the starting point for limitation. In this case we have no evidence as to when the plaintiff became aware of the fraud, for the question of limitation was not raised in the lower Courts, but it is incumbent on defendants to show that plaintiff had clear and definite knowledge of the fraud at a time which is too remote for a suit to be brought, if they wish to make limitation operative [*Rahimbhoy Habibbhoy* v. *Charles Agnew Turner* (9) and *Sukh Lal* v. *Madhuri Prasad* (10)].

In this view also plaintiff's suit is within time and the second appeal must, therefore, be dismissed with costs.

AYLING, J.—I agree. I must confess to considerable doubt on the question of limitation; and I am not prepared to dissent from the conclusion of my learned brother that Article 11 of Schedule I of the Limitation Act applies and that the suit is within time.

The second appeal must, therefore, be dismissed with costs.

Appeal dismissed.

M. C. P.

(9) 17 B. 341; 20 I. A. 1; 6 Sar. P. C. J. 256; 17 Ind. Jur. 40; 9 Ind. Dec. (N. S.) 222.
(10) 27 A. 540; A. W. N. (1905) 88; 2 A. L. J. 350.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 487 OF 1915.

January 28, 1918.

Present:—Mr. Justice Teunon and Mr. Justice Newbould.

GNANENDRA KUMAR RAI CHOWDHURY—PLAINTIFF—APPELLANT

versus

Sree Sree SHAYAMA SUNDER JEN AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 13, 17 (2)—Execution, application for—Supplementary list of properties, whether allowable after registration of application—Fresh application, whether can be treated as continuation of previous application.

An application for execution, which was on the face of it in accordance with law, was subsequently, on objection taken by the judgment-debtor, discovered to be defective, inasmuch as against the properties specified in the list furnished under Order XXI, rule 13, of the Civil Procedure Code proceedings could not be taken. The decree-holder then applied to the Court requesting it to accept a further and supplementary list of the properties and praying that execution should proceed by attachment and sale of those properties:

Held, that even after the admission and registration of the original application for execution it was open to the decree-holder to ask the Court to proceed against the properties specified in his supplementary list, which should be taken as part of the original application under the provisions of Order XXI, rule 17 (2), Civil Procedure Code, or if a fresh application were at all necessary that application should be treated as one made in continuation of the application first presented so that no question of limitation could arise in the case. [p. 554, col. 2.]

Asgar Ali v. *Troilokya Nath Ghose*, 17 C. 631; 8 Ind. Dec. (N. S.) 960; *Salimulla Bahadur* v. *Sainaddi Sarkar*, 22 Ind. Cas. 337; 18 C. L. J. 538, distinguished.

Appeal against the order of the District Judge of 24 Parganahs, dated the 1st July 1915, reversing that of the Munsif, Barnaipore, dated the 26th March 1915.

FACTS appear from the judgment.

Babu *Surendra Madhab Mallick*, for the Appellant.—The question for determination is whether an application for execution which has been admitted and registered can under any circumstances be amended at all. The lower Appellate Court is wrong in holding that no such amendment can be allowed and that the decree-holder cannot proceed against the properties specified in his supplementary list. Refers to Order XXI, rule 17 (2), Civil Procedure Code. The case of *Asgar Ali* v. *Troilokya Nath Ghose* (1) and the case of *Salimulla Bahadur* v. *Sainaddi Sarkar* (2) are distinguishable from the facts and circumstances of this case and hence cannot apply in a case like this, because in those cases the original application was not made in accordance with law; but here the application was in accordance with law as required by the Code. Moreover, the Full Bench case in *Asgar Ali* v. *Troilokya Nath Ghose* (1) was decided on the wording of section 245 of the old Code of 1882 and cannot apply after the passing of Act V of 1908,

(1) 17 C 631; 8 Ind. Dec. (N. S.) 960.
(2) 22 Ind. Cas. 337; 18 C. L. J. 538.

which introduced a change in the law on the subject.

Babus *Jogesh Chandra De* and *Khitish Chandra Chackerbutty*, for the Respondents.—The law laid down in *Salimulla Bahadur* v. *Sainaddi Sarkar* (2) is still good law and on the authority of that case, followed in several other cases, the lower Appellate Court was perfectly justified in not allowing amendment of the application for execution after the application was admitted and registered. The defects must be removed and the application must be amended just after the receipt of the application, *i. e.*, before the application is registered.

Babu *Surendra Madhab Mallick* in reply.

JUDGMENT.—This appeal arises out of certain proceedings in execution. The decree in question being a rent-decree was obtained against certain persons as *shebaits* of a certain Thakor on the 28th November 1911. The application for execution was made on the 23rd November 1914. On its face the application was one in accordance with law. Later, on objection taken by the judgment-debtors it was discovered that against the properties specified in the list furnished under Order XXI, rule 13, proceedings could not be taken and accordingly on the 14th January 1915 the decree-holder made an application to the Court requesting the Court to accept a further list of properties and praying that execution should proceed by attachment and sale of those properties. It has been held by the first Appellate Court that the application having been admitted and registered the proposed amendment could not be accepted and that it would be necessary for the decree-holder to make a fresh application in execution. In coming to this conclusion the Court relied upon the decision of a Full Bench of this Court reported as *Asgar Ali* v. *Troilokya Nath Ghose* (1). We may observe, a further reference has been made to the case reported as *Salimulla Bahadur* v. *Sainaddi Sarkar* (2). But the present case may be distinguished from both these cases, in that in those two cases the application as originally made was one not made in accordance with law and that it contained no list of properties against which the proceedings were intended to be taken. In the present case, as we have already pointed out, the matter is different. Here there was a list of properties, the application was one made in accordance with law and it was only on the objection taken by the judgment-debtors that it was discovered that against these properties execution could not proceed. We are not of opinion that in a case such as this the decree-holder should be confined to the properties he had originally specified, and we think that it was open to him to ask the Court to proceed against the properties specified in his further and supplementary list. We are further of opinion that that list should be taken as part of the original application under the provisions of Order XXI, rule 17 (2), or if a fresh application were at all necessary that that application should be treated as one made in continuation of the application first presented on the 23rd November 1914.

In this view no question of limitation arises and we, therefore, set aside the order of the first Appellate Court and decree this appeal with costs. The decree-holder will now be at liberty to proceed in execution as on his application of the date 23rd November 1914.

We assess the hearing fee at three gold *mohurs*.

Order set aside.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 1072 OF 1916.

February 8, 1918.

Present:—Mr. Justice Shah Din and Mr. Justice Wilberforce.

Musammat BARKAT AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat JAMILA AND OTHERS—PLAINTIFFS AND FAYAZ UD DIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Guardians and Wards Act (VIII of 1890), s. 29, applicability of—Transfer by guardian ad litem—Sanction of Court, whether necessary.

Section 29 of the Guardians and Wards Act does not apply to transfers of property made on behalf of minors by their guardians *ad litem*. No sanction of the Court is, therefore, necessary in the case of such transfers. [p. 556, col. 1.]

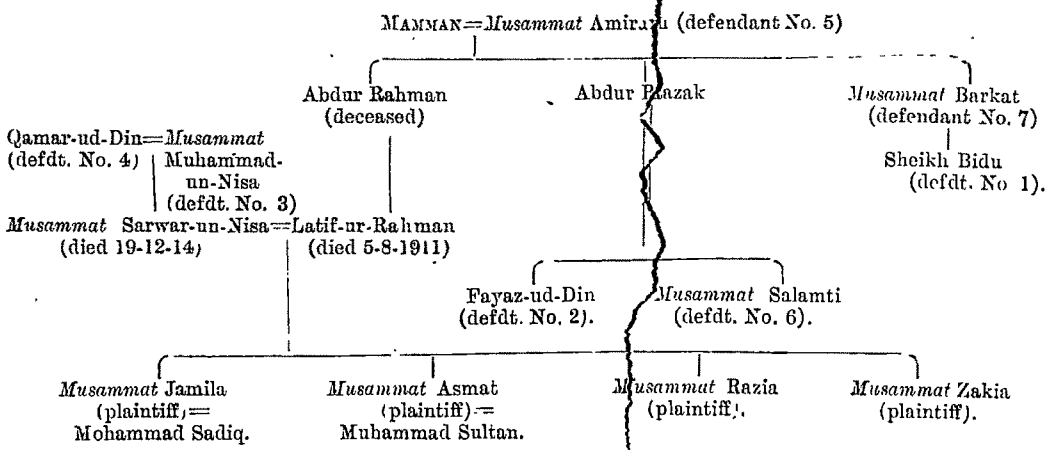
BARKAT *v.* JAMILA

First appeal from the decree of the District Judge, Delhi, dated the 7th April 1916, decreeing the claim.

Lala *Moti Sagar*, R. S., for the Appellants.

Mr. *Santanam*, for the Respondents.

JUDGMENT.—In this case the pedigree of the parties is as follows: —


Mamman=*Musammat* Amiran (defendant No. 5)
Abdur Rahman (deceased)
Abdur Razak
Musammat Barkat (defendant No. 7)
Sheikh Bidu (defdt. No 1).
Qamar-ud-Din (defdt. No. 4)
Musammat Muhammad-un-Nisa (defdt. No. 3)
Musammat Sarwar-un-Nisa (died 19-12-14)
Latif-ur-Rahman (died 5-8-1911)
Fayaz-ud-Din (defdt. No. 2).
Musammat Salamti (defdt. No. 6).
Musammat Jamila (plaintiff) = Mohammad Sadiq.
Musammat Asmat (plaintiff) = Muhammad Sultan.
Musammat Razia (plaintiff).
Musammat Zakia (plaintiff).

The property in dispute belonged to one Latif-ur-Rahman who died in 1911. His heirs included his four minor daughters, the present plaintiffs who inherited a 16/24th share. The remainder of his property went 3/24ths to *Musammat* Sarwar-un-Nisa, his widow, who has died ; 4/24ths to his grandmother *Musammat* Amiran and 1/24th to his cousins Fayaz-ud-Din and *Musammat* Salamti. The death of Latif-ur-Rahman was followed by various applications for the guardianship of his minor daughters. *Musammat* Sarwar-un-Nissa was appointed in January 1912 as guardian of their persons and Bidu and Fayaz ud-Din were appointed as guardians of their property on 17th January 1912. The property consisted of a Turkish Bath, which had been managed for some years by Bidu, and of other house property.

The present litigation commenced in November 1911 with a suit brought by *Musammat* Sarwar-un-Nissa, for herself and her daughters, for rendition of accounts of the Turkish Bath. The principal defendant was Bidu, whom she stated to be merely the manager on behalf of the owners. The other members of the faimly were made defendants. Bidu himself stated that he was a co-partner in the business and resisted the claim. The case eventually came before Mr. Clifford, Additional District Judge, Delhi, who held that Bidu was not a co-sharer but that he was a working manager with a share in the income after deducting expenses and that his share was only four annas. He held also that Bidu had an equitable lien on the Turkish Bath on account of contributions made by him for its improvements. He considered that this lien was to the extent of about Rs. 6,000. He remanded the case for an enquiry into this point and for a decision regarding the accounts. While the case was then proceeding before Lala Murari Lal, Subordinate Judge, a compromise was effected between the parties. A valuation was made of the Turkish Bath and of the remaining property. It was considered that Bidu, who had a right to manage the Turkish Bath, would manage it to its best advantage and that the minors would be unable to supervise or interfere in his management, and that if it became necessary to partition it the business would be ruined The Turkish Bath was valued at Rs 30,000 and the remainder of the property at Rs. 70,800. For the share of Sarwar-un Nissa and her daughters Bidu agreed to deposit Rs. 5,000 in cash and to hand over to them the rights of *Musammat* Amiran and Fayaz ud-Din in the remaining immoveable property. He also

agreed to pay Rs. 4,000 on account of the share of *Musammat* Sarwar-un-Nissa and her daughters in the profits of the Turkish Bath. The Turkish Bath thus became his property and that of Fayaz-ud-Din and *Musammat* Amiran, with whom he made his private arrangements. He deposited Rs. 10,000 in Court and apparently paid up the remainder shortly afterwards. The compromise was agreed to by all the members of the family. The present plaintiffs now sue for a declaration that they are not bound by the compromise and that they are still entitled to a rendition of accounts.

The present suit has been decreed by the District Judge of Delhi, mainly on three grounds :—

(1) that the guardians of the property and the guardians *ad litem* did not obtain the permission of the District Judge under section 29 of the Guardians and Wards Act to the transfer of property involved by the compromise ;

(2) that the compromise was not for the minors' benefit ; and

(3) that the compromise went beyond the scope of the suit.

As for the finding of the learned District Judge on the first point, it has to be considered whether any transfer was made by the certificated guardians as contemplated by section 29 of the Guardians and Wards Act. It is to be noticed that the suit was being conducted for the minors by Qamar-ud-Din and Muhammad-un-Nissa as their guardians *ad litem*. Bidu and Fayaz-ud-Din, the guardians of their property, were defendants in the case and parties to the compromise. By the compromise it is true that certain property was transfered by exchange in favour of the certificated guardians of the property, but we consider the view of the learned Judge unsound that any transfer was effected by them of the minors' estate. They merely were parties to the acceptance of a proposal to compromise the suit by means of exchange. The real transfer on behalf of the minors must be regarded as having been effected by their guardians *ad litem* and to such transfers section 29 of the Guardians and Wards Act has no application.

The most important issue in the case was whether the minors' benefit was considered in effecting the compromise and whether they have been adversely affected thereby. The learned District Judge held that the Subordinate Judge in accepting the compromise overlooked the fact that Fayaz-ud-Din and Bidu had valued the *Hammam* at Rs. 40,000, and that Bidu himself had valued the rental at Rs. 200 a month, while for the purposes of the compromise the Turkish Bath was valued at Rs. 30,000, and the rental value of the other property which fell by the compromise to the minors was little more than that of the Turkish Bath. He also doubted whether Bidu had an equitable lien to the extent of anything like Rs. 6,000 on the property. We are not impressed by the finding that the Subordinate Judge overlooked the true interests of the minors. After taking the statements of all the parties to the case, some of whom were interested in the minors' benefit and able to form an accurate opinion thereof, the Subordinate Judge passed a considered order accepting the compromise. He held that the main value of the Turkish Bath consisted in the skilled management of Bidu himself and that as he now would be uncontrolled it was extremely doubtful if the institution would prove as lucrative as previously, and that as the daughters would certainly marry in different families and probably demand partition the whole business would be ruined. In accepting the valuation fixed by the parties he had the advantage of the opinion of the adult members of the minors' family.

As for the valuation having been previously given by both Bidu himself and Fayaz-ud-Din at Rs. 40,000 and this valuation having been reduced for the purpose of the compromise to Rs. 30,000, it must be remembered that according to Mr. Clifford's considered judgment Bidu had a lien thereon of about Rs. 6,000, and it must also be repeated that its value largely depended on Bidu's personal supervision. We, therefore, do not consider that the reduction in the valuation accepted by the Subordinate Judge gives any indication that the interests of the minors were not fully considered. The learned District Judge may have had some material before him from which he stated that Bidu valued the rental of the *Hammam* at about Rs. 200 a month but there is no such material on the record. No accounts of the income of the Turkish Bath are on the record and even if the income did amount

to Rs. 200 a month, it would not follow that the rental paid by a third person would approach this sum.

A further obvious advantage to the minors from this compromise was that they obtained Rs. 4,000 in cash on account of the profits of the Turkish Bath. Bidu had apparently been paying into Court certain items to their account, but definite information is lacking as also definite information as to the extent of the profits which were then due to the minors. We see no reason, however, to believe that these profits would have exceeded Rs. 4,000 and even if they did exceed this sum to some extent, we consider that it is most improbable that they would ever have obtained even as large a sum by litigation.

So far from considering that the interests of the minors were overlooked by the Court or by their representatives, we find every reason to hold that the compromise was an eminently fair and sensible arrangement between the parties.

It has also been urged with some force that none of the minor girls has yet come of age and so been able to form any independent opinion as to the result of the compromise. The present suit was instituted by a maternal relation, who apparently thought nothing of their interests at the time of the compromise.

The learned Counsel for the appellants argued that the District Judge held that the compromise was unenforceable as it went beyond the scope of the suit. It is somewhat difficult to ascertain the meaning of the finding of the District Judge on this point as it is of an indefinite character. But assuming the finding of the District Judge to be as stated by Counsel for the appellant, we can find no authority for the apparent views of the learned District Judge. We were referred to some authorities regarding the duties of a Court in dealing with a compromise which affects property other than that concerned in a suit, but these authorities appear to have no application to the present case.

The appeal, therefore, is accepted and plaintiffs' suit is dismissed with costs in both Courts.

Pleader's fees Rs. 50.

Appeal accepted.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 191 OF 1917.

November 8, 1917.

Present:—Mr. Batten, A. J. C.

GHOOTI AND OTHERS—APPLICANTS

versus

SITKU AND OTHERS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 9, applicability of —Dispossession by co-owner —Joint possession, whether can be decreed—Civil Procedure Code (Act V of 1908), O. VII, r. 7—Pleadings—Relief, lesser han that asked for, whether can be granted.

Section 9 of the Specific Relief Act applies to cases where a co-owner in possession of property jointly with other co-owners is dispossessed by the latter [p. 558, col. 1.]

Ajiman Bibi v *Reasat Sheikh*, 28 Ind. Cas. 570; 19 C. W. N. 1117, followed.

A plaintiff is always entitled to a lesser relief of the same kind as he has asked for. [p. 557, col. 2.]

Revision against the judgment and decree in Civil Suit No. 317 of 1916, dated the 2nd April 1917, of the Court of the Additional Munsif, Bhandara.

Mr. *M. K. Padhye*, for the Applicants.

Mr. *D. T. Mangalmurty*, for the Non-Applicants.

JUDGMENT.—The 1st ground of revision has no force in it whatever, since to the suit as brought section 92 of the Tenancy Act had no application whatever. As to the 3rd ground, the lower Court has held that all the plaintiffs were in possession and this being a finding of fact cannot be dealt with in revision. The 4th and 5th grounds have no force whatever since the defendants have admitted that the plaintiffs were in joint possession within six months before the date of the suit, although they alleged that they were in possession merely as sub-tenants. The ground of revision that needs some consideration is the 2nd ground. The suit was brought under section 9 of the Specific Relief Act. The plaintiffs claimed that they had been in exclusive possession and asked to be restored to exclusive possession. It was found, however, that they had been in joint possession and they were restored by the decree to joint possession. If such a decree is otherwise unobjectionable, there was no reason why it should not be granted on the suit as brought, for plaintiffs are always entitled to a lesser relief of the same kind as they have asked for. The only question that remains is whether section 9 of the

Specific Relief Act applies to cases where a co-owner in possession of property jointly with other co-owners is dispossessed by the latter. There is a clear authority on this point with which I entirely agree. It was held in *Ajiman Bibi* v. *Reasat Sheikh* (1) that the section could be employed in such cases. If the plaintiffs were in physical possession they can be restored to such possession as they had, under the decree of the Court. The application is dismissed with costs.

Application dismissed.

(1) 28 Ind. Cas. 570; 19 C. W. N. 1117.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 3195 AND 3253 OF 1915.

February 1, 1918.

Present :—Mr. Justice Richardson and Mr. Justice Beachcroft.

Haji Munshi JILLOR RAHMAN—PLAINTIFF—APPELLANT

versus

EBRAHIM KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), s. 153—Appeal, whether lies—Question of title raised but not decided.

Under section 153 of the Bengal Tenancy Act, it is not sufficient merely that there should be a controversy on the question of title as between parties having conflicting claims to land but the section requires that some question of title should be decided as between such parties. Therefore, where in a suit for rent the lower Court does not decide the question of title which is raised between parties having conflicting claims thereto, no appeal lies under section 153 of the Bengal Tenancy Act. [p. 558, col. 2; p. 559, col. 1.]

Appeals against the decrees of the Subordinate Judge, Birbhum, dated the 13th of September 1915, confirming those of Munsif at Suri, dated the 20th of May 1914.

FACTS appear from the judgment.

Babu *Baranashibasi Mukerjee*, for the Repondents, raised a preliminary objection that under section 153 of the Bengal Tenancy Act the appeal was not competent, as the question of title to land or to any interest in land though raised by the plaintiff was not decided by the Courts below. Referred to *Gangadhar Karmakar* v. *Shekharbasini Dasya* (1).

Babus *Jogesh Chandra Roy* and *Mohesh Chandra Banerjee*, for the Appellants, submitted that the question of title raised by the plaintiff was gone into by the Courts below incidentally though not directly, and inasmuch as the purchaser at the auction-sale for arrears of revenue, whose title was set up by the tenant, was a party to the suit, it was sufficient for the purpose of section 153, Bengal Tenancy Act, if the question was gone into incidentally Furthermore, the question of the relationship of landlord and tenant, under the facts and circumstances of the case, involved a question of title.

JUDGMENT.

RICHARDSON, J.—A preliminary objection is taken to the hearing of this appeal on the ground that the appeal is incompetent under the provisions of section 153, Bengal Tenancy Act. It is urged that the Courts below have decided no question relating to title to land or to any interest in land as between parties having conflicting claims thereto. The plaintiff brought this suit for rent on the footing that he was originally a co-sharer to the extent of 2 annas 3 pies in the estate within the ambit of which the land in question is situated. That share of the estate, it appears, had been sold under Act XI of 1859 for arrears of revenue. But the plaintiff claims that he is entitled to his original share in respect of the land, inasmuch as it is resumed *chowkidari chakran* land which he says did not pass at the sale. As defendants the plaintiff impleaded not only the tenant from whom the rent was claimed but also the purchaser of the share of the estate sold for arrears of revenue. A controversy no doubt arose between the plaintiff and the purchaser as to the title of the land; but under section 153, Bengal Tenancy Act, it is not sufficient merely that there should be a controversy on the question of title, but the section requires that some question of title should be decided. On this point reference may be made to the case of *Gangadhar Karmakar* v. *Shekharbasini Dasya* (1). A perusal of the judgments of the Courts below will show that the question of

(1) 35 Ind. Cas. 348; 24 C. L. J. 235 at pp. 240, 243; 20 C. W. N. 967.

title though raised was not decided. The learned Munsif in the trial Court expressed himself thus: "Considering the evidence on the record I am of opinion that the plaintiff was dispossessed from these lands by the auction-purchaser even if he had any separate right to these lands and the auction-purchaser has been in peaceful possession by receiving rents from the defendants and his possession should not be disturbed in these rent suits." The learned Subordinate Judge in the lower Appellate Court concurred generally with the Munsif and dealt in his judgment merely with the question whether the relationship of landlord and tenant existed between the plaintiff and the tenant defendants. He decided that question in the negative and passed over the question whether the plaintiff or the purchaser at the auction sale was entitled to the resumed *chowkidari chakran* lands. There is nothing, therefore, in the judgments of the Court below to prevent the plaintiff from raising this question of title again, if he be so advised, in a regular suit. In my opinion the preliminary objection must prevail and the appeal must be dismissed with costs.

This judgment governs second appeal No. 3253 of 1915.

BEACHCROFT, J.—I agree.

Appeals dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 25 OF 1917.

January 19, 1918.

Present:—Mr. Justice Chevis.

MUHAMMAD USMAN—DEFENDANT—APPELLANT

versus

Hafiz RAHIM BAKHSH AND OTHERS—PLAINTIFFS—RESPONDENTS

Evidence Act (I of 1872), s. 90—Presumption as to genuineness of ancient documents—Discretion of Court—Appellate Court, interference by.

The question of making a presumption with regard to the genuinenes of a document under section 90 of the Evidence Act is one in which the Court has to exercise its discretion and when that discretion has been exercised with due care and the presumption allowed by law has been made an Appellate Court should be slow to interfere with such discretion. [p. 560, col. 1.]

Second appeal from the decree of the Additional District Judge, Delhi, dated the 10th October 1916, modifying that of the Munsif, 2nd Class, Delhi, dated the 31st March 1916, decreeing the claim to the extent of Rs. 18 for three years' rent and dismissing rest of the claim.

Mr. *Kirkpatrick*, for the Appellant.

Lala *Moti Sagar*, R. S., for the Respondents.

JUDGMENT.—The question in this appeal is whether the defendant purchaser from Saudagar Mal is a permanent tenant of the property in suit.

The contention centres round a lease executed by Saudagar Mal in 1873. This lease is over 40 years old, but the first Court declined to make the presumption allowed by section 90, Evidence Act. The District Judge on appeal made this presumption and gave plaintiff a decree for possession allowing defendant 6 months for removing his materials.

Mr. Kirkpatrick at first contended that this lease does not cover the property in suit. No such contention seems to have been raised in the lower Courts, and Mr. Kirkpatrick did not press the matter but confined himself entirely to arguing that the District Judge was wrong in presuming in favour of the lease. Mr. Kirkpatrick refers to *Amir* v. *Nur Muhammad* (1) and urges that forgery and fraud are frequent in Delhi, and that special care must be taken before a document can be accepted as genuine. But I note that the Additional District Judge, Mr. Clifford, whose order is under appeal, resided for long years in Delhi, and if ever there was a judicial officer who could claim an intimate acquaintance with Delhi people and their customs I should say Mr. Clifford could. He has carefully considered the case, and I should be slow to interfere with a decision of his in such a case as the present, which rests on the question whether the presumption allowed by law should be made or not.

Mr. Clifford's main reason, or at least one of his main reasons, for presuming the lease to be genuine is that it was "filed with the plaint of 1904 when Saudagar

(1) 82 P. R. 1902; 110 P. L. R. 1902.

Mal was alive and that it is difficult to believe that plaintiffs would have produced a forged lease during his lifetime."

Mr. Kirkpatrick points out that it is not correct to say that it was filed with the plaint. It was filed at a late stage of the case, and Mr. Kirkpatrick urges that as Saudagar Mal did not appear to contest the suit there was no danger in putting in a forged lease. But the lease was distinctly mentioned in the plaint, so I presume that plaintiffs had it in their possession when the plaint was written, and I certainly cannot presume that plaintiffs were aware when their plaint was drawn up that Saudagar Mal was not going to contest their claim.

As for the District Judge's finding that the land in the Rui Mandi must have been acquired by Saudagar Mal in the end of 1872 or the beginning of 1873, there is of course no direct evidence as to when he got this land, but the District Judge makes an inference from the previous history of the relations between Saudagar Mal and the plaintiffs and I am not at all prepared to say that the District Judge's reasoning is incorrect.

I think the learned District Judge has given good reasons for making the presumption allowed by section 90. It is a matter in which the Court has to exercise its discretion and when that discretion has been exercised with due care, and the presumption allowed by law has been made as in the present case, an appellate Court should be slow to interfere with such discretion, *vide Shafiq-un-nissa* v. *Shaban Ali Khan* (2). In fact it is argued on behalf of the respondents that the question involved is one of fact and not one of law, and here *Parankusa Zatinrda Mahadesikuswami* v. *Subramania Pillai* (3) is quoted, a case in which the learned Judges differed; this, however, is a question which I do not think I need decide

I uphold the decision of the learned Additional District Judge except that I extend the period allowed for removing the *malba* till the 19th July 1918 (see my orders dated 8th February 1917 and 23rd March 1917 passed in this case), in all other respects the Additional District Judge's decision is affirmed and the appeal fails. The appellant will pay costs in this Court.

Appeal dismissed.

(2) 26 A. 581; 9 C. W. N. 105; 6 Bom. L. R. 750; 7 O. C. 290; 31 I. A. 217; 8 Sar. P. C. J. 674 (P. C.)

(2) 26 Ind. Cas. 117.

PATNA HIGH COURT.

CUTTACK CIRCUIT.

APPEAL FROM APPELLATE ORDER No. 1 OF 1917.

July 17, 1917.

Present:—Mr Justice Mullick and Mr. Justice Atkinson.

SAKINA BIBI—JUDGMENT-DEBTOR—APPELLANT

versus

GANESH PRASAD BHAGAT—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 48, applicability of—Limitation Act (IX of 1908), Sch. I, Art. 181—Execution, stay of—Revival of antecedent application—Limitation.

Section 48 of the Civil Procedure Code applies only to a fresh application for leave to issue execution. It has no application whatsoever to the case of a revival of an antecedent application for execution which has been in suspense by reason of some bar or which has been stayed pending the determination of subsequent litigation. The limitation applicable to such a case is that provided by Article 181 of the Limitation Act, *i. e.*, three years from the time when the bar is removed. [p. 561, col. 1.]

Appeal from an order of the District Judge, Cuttack, dated the 12th December 1916, confirming that of the Munsif, Cuttack, dated the 11th September 1916.

Mr. *B. N. Singh*, for the Appellant.

Mr. *Tinkori Banerjee*, for the Respondent.

JUDGMENT.

ATKINSON, J.—The plaintiff brought an action on foot of a mortgage and recovered judgment on the 23rd of May 1900. The plaintiff made many attempts to execute this decree and I believe eight executions, or attempts at execution, were instituted. However the last petition for leave to issue execution was filed on the 20th of May 1912. The defendants, subsequently, brought a suit, after the property had been sold, contending that the same was not the property of the judgment-debtor but that it formed their own property. Consequently the plaintiff's application for leave to issue execution was stayed by order of the High Court dated the 13th of

November 1912. The defendants' suit was finally disposed of and dismissed by the High Court on the 20th of May 1916. The last petition for leave to issue execution was filed three days before the 12 years had expired from the date of the decree; and therefore the application was within time within the meaning of section 48 of the Civil Procedure Code. It is contended now that the plaintiff is not entitled to issue execution or to revive the antecedent application for execution that was made on the 20th of May 1912, because he did not proceed with his application for revival within three days from the date of the dismissal of the defendants' suit on the 20th of May 1916—that is to say, that the plaintiff, after the determination of the defendants' suit, had three days only in which to file any application that may have been necessary to revive the previous application to issue execution. As a matter of fact the plaintiff applied on the 6th of July 1916 to revive the application for leave to issue execution and this was granted. The learned Judge declined to yield to the contention of the defendants and held that the plaintiff was entitled to issue execution within the period of three years from the date of the removal of the bar for leave to issue execution or the carrying into effect of the last petition for execution filed on the 20th of May 1912. It is argued before us that section 48 of the Civil Procedure Code applies. That section would only be applicable if it was a fresh application for leave to issue execution. It has no application whatsoever to the case of a revival of an antecedent application for execution, which had been in suspense by reason of some bar or which had been stayed pending the determination of subsequent litigation. The Article which seems to apply and which was designed to apply to this case is Article 181, formerly Article 178, of the general Limitation Act; and that Article provides that where no limitation is expressly provided by the Act for the doing of any particular act, the period of three years is to be deemed to be the period of limitation from the date on which the right accrued. In this case the right accrued at the date when the bar was removed; and the plaintiff must be deemed to have three years from that date within which he would be entitled to revive the application of the 20th of May 1912 for leave to issue execution. The defendants contend that this is very hard. It may be hard but it is very just, because it is very right and proper that the plaintiff should be entitled to a reasonable time at any rate from the date of the removal of the bar to issue execution; and to hold that he is entitled to only three days would, in my opinion, be very unfair and unjust, more especially when the defendants deliberately set themselves to endeavour by every means in their power to defeat the execution proceedings. I think that the learned Judge was right in the conclusion at which he arrived and I would dismiss this appeal with costs.

MULLICK, J.—I agree.

Appeal dismissed.

PUNJAB CHIEF COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 3485 OF 1916.

June 11, 1917.

Present:—Mr. Justice LeRossignol.

KISHEN SINGH AND ANOTHER—DECREE-HOLDERS—APPELLANTS

versus

Musammat RAHMAT BIBI—JUDGMENT-DEBTOR—RESPONDENT.

Custom—Daughter, whether agnate—Execution—Father's estate, whether liable in hands of daughter.

A daughter is not an agnate of her father and she derives her title not from the common ancestor but from her father. She has no right, superior to that of her father; she represents him; and his estate in her hands is liable for his debts. [p. 562, col. 1.]

Miscellaneous second appeal from the decree of the Additional District Judge, Gujranwala, at Sialkot, dated the 18th August 1916.

Mr. *Devi Das*, for the Appellants.

Mr. *Narain Singh*, for the Respondent.

JUDGMENT.—The judgment-debtor in this case is the daughter of the original debtor, and she objected to the execution of the decree against the property in her hands on various grounds.

The learned Judge refused her prayer for relief on agrarian considerations, but held that *Jagdip Singh* v. *Narain Singh* (1) was authority for granting the relief prayed for, on the ground that the property was ancestral and the decree had not been charged on the property by the last male owner.

Jagdip Singh v. *Narain Singh* (1) has no application to a case of this kind. *Jagdip Singh* v. *Narain Singh* (1) gave a very wide extension to the rights of agnates, because agnates are supposed to derive their title not from the last male owner but from the common ancestor.

A daughter, however, is not an agnate and she derives her title not from the common ancestor but from her father. She has no right superior to that of her father; she represents him, and his estate in her hands is liable for his debts.

I accept the appeal and restore the Munsif's order. Costs throughout to appellant.

Appeal accepted.

(1) 15 Ind Cas. 866; 4 P. R. 1913; 160 P.W.R. 1912; 173 P. L. R. 1912.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 710 OF 1916.

June 23, 1916.

Present:—Mr. Justice Fletcher and Mr. Justice Teunon.

BEPIN KRISHNA KUMAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

HARI DAS GHOSE AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), ss. 105A, 109—Status of tenant—Decision by Settlement Officer—Suit for declaration, maintainability of.

Under section 105 A of the Bengal Tenancy Act a Settlement Officer hearing an application for the settlement of a fair rent is authorised to decide whether the tenant belongs to a class different from that to which he is shown in the Record of Rights as belonging. When a Settlement Officer has decided that question, it is not competent to a Civil Court, having regard to the terms of section 109 of the Act, to entertain a suit for a declaration of the status of the tenant. [p. 563, col. 1.]

Appeal against the decree of the Subordinate Judge, 3rd Court, Hooghly, dated the 17th December 1913, affirming that of the Munsif, 3rd Court, at Howrah, dated the 6th August 1912.

Babus *Jyoti Prosad Sarbadhicary* and *Jogendra Nath Dutt*, for the Appellants.

Babus *Hemendra Nath Sen* and *Jatindra Mohan Sen Gupta*, for the Respondents.

JUDGMENT.

FLETCHER, J.—This is an appeal by the defendant against the judgment of the learned Subordinate Judge of Hooghly, dated the 17th December 1913, affirming the decision of the Munsif at Howrah. The suit was brought by the plaintiffs, the tenants, against the defendants, the landlords, for a declaration that the entry in the Record of Rights was wrong and that they were permanent tenants at a fixed rate and not settled *raiyats* as entered in the record. The Record of Rights in this case was finally published on the 29th October 1907; that is, after the date on which Act I (B. C.) of 1907 came into force, which amended the Bengal Tenancy Act by adding a new section (section 105 A). On the 29th November 1907 an application was made by the landlords, the defendants, under the provisions of section 105 for settlement of a fair rent. On the 28th February 1908 an order was passed settling a fair rent under which the rent of the tenants was somewhat enhanced. Then the tenants brought the present suit. The only question is whether the present suit is maintainable. Before section 105A came into force, the decisions of this Court show that, when the Settlement Officer was dealing with an application to settle a fair and equitable rent, he could not go behind the Record of Rights. He was bound to accept the entries that appeared there. That was the view which Mr. Justice Teunon and myself took in the case of *Shashi Bhusan Hazrah* v. *Sheikh Esabar Ali* (1). It appears that the record in that case was finally published in the year 1903. It was clearly a case to which Act I (B. C.) of 1907, which enacted for the first time section 105A, could not apply. But the present

(1) 29 Ind Cas 122; 19 C. W. N. 686.

case must be dealt with with reference to the new section that has been added by Act I (B. C.) of 1907. Now, section 105A was expressly enacted to meet the objection that had been raised in the cases referred to, so as to enable the Settlement Officer who was hearing an application for settlement of rent to decide certain issues which the Court had held that he was not entitled to decide in an application under section 105. Amongst those issues which the Settlement Officer was authorised to decide by section 105A was issue No. (*e*) of that section, namely, whether the tenant belonged to a class different from that to which he was shown in the Record of Rights as belonging. That being so, it is quite clear that the Settlement Officer had in this case jurisdiction to enquire as to whether the tenants belonged to the class to which they were shown in the Record of Rights. The question is, "did he so enquire"? It is quite clear that he did. The written statement set up a case that the rent was not liable to enhancement. The learned Settlement Officer by his decision decided that the rent was enhancible and ought to be enhanced. Therefore, he must have come to a definite and clear conclusion that the status of the tenants was one of tenants whose rent was liable to be enhanced. That being so, under section 109 of the Act, a Civil Court is prohibited from entertaining any application or suit concerning any matter which is or has already been the subject of an application made, suit instituted or proceedings taken under sections 105 to 108 (both inclusive). That includes, of course, the new section 105A. It seems to me quite clear, on a reading of the new section along with section 109, that, in this case, the Settlement Officer having decided that the tenants were not tenants at fixed rates of rent but were liable to have their rents enhanced, and their rents having been enhanced, it was not competent to the Civil Court, having regard to the terms of section 109, to enter into and enquire what was the status of those tenants. That being so, the judgment of the lower Appellate Court is, in my opinion, wrong. We should, therefore, allow the appeal and dismiss the plaintiffs' suit. The plaintiffs-respondents must pay to the defendants-appellants their costs in this Court as well as in the Courts below.

TEUNON, J.—I agree.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 281 OF 1912.

March 31, 1913.

Present:—Mr. Batten, A. J. C.

LACHUSA MOTILAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MAHERALI RAHIMALI AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 95—Execution—Decree-holder purchasing at auction, position of—Suit for possession, maintainability of.

When a decree-holder by his own action combines the position of decree-holder and auction-purchaser by purchasing at the auction sale with the permission of the Court, he does not lose his character of a party to the suit, and proceedings in execution are not terminated until he obtains possession of the property, inasmuch as Order XXI, rule 95, of the Civil Procedure Code provides for delivery of possession being enforced in execution of the decree. [p. 564, cols. 1 & 2.]

Section 47 of the Civil Procedure Code is a bar to a suit for possession by a decree-holder-auction-purchaser. [p. 564, col. 2.]

Appeal from the decree of the District Judge, Nimar, dated the 29th February 1912, in Appeal No. 225 of 1911.

Mr. *M. Chuckerbutty*, for the Appellants.

Mr. *C. S. Naidu*, for the Respondents.

JUDGMENT.—The sole question raised in this appeal is one of law. The plaintiffs-appellants were the holders of a money-decree. In execution they procured the attachment and sale of a house belonging to the judgment-debtors-respondents. With the permission of the Court the decree-holders bid at the sale and bought the house. The sale was confirmed and the appellants were given a sale certificate on the 27th January 1913. They, however, failed to apply to be given possession of the house under section 318 of the then Civil Procedure Code, corresponding to rule 95 of the Order XXI of the present Code. They have brought the present suit for possession of

the house on the 24th June 1911. If the suit is maintainable, it is within time with reference to Article 138 of Schedule I of the Limitation Act. According to the plaint the house remained in the possession of the defendants, the judgment-debtors. The suit cannot be treated as an application in execution of the decree, as such an application would be time-barred. It was contended for the defendants that the suit was barred by section 47 of the Civil Procedure Code; that plaintiffs' proper course would have been to ask for possession under section 318, Civil Procedure Code (now Order XXI, rule 95). The learned Munsif, following the ruling in *Bhagwati* v. *Banwari Lal* (1), held that section 47 was no bar to the suit, but in appeal the learned District Judge has held the contrary, relying on the view of Sir Basil Scott, C. J., and Rao, J., in *Sadashiv Mahadu* v. *Narayan Vithal* (2), which is also the view of the Calcutta and Madras High Courts as shown by *Madhusudan Das* v. *Gobinda Pria Chowdhurani* (3) and *Sandhu Taraganar* v. *Hussain Sahib* (4). The Allahabad ruling cited above is relied on by the learned Counsel for the appellants, but it is to be observed that the view of the majority of the Full Bench was dissented from by Stanley, C. J., and Knox, J. who have given what are, in my opinion, very strong reasons for supporting the opinion of the District Judge, who has thus followed the practice of the Calcutta, Madras and Bombay High Courts, which has the support of a strong minority of the Allahabad Bench. I cannot hope to put the arguments in support of the respondents more clearly than they have been put by Stanley, C. J., Knox and Rao, JJ. I can only say that I agree with the opinion that when a decree-holder by his own action combines the position of decree-holder and auction-purchaser by purchasing at an auction sale with the permission of the Court, he does not lose his character of a party to the suit and that the proceedings in execution are not terminated until the auction-purchaser obtains possession of the property, inasmuch as the Civil Procedure Code provides in the Chapter relating to execution of decrees, for delivery of possession being enforced. I agree that section 47, Civil Procedure Code, is a bar to the suit and the appeal is dismissed with costs. Since writing the above I have had the advantage of referring to the judgment of Drake-Brockman, Offg., J. C., in Second Appeal No. 209 of 1906 in which the learned Officiating Judicial Commissioner held that the balance of authority was in favour of the view which I have adopted.

Appeal dismissed.

(1) 1 Ind. Cas. 416; 31 A. 82; 6 A. L. J. 71; 5 M. L. T. 185.

(2) 11 Ind. Cas. 987; 35 B. 452; 13 Bom. L. R. 661.

(3) 27 C. 34; 4 C. W. N. 417; 14 Ind. Dec. (N. S.) 23.

(4) 28 M. 87; 14 M. L. J. 474.

CALCUTTA HIGH COURT.

RULE *Nisi* No. 578 OF 1917.

December 19, 1917.

Present:—Mr. Justice Teunon and Mr. Justice Newbould.

JUGAL KRISHNA MULLICK —PETITIONER

versus

PHUL KUMARI DASSI—PLAINTIFF AND OTHERS—DEFENDANTS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), s. 115, O. I, r. 10 (2), O. XXXI, r. 1—Government of India Act, 1915 (5 & 6 Geo. V, C. 61), s. 107—Addition of parties—Suit by administrator—Beneficiary, whether can be added as a co-plaintiff—Revision—High Court, whether can interfere with order refusing to add co-plaintiff.

P. as administratrix to the estate of her deceased husband instituted a suit against *X. J.* claiming to be a son adopted by her to her deceased husband, on coming of age, applied to be made a co-plaintiff with *P.* on the ground that *P.* was not prosecuting the suit with due diligence In another suit pending between *P.* and *J. P.* admitted the factum of *J.'s* adoption by her but pleaded that she had no authority from her husband to adopt. The Trial Court rejected *J.'s* application to be added as a party to the suit:

Held, (1) that although *J.'s* title might not be finally adjudicated in the suit, *J.* having made out a *prima facie* case was entitled to be made a party; [p. 566, col. 2.]

(2) that in the matter of addition or substitution of parties the High Court had power to interfere under section 115 of the Civil Procedure Code or section 107 of the Government of India Act. [p. 566, col. 2.]

Dwarka Nath Sen v. *Kisori Lal*, 6 Ind. Cas. 549; 11 C. L. J. 426 at p. 427; 14 C. W. N. 703, followed.

JUGAL KRISHNA MULLICK v. PHUL KUMARI DASSI.

Rule against the order of the Subordinate Judge, 2nd Court, 24-Pergannahs, in Title Suit No. 6 of 1915.

FACTS of the case appear from the judgment.

Babu *Surendra Madhub Mullick*, (with him Babu *Satyendra Kumar Roy Chowdhury*), for the Petitioner.—The Court below has acted illegally and with material irregularity in rejecting the application of the petitioner to be added as a party to the suit, in view of the fact that his interest as beneficiary will be seriously prejudiced if the suit fails for want of taking proper steps for the conduct of the suit. The administratrix is not taking proper steps; that would appear from the report of the Commissioner, appointed for local investigation, made to the Court that his work came to a standstill as the administratrix did not, in spite of repeated notices, place any evidence before him.

[TEUNON, J.—Does the administratrix admit the fact of petitioner's adoption?]

Yes. The petitioner Jugal and his adoptive mother the present administratrix have fallen out and the latter is now questioning the validity of the adoption, which is testified to by a registered deed of adoption dated the 4th of July 1902. A conflict of interests has now arisen in the property in suit between the adopted son and the plaintiff who is the administratrix to the estate.

[TEUNON, J.—The petitioner cannot ask to be added as a party unless he is found to be a necessary party.]

Under Order I, rule 10, sub-rule (2) of the Civil Procedure Code he can be added as a party, as his presence before the Court is necessary in this sense that if the suit fails for failure to place proper evidence before the Court owing to the default of the administratrix the petitioner shall be the sufferer in the end, because the decision in the suit will be binding upon him. Moreover, if he is made a party and allowed to watch the proceedings in the suit, neither the plaintiff nor the defendants can be prejudiced in any way. Having regard to the provisions of Order I, rule 10, and Order XXXI, rule 1, of the Civil Procedure Code the lower Court should have added the petitioner as a party to the suit under the particular facts and circumstances of the case.

Babu *Bepin Chandra Mullick* (with him Babus *Dhirendra Nath Bagchi* and *Panna Lal Dutt*), for the Opposite Party.—The Court below had under Order I, rule 10, sub-rule (2), ample jurisdiction to decide, in the exercise of its discretion, whether or not the petitioner should be added as a party to the suit, and it has decided that the petitioner is not a necessary party and his presence before the Court is not necessary for deciding the subject-matter in dispute in the suit. Therefore under section 115 of the Civil Procedure Code the order of the Court below is not open to revision. Even if the decision of the Court below is wrong in law, it is no ground for the interference of the High Court in revision under section 115, Civil Procedure Code. See *Amir Hassan Khan* v. *Sheo Baksh Singh* (1), *Muhammad Yusuf Khan* v. *Abdul Rahman Khan* (2) and *Parasurama Ayyar* v. *Seshier* (3).

Under Order XXXI, rule 1, Civil Procedure Code, in a suit between the administrator and a third person the beneficiary is not a necessary party unless the interest of the administrator is adverse to that of the beneficiary. The order of the Court below which is now sought to be set aside is to the following effect:—"The petition and affidavit of one Jugal Kissore Mullick for making him a co-plaintiff in this suit on the ground that he is a beneficiary of the estate of Sham Lall Mullick, the present plaintiff being the administratrix of that estate and that the present plaintiff as administratrix is taking no interest in the present suit.....The plaintiff denies the right of the petitioner as beneficiary altogether. There is nothing to show that the plaintiff has an interest adverse to the interest of the petitioner regarding the subject-matter of the suit.....The prayer for making the petitioner a co-plaintiff in this suit is, therefore, rejected". In the face of the above findings of the Court below the petitioner cannot be added as a co-plaintiff. Refers to *Beresford* v. *Ramasubba* (4). Moreover, the

(1) 11 C. 6; 11 I. A. 237; 4 Sar. P. C. J. 559; Rafique & Jackson's P. C. No. 83; 5 Ind Dec. (N. S.) 760.

(2) 16 C. 749; 16 I. A. 104 13 Ind. Jur. 170; 5 Sar. P. C. J. 362; Rafique & Jackson's P. C. No. 112; 8 Ind. Dec (N. S.) 496.

(3) 27 M. 504.

(4) 13 M. 197 at p. 202; 4 Ind. Dec. (N. S.) 850.

expression "persons beneficially interested" in Order XXXI, rule 1, Code of Civil Procedure, means persons whose rights as beneficiaries have been established or are not disputed. Only such persons may, under extraordinary circumstances, be made parties in suits between the administrator and third persons. In this case the validity of the petitioner's adoption is in dispute in a suit between the plaintiff and the petitioner pending on the Original Side of this Court. Therefore the petitioner whose interest as beneficiary is not yet established cannot be made a co-plaintiff.

Babus *Surendra Madhub Mullick*, in reply.—The order of the Court below is open to revision by the High Court not only under section 115 of the Civil Procedure Code but also under section 107 of the Government of India Act. Refers to *Dwarka Nath Sen* v. *Kisori Lal* (5).

On the merits, my submission is that the very fact that the petitioner and the administratrix have already fallen out shows that the latter is likely to act adversely to the interests of the former.

JUDGMENT.—In this case one Phul Kumari Dassi has sued as the administratrix to the estate of her deceased husband for the purpose of having a sale of part of the estate for arrears of revenue set aside.

The petitioner before us one Jugal Kishore Mullick, claiming to be a son adopted to her deceased husband by Phul Kumari and being now of full age, applied to be made a party plaintiff in the suit. The application was refused by the Subordinate Judge of Alipore in whose Court the suit is pending, on the ground that the administratrix fully represented the estate and that there was nothing to show that she had interests adverse to the interests of the petitioner.

Here there can be no doubt that the Subordinate Judge has fallen into error.

In the new current year the petitioner in fact brought a suit (No. 212 of 1917) on the Original Side of this Court to recover possession from Phul Kumari and for accounts. In that suit Phul Kumari has entered appearance and while apparently admitting the factum of the adoption has pleaded that she had no valid authority from her husband to make it. Further on the record of the present suit there are many indications going to show that she is not prosecuting the suit with due diligence.

But on behalf of the opposite party it is contended that neither under section 115 of the Civil Procedure Code or section 107 of the Government of India Act, 1915, are we empowered to interfere in a matter of addition or substitution of parties. To that contention the case reported as *Dwarka Nath Sen* v. *Kisori Lal* (5) is a sufficient answer.

It is next contended that Order XXXI, rule 1, applies only when the interest of the claimant as a beneficiary is admitted or not disputed. No authority has been adduced in support of this proposition. It may be that the petitioner's title cannot be finally adjudicated in the present suit but having regard to the registered deed of 4th July 1902 and the admissions made by the plaintiff Phul Kumari from time to time, we are satisfied that the petitioner has made out a *prima facie* case sufficient to entitle him to be made a party to the suit. We, therefore, set aside the order complained of and direct that the petitioner be added as a party plaintiff.

The Rule is accordingly made absolute with costs against the plaintiff-opposite party, hearing fee three gold *mohurs*.

Rule made absolute.

(5) 6 Ind. Cas. 549; 11 C. L. J. 426 at p. 427; 14 C. W. N. 703.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 72 OF 1916.

July 16, 191 .

Present:—Mr. Justice Abdur Rahim and Mr. Justice Bakewell.

CHIVIKULA VENKATASUBBIAH AND ANOTHER—APPELLANTS

versus

GOLLAPUDI VENKATESWARULU —RESPONDENT.

Limitation Act (IX of 1908), s 7—Manager of Hindu family, whether can give valid discharge of decree-debt—Execution—Attachment—Dismissal of execution petition,

whether removes attachment—Civil Procedure Code (Act V of 1908), O. XXI, rr. 56, 57.

A major manager of a joint Hindu family is competent to give a valid discharge of a decree-debt within the meaning of section 7 of the Limitation Act so as to make the time run against the minor members of the family.

(Case-law discussed)

Whether the dismissal of an execution petition has the effect of removing the attachment depends upon the facts of each case.

Appeal against the decree of the Court of the Additional Subordinate Judge, Guntur, in Appeal Suit No. 148 of 1915, preferred against that of the Court of the District Munsif, Ongole, in Execution Petition No. 1042 of 1912, in Original Suit No. 317 of 1902.

Messrs. *T. Prakasam* and *P. Chenchiah*, for the Appellants.

Mr. *V. Lakhshminarayana*, for the Respondent.

JUDGMENT.—As regards the question whether section 7 of the Limitation Act of 1908 has the effect of barring the application for execution, Execution Petition No. 1042 of 1912, the preponderance of authority is clearly in favour of the affirmative view. The question whether a major manager of a joint Hindu family can give a valid discharge of a decree-debt within the meaning of the above section so as to make the time run against the minor members of the family is fully discussed in *Duraisawmi Sastrial* v. *Venkatarama Iyer* (1), where it was held that the dictum of Bashyam Aiyangar, J., in *Periasami* v. *Krishna Ayyan* (2) could no longer be said to be good law having regard to the change of language in section 7 of the new Limitation Act. The same view is enunciated by Sadasiva Aiyar and Spencer, JJ., in *Planiandi Pillai* v. *Papathi Ammal* (3) and one of us followed *Duraisawmi Sastrial* v. *Venkatarama Iyer* (1) in *Ramnadhan Sivayya* v. *Udatha Atchayya* (4): No doubt in *Mahomed Silar Sahib* v. *Nabi Khan* (5) Oldfield and Sadasiva Aiyar, JJ., seem to approve of Bashyam Aiyangar's observation in *Periasami* v. *Krishna Ayyan* (2), but this decision may perhaps be distinguished on the ground that no question of limitation directly arose in that case. However that may be, we think that since there is express mention of applications for execution of decrees in section 7, there is no longer room for the contention that it has no application to cases where under the Hindu Law the manager can give a valid discharge simply because the liability to be enforced arises under a decree.

Another point was raised before us in second appeal, *viz.*, that the attachment of the judgment-debtor's decree by order dated 15th April 1908 continued in spite of the dismissal of the petition on the 25th April 1908. But whether the dismissal of an execution petition has not the effect of removing the attachment depends upon the facts of each case, as observed in *Raghavachariar* v. *Anantha Reddi* (6). The District Munsif points out that there was nothing to show that the petition was not dismissed in the presence of parties and the decree-holder himself has treated the attachment as having ceased to exist. In the lower Appellate Court the question does not appear to have been argued and in second appeal we are not under the circumstances forced to hold that the view of the District Munsif on this point is wrong.

The appeal is dismissed with costs.

Appeal dismissed.

M. C. P.

(6) 31 Ind. Cas. 911.

(1) 12 Ind. Cas. 503; (1911) 2 M. W. N. 420; 10 M. L. T. 370; 21 M. L. J. 1088.

(2) 25 M. 439 at p. 439; 12 M. L. J. 166 (F. B.).

(3) 22 Ind. Cas. 76; (1914) M. W. N. 159; 15 M. L. T. 100.

(4) 18 Ind. Cas. 723; 13 M. L. T. 304; (1913) M. W. N. 288.

(5) 35 Ind. Cas. 157; (1916) 1 M. W. N. 471; 3 L. W. 579; 31 M. L. J. 93; 20 M. L. T. 381.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2259 OF 1915.

January 16, 1918.

Present:—Mr. Justice Richardson and Mr. Justice Beachcroft.

MONMOTHO NATH LAHA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ANNODA PROSAD ROY AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 134—Transfer, whether includes permanent lease—Suit to recover

MANMOTHO NATH LAHA v. ANNODA PROSAD ROY.

debutter *property transferred by* shebait—*Limitation, commencement of*—Shebait, *position of.*

The word 'transfer' in Article 134 of Schedule I of the Limitation Act includes a transfer by way of a permanent lease. [p. 569, col 1.]

A suit by a *shebait* to recover *debutter* property held by the defendant under a permanent lease granted by the plaintiff's predecessor is governed by Article 134 of Schedule I of the Limitation Act and must be brought within twelve years of the date of the transfer. [p. 568, col. 1.]

The representation of an idol by the *shebaits* is a continuing representation and limitation runs against the *shebaits* continuously and not as against each *shebait* individually as and when he succeeds to the office, the *shebaits* not being holders of successive life-estates in the management or in the property of the endowment. [p. 569, col. 1.].

Appeal against the decree of the Subordinate Judge, Burdwan, dated the 28th May 1915, affirming that of the Munsif, Burdwan, dated the 30th March 1914

Babus *Biraj Mohan Mojumdar* and *Samarendra Kumar Dutt*, for the Appellants.

Babus *Mohendra Nath Ray*, *Bepin Behari Ghose* and *Sajani Kanta Sinha*, for the Respondents.

JUDGMENT.

RICHARDSON, J.—The present appeal is preferred from the judgment and decree of the Subordinate Judge of Burdwan, dated the 28th May 1915, affirming the decree of the Munsif of Burdwan, dated the 30th March 1914. The plaintiffs in the suit, who are the appellants before us, are the *shebaits* of a certain idol and they sue the defendants to recover possession of certain *debutter* property held by them under colour of a *mokarari* lease granted by the father of the plaintiffs, the previous *shebait*, in the year 1876. The sole question which arises is whether the suit, which was instituted on the 14th February 1913, is barred by the provision of Article 134 of the Schedule of the Indian Limitation Act of 1908. By that Article a suit to recover possession of immoveable property conveyed or bequeathed in trust or mortgage and afterwards transferred by the trustee or mortgagee for valuable consideration must be brought within 12 years of the date of the transfer. *Prima facie* the present suit falls within the Article and having been brought more than 12 years after the date of the lease to the defendants is out of time. The Courts below have so held.

It has been contended on behalf of the plaintiffs that the transfer to the defendants having taken the form of a lease, the transfer is not a transfer within the meaning of Article 134 and that Article has no application. In support of this contention reliance has been placed upon the cases of *Abhiram Goswami Mohant* v. *Shyama Charan Nandi* (1) and *Ishwar Shyam Chand Jiu* v. *Ram Kanai Ghose* (2). These cases, however, were decided by the Judicial Committee under the Limitation Act of 1877, in Article 134 of which the word 'transferred' was not used. As the Article then stood, it applied only to properties "purchased" from the trustee or mortgagee and the period of limitation was 12 years from the date of the "purchase." It was held in *Abhiram Goswami's case* (1) that the word 'purchase' did not include a transfer by way of lease, even though the lease was a permanent lease. As to the second of the two cases, if regard be had to the course which it took, it will be found to be in respect of the present law an authority rather in favour of the defendants than in favour of the plaintiffs. The judgment of this Court which was taken on appeal to the Privy Council was delivered in 1905 [*Ram Kanai Ghose* v. *Raja Sri Sri Hari Narayan Singh Deo Bahadur* (3)]. This Court held that the word 'purchased' in Article 134 of the Act of 1877 was as applicable to a permanent lease, such as a *putni* lease, as to an absolute conveyance, and in so doing adopted the view taken in an earlier case decided in 1896, the case of *Nilmony Singh* v. *Jogabandhu Roy* (4). On the first hearing of the appeal to the Privy Council, the appeal was dismissed and the decision of this Court was affirmed. An application was, however, subsequently made to their Lordships to review their judgment [*Sri Sri Ishwar Shyam Chandjiu* v. *Ram Kanai Ghose* (5)] and on review the decision of this Court was reversed in 1911 on

(1) 4 Ind. Cas. 449; 36 I. A. 148; 36 C. 1003; 10 C. L. J. 284; 6 A. L. J. 857; 11 Bom. L. R. 1234; 14 C. W. N. 1; 19 M. L. J. 530 (P. C.).

(2) 10 Ind Cas. 683; 38 I.A. 76; 38 C. 526; 15 C. W. N. 417 9 M. L. T. 448; 8 A L. J. 598; 13 Bom. L. R. 421; 14 C L. J. 238; (911) 2 M. W. N. 281; 21 M. L. J. 1145 (P. C.).

(3) 2 C. L. J 546.

(4) 23 C. 536; 12 Ind. Dec. (N. s.) 357.

(5) 14 C. W. N. ccxliv (244 *notes*).

the ground that it was, as regards the meaning of the word "purchased", inconsistent with *Abhiram Goswami's case* (1) which had been decided by their Lordships in 1909. As Article 134 is now worded, it is impossible to say that a transfer by way of a permanent lease is not within its scope. Apart from the dates it might seem that the language was altered for the express purpose of avoiding the effect of the ruling in *Abhiram Goswami's case* (1). In fact it was apparently not intended to make any change in the law but only to state more clearly the law as it was at the time understood.

The further point taken, that the plaintiffs had no cause of action till their father died, is also untenable on the authorities. In *Madhu Sudan Mandal* v. *Radhika Prosad Das* (6) the question was treated as concluded by the decision of the Privy Council in *Damodar Das* v. *Lakhan Das* (7). The representation of the idol by the *shebaits* is a continuing representation, and limitation runs against the idol continuously and not as against each *shebait* individually as and when he succeeds to the office, the *shebaits* not being holders of successive life-estates in the management or in the property of the endowment: *Prosunno Kumari Debya* v. *Golab Chand Baboo* (8), *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (9).

It has next been contended, however, that *Abhiram Goswami's case* (1) must be taken to have settled what the law was before the Limitation Act of 1908 was passed and that the plaintiffs, therefore, are entitled to say that they have been deprived of a right of suit which they had under the pre-existing law or that in some way they are entitled to treat the present suit as a suit not under Article 134 but as a suit to which some other Article applies. As the argument is put, in one aspect it is the last point over again, namely, that the plaintiffs had no cause of action till their father died in 1912. Even if this were so, it is obvious that they had no vested right of suit when the Act of 1908 was passed. In another aspect the argument seems to be that their cause of action has at any rate been in some way changed. But if time ran against the idol, no change of substance has occurred in respect of the cause of action. That still depends, as it did before, on the unlawful alienation of the property by the plaintiffs' father and even if the defendants had to prove adverse possession, adverse possession would run against the idol under the old law just as it would under the new law: *Nilmony Singh* v. *Jogabandhu Roy* (4), *Damodar Das* v. *Lakhan Das* (7). The gist of this part of the argument seems to be that the Article of the Limitation Act applicable would previously have been Article 144 and not Article 134. But whether that be so or not, the whole of the contentions based on the change in the law really come to this, that the passing of the Act of 1908 has cut down and made shorter the period of limitation to which the plaintiffs would otherwise have been entitled. In such a state of things the relevant section of the Act, to which we must look, is section 30. That section provides that "notwithstanding any thing herein contained, any suit for which the period of limitation prescribed by this Act is shorter than the period of limitation prescribed by the Indian Limitation Act, 1877, may be instituted within the period of two years next after the passing of this Act or within the period prescribed for such suit by the Indian Limitation Act, 1877, whichever period expires first." The Act of 1908 was passed on the 7th August of that year and the period of two years allowed by section 30 expired before the suit was instituted. There is no other concession to which the plaintiffs are entitled and having regard to the law as it was understood to be in this country up to 1908, there is no hardship.

As a last resort, it has been argued that, at any rate, the minor plaintiffs are entitled to an extension of time under the provisions of section 6 of the present Act. It may be doubted whether the provisions of section 6 control those of section 30. But the true answer to this argument seems

(6) 16 Ind. Cas. 927; 17 C. W. N. 873; 16 C. L. J. 349.

(7) 7 Ind. Cas. 240; 37 I. A. 147; 37 C. 885; 12 C. L. J. 110; 14 C. W. N. 889; 20 M. L. J. 624; (1910) M. W. N. 303; 8 M. L. T. 145; 7 A. L. J. 791; 12 Bom. L. R. 632 (P. C.).

(8) 2 I. A. 145; 14 B. L. R. 450; 23 W. R. 253; 3 Sar. P. C. J. 449; 3 Suth P. C. J. 102 (P. C.).

(9) 27 I. A. 69; 23 M. 271; 2 Bom L. R. 597; 4 C. W. N. 329; 10 M. L. J. 29; 7 Sar. P. C. J. 671; 8 Ind. Dec. (N. S.) 591 (P. C.).

to be that under the law as it now stands it must be taken that the time began to run in 1877 when the lease to the defendants was granted and that under section 9 of the Act the time having once begun to run no subsequent disability or inability to sue stops it.

For the reasons indicated I am of opinion that this appeal fails and must be dismissed with costs.

BEACHCROFT, J.—I agree.

Appeal dismissed.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 29 OF 1917.

August 13, 1917.

Present:—Sir Edward Chamier, KT., Chief Justice, and Mr. Justice Chapman.

MIDNAPUR ZAMINDARY CO.—JUDGMENT-DEBTOR—APPELLANT

versus

THE DEPUTY COMMISSIONER OF MANBHUM—DECREE-HOLDER—RESPONDENT.

Limitation Act (IX of 1908), ss. 5, 15, applicability of—Execution, application for—Decree offered as security for costs—Exclusion of period during which decree served as security, whether allowable—Limitation, whether can be excluded by agreement—Estoppel.

It is the duty of the Court to look into the question of limitation itself and it is not relieved from the duty of doing so by the fact that the parties or one of them has agreed not to plead limitation. [p. 572, col. 1.]

If to an action the Statute of Limitation is pleaded and proof is given that the action clearly commenced after the period of limitation had expired, the defendant, notwithstanding the existence of any agreement, is entitled to a verdict. [p. 572, col. 1.]

Section 5 of the Limitation Act is not applicable to an application for execution of a decree. [p. 571, col. 1.]

A plaintiff wishing to appeal to the Privy Council against a decree of the High Court offered as security for costs a decree for rent which he had obtained against the defendant. The security was accepted by the High Court and the plaintiff was thereby enabled to appeal to the Privy Council. His appeal failed and costs were awarded against him. He then applied for execution of his rent-decree:

Held, (1) that the acceptance of the security by the High Court did not involve an order staying execution of the rent-decree, and that section 15 of the Limitation Act had no application to the case; [p. 572, col. 1; p. 571, col. 1.]

(2) that, therefore, the time during which the appeal was pending before the Privy Council could not be excluded from the period of limitation provided for the execution of the decree. [p. 571, col. 2; p. 572, col. 2.]

Appeal from an order of the Deputy Collector, Manbhum, dated the 1st March 1917.

Mr. *P. R. Dass* (with him Mr. *Sailendra Nath Palit*), for the Appellant.

Mr. *Mohammad Fakhruddin*, for the Respondent.

JUDGMENT.

CHAMIER, C. J.—The question for decision in this appeal is whether an application for execution of a decree against the appellant presented by the respondent to the Court below on July 5th, 1916, is barred by limitation. The decree which was dated December 17th, 1909, and was for a large sum on account of arrears of rent, expressly provided that execution should not be taken out until the disposal of an appeal in another suit between the same parties then pending in the Calcutta High Court, the appellant in that case being the present respondent. The appeal to the High Court was dismissed on April 28th, 1910. The present respondent then applied to the High Court for leave to appeal to the Privy Council and obtained leave in the ordinary course. On being required to give security for the costs of the present appellant who was the defendant in the rent suit, he gave as security the decree for rent which he held against his opponent. The bond by which the decree was made security for the costs of the respondent in the Privy Council recited the course of the litigation and the fact that the High Court had allowed the rent decree to be given as security, and then it provided that if the present respondent paid to the extent of Rs. 4,000 any costs payable by him to the present appellant under the order of His Majesty in Council, then the document was to be void and the rent decree was to be released from the bond, but in default of the costs being paid they were to be realised by sale of the rent-decree, the sale-proceeds to be applied in payment of such costs to the extent of Rs. 4,000, and until such costs were paid the decree was to remain charged

therefor. The appeal to the Privy Council was dismissed with costs in February 1915, and the present application for execution of the rent decree was presented, as already stated, on July 5th, 1916. It is quite clear that the respondent is entitled to deduct the time which elapsed between the date of the decree and the disposal of the appeal in the other case by the Calcutta High Court. The question is whether he is entitled to deduct the time which elapsed between the disposal of the case by the Calcutta High Court and the date on which his present application for execution was filed.

The first contention is that the case is covered by section 5 of the Limitation Act and that the respondent has established sufficient cause for not making the application within time. But one has only to read section 5 to see that it has no application whatever to the present case. It applies only to an appeal or application for review of judgment or for leave to appeal or any other application to which the section may be made applicable by any enactment or rule for the time being in force. It is not suggested that there is any enactment or rule which makes this section applicable to the present application for execution. Section 5 has, therefore, no bearing on the case.

Next it was contended that the case was covered by section 15 of the Limitation Act. There was no express injunction or order staying the execution of the decree, but it is suggested that what took place in the High Court, when the decree was made security for the costs in the other case, amounted to an order by the Court that execution should not proceed pending the disposal of the case by their Lordships of the Privy Council. It appears to me impossible to accept this contention. It is probable that neither side contemplated the possibility of the rent-decree becoming barred by limitation and that it never occurred to the Court or the parties that there was any necessity to stay execution of the rent-decree. If by the bond mentioned above the decree was transferred to the Registrar of the High Court, then the Registrar could have taken out execution. If the decree was not effectively transferred by that document, then it appears that the respondent could have taken out execution himself. He could certainly have made an application to the Court setting out the facts and representing that the execution of the decree was about to become barred by limitation. If he had done so, suitable action would have been taken. Other security could have been substituted or arrangements made for the execution of the decree. In suits for partition of family property where the property to be divided includes bonds or decrees standing in the name of one or other of the parties, it is a common practice to apply to the Court to make arrangements for the bringing of suits on the bonds or for the execution of decrees proceedings on which are likely to be barred by limitation. The truth appears to be that the decree-holder overlooked the fact that his decree was becoming barred by limitation and he now seeks to make out that the Court prevented him from executing it. That, however, is not the case. I am unable to hold that the case is covered by section 15 of the Limitation Act.

Lastly, it was contended that what took place in the Calcutta High Court amounted to an agreement extending the period of limitation until the disposal of the case by the Privy Council. It was settled many years ago that limitation could not be extended even by express agreement, and it certainly could not be extended by an agreement to be implied from circumstances such as those with which we have to deal in the present case.

I am of opinion that this application for execution was barred by limitation and should have been dismissed. I would allow this appeal, set aside the order of the Court below and dismiss the application for execution with costs in both Courts.

CHAPMAN, J.—I agree. Raja Ram Kanai Sahe wished to appeal to the Privy Council against a decree of the Calcutta High Court dismissing his suit for a declaration that a lease which had been given to the Midnapur Zamindary Co. was invalid. In order to be able to appeal the Raja had to give security for any costs which might be awarded to the Zamindary Co. by the Privy Council. He offered as security a

decree for a considerable sum of rent which the Estate had obtained against the Zamindary Co. The security so offered was accepted by the Calcutta High Court and the Raja was thereby enabled to prosecute his appeal in the Privy Council. His appeal failed and costs were awarded against him. An application was then made by the Deputy Commissioner in his capacity as Manager of the estate for execution of his rent decree against the Zamindary Co. The application was on the face of it barred by limitation. In order to get over the difficulty of limitation the two contentions which appear to me to have any substance appear to be these. First, that when the security offered by the Raja was accepted by the High Court that acceptance involved an order staying the execution, of the rent-decree and that section 15 of the Limitation Act became then applicable. It is, however, conceded that there was in fact no order staying execution, nor can it be said that any such order was implied. The other alternative is to consider whether the fact of the acceptance of the rent decree by the High Court as security for costs resulted in such a relationship between the Deputy Commissioner and the Midnapur Zamindary Co. as would estop the Company from now pleading limitation or would extend the period of limitation in favour of the Deputy Commissioner. So far as estoppel is concerned, it is the duty of the Court to look into the question of limitation itself and it is not relieved from the duty of doing so by the fact that the parties or one of them had agreed not to plead limitation. So far as the question whether the period of limitation was extended as the result of such an agreement is concerned, it was decided by the Privy Council so far back as the year 1849 in the case of *East India Company* v. *Oditchurn Paul* (1), not without reluctance, that if to an action the Statute of Limitation is pleaded and proof is given that the action clearly commenced after the period of limitation had expired, the defendant, notwithstanding the existence of any agreement, is entitled to a verdict. There is a decision to the same effect by the Full Bench of the Calcutta High Court in the case of *Kristo Komul Singh* v. *Huree Sirdar* (2). The case no doubt is one of very considerable hardship to the decree-holder, because no doubt it was not obvious to him that it was his duty to keep the rent-decree alive nor indeed was it easy to say how that decree should be kept alive, whether by application by the decree-holder or by some sort of motion to the High Court, in order that the Registrar might make arrangements for some application to be made in the matter. I agree that the lower Court was wrong in holding that the application for execution was not barred by limitation. I desire to abstain from expressing any opinion as to whether anything could be made of the equities of the case in order to meet an application for execution by the other side of the decree of the Privy Council for costs.

Appeal allowed.

(1) 5 M. I. A. 43 at p. 70; 7 Moo. P. C. 85; 14 Jur. 253; 1 Sar. P. C. J. 394; 18 E. R. 810; 13 E. R. 811.

(2) 13 W. R. F. B. 44; 4 B. L. R. F. B. 101.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 746 OF 1916.

October 29, 1917.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

MANKOOTTIL CHATHUKUTTI NAIR—PLAINTIFF—APPELLANT

versus

P. P. M. KOMAPPAN NAIR AND OTHERS—DEFENDANTS—RESPONDENTS.

Malabar Law—Karnavan, *position of*—*Mortgage by* karnavan *to pay barred debt*—*Consideration*—Tarwad, *liability of*—*Contract Act* (*IX of* 1872), *s.* 25.

The status of a *karnavan* in a Malabar *tarwad* is more akin to that of a manager of a Hindu family than to that of a Hindu father. The peculiar obligations which a Hindu son incurs in respect of the debts of his father are not those with which a junior member of a *tarwad* is chargeable with reference to the *karnavan's* debts. [p. 573, col. 1.]

A mortgage executed by a *karnavan* in payment of a barred decree-debt is not binding on the junior members of the *tarwad*. [p. 573, col. 1.]

Dalip Singh v. *Kundan Lal*, 18 Ind. Cas. 726; 35 A. 207; 11 A. L. J. 244, not approved.

The provisions of section 25 of the Contract Act do not apply to such a case, for though the mortgage might be treated as having consideration, it is not enough to charge the *tarwad* with liability, which must be shown to have been benefited by the transaction. [p. 573, col. 2.]

MANKOOTTIL CHATHUKUTTI NAIR *v.* KOMAPPAN NAIR.

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Tellicherry, in Appeal Suit No. 602 of 1913, preferred against that of the Court of the District Munsif, Quilandy, in Original Suit No. 608 of 1912.

Mr. *Kutti Krishna Menon*, for the Appellant.

Mr. *C. Madhavan Nair*, for the Respondents.

JUDGMENT.—The question for decision is whether a deed of mortgage executed by a Karnavan in payment of a decree debt which was barred by limitation at the date of the mortgage is binding on the junior members of the Tarwad.

Mr. Kuttikrishna Menon for the appellant relied on *Eravanni Revivarman* v. *Ittapu Revivarman* (1), in support of the proposition that the Karnavan of a Malabar Tarwad occupies a position analogous to that of a Hindu father under the Mitakshara Law. We do not think that the learned Judges intended in that case to draw a distinction between the position of a father and that of a bare manager. The exact status of a Karnavan was considered more elaborately in *Achal Ram* v. *Kazim Husain Khan* (2) and in *Kunhichekkan* v. *Lydia Arucanden* (3), and we agree with the view taken in these two decisions that the Karnavan occupies a position more akin to that of a manager than to that of a Hindu father. The peculiar obligations which a Hindu son incurs in respect of the debt of his father are not those with which a junior member of a Tarwad is chargeable with reference to the Karnavan's debts.

It has been held in *Chinnaya Nayudu* v. *Gurunatham Chetti* (4) that the manager of a Hindu family is not entitled to revive a barred debt, and this decision has been cited with approval in *Narayanasami Chetti* v. *Samidas Mudali* (5), *Kondappa* v. *Subba* (6) and *Suryanarayana* v. *Narendra Thatraz* (7). As regards *Kondappa* v. *Subba* (6), it is enough to point out that the widow was regarded as being under a pious duty to relieve her husband from the sin of not paying a just debt. In the case of sons, the Hindu Law imposes an obligation to pay their father's debts not tainted with illegality or immorality. That is the reason of the rule in *Narayanasami Chetti* v. *Samidas Mudali* (5). We do not think that the view in *Dalip Singh* v. *Kundan Lal* (8) to the contrary is good law.

As regards the English cases, the principle enunciated by Romer, J., in *Midgley* v. *Midgley* (9) is that the payment of barred debt will not enable the legatees to charge an executor with Devastavit. As pointed out by Mr. Madhavan Nair, this is a very exceptional proposition which should not be extended to Indian conditions. Moreover in England, a debtor is not bound to plead the Statute of Limitations, whereas under the Limitation Act, the Court is bound to dismiss a claim, if it is barred by limitation. One other distinguishing feature is, that an executor is directed to pay all the just debts of a testator, there is no similar obligation on the Karnavan. It is open to argument, however, that if a debt barred by limitation has been actually paid, the Karnavan might not be held liable for having paid it; that would stand on the analogy of an executor or trustee not being liable to be proceeded against for Devastavit under similar circumstances. See *Rowson, In re, Field* v. *White* (10). But that is not the present case. Here the holder of the mortgage has obtained only a promise and not payment. That promise has to be enforced against the Tarwad and the members are entitled to plead that the promise has not been made for necessary or lawful purposes. That is the principle which Hindu junior members are entitled to invoke as against the manager.

Regarding the argument that section 25 of the Contract Act can be utilized against the Tarwad, the answer suggested by Mr. Madhavan Nair seems reasonable. The mortgage document may be regarded as having consideration; but that is not enough to charge the Tarwad with liability. The consideration must be such as to bind the members, either by showing that the transaction was beneficial or was justifiable.

(1) 1 M. 153; 1 Ind. Jur. 10; 1 Ind. Dec. (N. S.) 101.
(2) 15 M. L. J. 197 at p. 201; 8 Sar. P. C. J. 772; 9 C. W. N. 477; 8 O. C. 155; 27 A. 271; 32 I. A. 113.
(3) 14 Ind. Cas. 480; 11 M. L. T. 232; (1912) M. W. N. 386.
(4) 5 M. 169; 2 Ind. Dec. (N. S.) 118.
(5) 6 M. 293; 7 Ind. Jur. 357; 2 Ind. Dec. (N. S.) 483.
(6) 13 M. 189; 4 Ind. Dec. (N. S.) 844.
(7) 19 M. 255; 6 Ind. Dec. (N. S.) 883.
(8) 18 Ind. Cas. 726; 35 A. 207; 11 A. L. J. 244.
(9) (1893) 3 Ch. 282; 62 L. J. Ch. 905; 2 R. 561; 69 L. T. 241; 41 W. R. 659.
(10) (1885) 29 Ch. D. 358; 54 L. J. Ch. 950; 52 L. T. 825; 35 W. R. 604; 49 J. P. 759.

We are, therefore, of opinion that the document sued on is not binding on the Tarwad and dismiss the second appeal with costs.

M. C. P. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1493 OF 1915.

February 6, 1918.

Present:—Mr. Justice Richardson and Mr. Justice Beachcroft.

Maharaja Bahadur SIR PRODYAT KUMAR TAGORE, KT., AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

CHUNDRA MOHUN SIL AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), *s.* 29—*Landlord and tenant*—Hajat *or rent kept in abeyance*—*Landlord's right to realise full nominal rent.*

Where a tenant by a *kabuliyat* agreed to pay rent at the rate of Rs. 37-1-0 per annum subject to a *hajat* or deduction of Rs. 21-10-0 and the *kabuliyat* contained the following clause: "If after the expiry of the term I do not within a year deliver a fresh *dawl kabuliyat* for the whole amount inclusive of the sum kept in abeyance I shall pay Rs. 37-1-0, being the full amount of actual rent inclusive of the sum kept in abeyance:"

Held, (1) that the clause in the *kabuliyat* was in the nature of a threat that the rent at the full nominal rate would be levied in case the tenant did not execute a *kabuliyat* within a year after the expiry of the term; [p. 575, col.1]

(2) that the landlord's claim at the full nominal rate was inadmissible, as the stipulation in the *kabuliyat* with regard to the deduction to be allowed was a device to evade the provisions of section 29, Bengal Tenancy Act; [p. 575, col. 1.]

(3) that as in cases of this nature each case must depend on its own facts, it would be better in all such cases for the lower Courts to record an express finding one way or the other whether or not the agreement was a device to evade the Statute. [p. 575, col. 2.]

Appeal against the decree of the District Judge, Rungpore, dated the 23rd March 1915, confirming that of the Munsif, 2nd Court at Rungpore, dated the 29th April 1914.

FACTS appear from the judgment.

Babu *Ram Charan Mitter* (with him Babu *Mukundnath Roy*), for the Appellants.—This appeal arises out of a suit for arrears of rent for 3 years 1317—19 *B. S.* in respect of 25 *bighas* and 13 *katas* at the rate of Rs 37-1-0 per year, subject to a *hajat* or deduction of Rs. 21-10-0. These lands were settled with the present defendants upon a *kabuliyat* in the year 22nd Agrahan 1287 *B. S.*-1880, before the Bengal Tenancy Act was passed. A portion of the rent was kept in abeyance and the remainder Rs. 15-7-0 was payable. The question is whether it is a device to evade the law. The case reported as *Mahamaya Kar* v. *Kishore Chang* (1) relied on by the District Judge in the Court below has no application here, because there is no finding that it is a device to evade section 29 of the Bengal Tenancy Act. The tenancy being created before the Bengal Tenancy Act, it was competent to the parties to make any arrangement as to the amount of rent. See *Romesh Chandra Biswas* v. *Ghulam Nabi Fakir* (2), *Ram Doyal Das* v. *Kamala Priya Debya* (3), *Kalis Chandra Saha* v. *Darbaria Sheik* (4) and *Manindra Chandra Nandi* v. *Durga Sundari Dasya* (5). If there was an agreement between the parties settling rent at a time when it was competent to settle that rent and the parties intended that it should come into operation, there is no bar to the right of the landlord to realise that rent. But if the tenants thought that it should not be realised from them, then and then only the tenants should not be compelled to pay the higher rent.

[BEACHCROFT, J.—That rent was not paid for 30 years.]

There is no finding that the nature of the *kabuliyats* was explained or understood by the tenants. There is no such defence that the land was not such as would entitle the landlord to claim rent at Rs. 37-1-0. The terms of the two *kabuliyats* are the same.

Ram Doyal Das v. *Kamala Priya Debya* (3) is in my favour.

In *Romesh Chandra Biswas* v. *Ghulam Nabi Fakir* (2) where the tenants did not set up that the *kabuliyat* was not intended to be acted upon, it was held that section 29 of Bengal Tenancy Act was no bar to the rate claimed.

In *Manindra Chandra Nandi* v. *Durga Sundari Dasya* (5) a portion was kept in abeyance for some time.

(1) 21 Ind. Cas. 948; 18 C. L. J. 502; 18 C. W. N. 738.
(2) 29 Ind. Cas. 807; 19 C. W. N. 867.
(3) 3 Ind. Cas. 223; 6 M. L. T. 192.
(4) 32 Ind. Cas. 251; 20 C. W. N. 347.
(5) 32 Ind. Cas. 185; 20 C. W. N. 630.

RAI BRIJRAJ *v.* NAURATAN LAL.

Babu *Atul Chandra Gupta*, for the Respondent, was not called upon to reply.

Babu *Biraj Mohun Majumdar*, appeared for Deputy Registrar.

JUDGMENT.

RICHARDSON, J.—By the *kabuliyat* of 1287 the tenants agreed to pay a rent of Rs. 37-1-0 per annum subject to a *hajat* or deduction of Rs. 21-10-0. The rent actually payable was, therefore, Rs. 15-7-0. The *kabuliyat* contains the following clause: "If after the expiry of the term I do not within a year deliver a fresh *dowl kabuliyat* for the whole amount inclusive of the sum kept in abeyance, I shall pay Rs. 37-1-0, being the full amount of actual rent inclusive of the sum kept in abeyance." That clause is rather in the nature of a threat that rent at the full nominal rate would be levied in case the tenants did not execute a *kabuliyat* within a year after the expiry of the term, which was six years. The tenants, however, seem to have continued to pay rent at the rate of Rs. 15-7 a year and no further *kabuliyat* seems to have been executed till the year 1311. The *kabuliyat* then executed contains a similar provision as to rent, except that the amount of the deduction was diminished by 4 annas and the amount of the rent payable was increased by the same sum. The *kabuliyat* in this case contains this clause towards the end: "After the expiry of the said term I shall pay according to the above-mentioned arrangement the sum of Rs. 37-1-0, being the full amount of the actual rent inclusive of the rent kept in abeyance." Acting presumably upon this clause, the plaintiffs have brought the present suit, claiming rent in respect of a period subsequent to the expiry of the term at the full rate without any deduction, the tenants having paid up to the end of 1316, first at the rate of Rs. 15-7-0 and then at the rate of Rs. 15-11-0. The Courts below have held that the claim for rent at the higher rate is inadmissible. The only ground on which these judgments are attacked is that neither Court has expressly found that the arrangement with regard to the deduction to be allowed was a device to evade the provisions of section 29, Bengal Tenancy Act. The District Judge, however, has referred to the case of *Mahamaya Kar* v. *Kishore Chang* (1) and the only reason why he has not expressly found that the provisions of the law are being evaded is apparently that he considered the facts to be too clear to admit of any doubt. The facts of the present case are stronger than those of the case to which the learned District Judge has referred. No doubt there are a number of decisions relating to contracts more or less like the present. No doubt also each case must depend upon its own facts, and it would be better in all such cases for the lower Courts to record an express finding one way or the other, whether or not the agreement is a device to evade the Statute. It would be better that they should do so, if only for the purpose of saving the parties from the expense of appealing as also in cases near the line from the additional expense of a remand. We see no reason here for disturbing the concurrent judgments of the lower Courts and the appeal must be dismissed with costs.

BEACHCROFT, J.—I agree.

Appeal dismissed.

PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 3 OF 1917.

July 31, 1917.

Present:—Sir Edward Chamier, KT., Chief Justice, and Mr. Justice Sharfuddin.

RAI BRIJRAJ—APPELLANT

versus

NAURATAN LAL—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 182—"Where there has been an appeal," meaning of—"Review of judgment," whether includes application for re-hearing of suit dismissed for default.

The words "where there has been an appeal" in clause 2 of the last column of Article 182 of the First Schedule to the Limitation Act mean where there has been an appeal against a decree in the suit and cannot be held to include an appeal against an order made on an application to set aside that decree. [p. 576, cols. 1 & 2.]

Clause 3 in the third colum of Article 182 of the Limitation Act does not apply where an application for a re-hearing or review has been dismissed. The intention of the Legislature was to allow further time to a holder of a decree or order for costs where there has been an application for review which has been heard and a fresh decision has been pronounced, not to allow further time where an application for re-hearing or review has been put forward on untenable grounds and has consequently been rejected or dismissed. [p. 576, col. 2.]

Quære.—Whether the words "review of judgment" in clause 3 of Article 182 of Schedule I of the Limitation Act cover an application for re-hearing of a suit dismissed for default.

RAI BRIJRAJ *v.* NAURATAN LAL.

Miscellaneous civil appeal from an order of the Subordinate Judge, Patna, dated the 20th September 1916.

Messrs. *Mustafa Khan*, *Banwari Lal* and *Purnendu Narain Sinha*, for the Appellant.

Messrs. *Ganesh Dutt Singh* and *Gangadhar Dass*, for the Respondent.

CHAMIER, C. J.—The facts of this case are as follows: There was a suit for a declaration which was dismissed for default on November 15th, 1912, and costs amounting to Rs. 642-11-0 were awarded to the present respondent. There was an application to set aside the dismissal for default, which was dismissed on June 17th, 1913, and costs amounting to Rs. 82-7-3 were awarded to the present respondent. Then there was an appeal against the order rejecting the last-mentioned application, which was dismissed on November 30th, 1914, and costs amounting to Rs. 132 2-3 were awarded to the present respondent. Lastly, there was an application for leave to appeal to the Privy Council, which was dismissed on December 6th, 1915, and costs amounting to Rs. 80 were awarded to the present respondent. An application was made by the respondent for recovery of the costs awarded to him under the decree and the three orders mentioned above. This application for execution was presented on April 11th, 1916. There can be no doubt that the application was made within time as regards all the sums, except the first mentioned sum of Rs. 642-11-0. The Court below has held that the application was made within time with regard to that sum also, and the question which we have to decide in this appeal is whether the application is barred as regards the first mentioned sum. The Subordinate Judge relied on the decision of the Calcutta High Court in *Lutful Huq* v. *Sumbhudin Patluck* (1). That decision can no longer be accepted in view of the later decision of the Bombay High Court in *Jivaji* v. *Ramchandra* (2) and the decision of the Calcutta High Court in *Baikunta Nath Mittra* v. *Aughore Nath Bose* (3) and other cases. It is now settled that the words "where there has been an appeal" in the last column of Article 182 of the First Schedule to the Limitation Act mean where there has been an appeal against a decree in the suit, and cannot be held to include an appeal against an order made on an application to set aside that decree. The learned Vakil for the respondent frankly admits that the authorities on this point are against him, but he contends that the case is covered by clause (3) in the third column of Article 182. He maintains that the application to set aside the dismissal of the suit for default was a review of judgment within the meaning of clause (3). There is no doubt authority in favour of the contention that the words "review of judgment" are not intended to be restricted only to a review strictly so called in the Code of Civil Procedure. But this will not avail the respondent for it has also been held that clause (3) of Article 182 does not apply where an application for a re-hearing or review has been dismissed [see *Kurupam Zamindar* v. *Sadasiva* (4)]. The intention of the Legislature seems to have been to allow further time to a holder of a decree or order for costs where there has been an application for review which has been heard and a fresh decision has been pronounced, not to allow further time where an application for re-hearing or review has been put forward on untenable grounds and has consequently been rejected or dismissed. Personally I am disposed to doubt whether the words "review of judgment" were intended to cover an application for re-hearing of a suit dismissed for default, but assuming that the words were intended to cover such a case I am of opinion that in the case before us there was no decision passed on the review within the meaning of clause (3) in the third column of Article 182 in the First Schedule of the Limitation Act. For these reasons I am of opinion that the application for execution was barred by limitation as regards the sum of Rs. 642-11-0. I would allow this appeal and modify the order of the Court below accordingly.

SHARFUDDIN, J.—I agree.

Appeal allowed.

(1) 8 C. 248; 10 C. L. R. 143; 6 Ind. Jur. 357; 4 Ind. Dec. (N. S.) 158.
(2) 16 B. 123; 8 Ind. Dec. (N. S.) 558.
(3) 21 C. 387; 10 Ind. Dec. (N. S.) 888.
(4) 10 M. 66; 3 Ind. Dec. (N. S.) 797.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 310 OF 1917.

October 5, 1917.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

In re PARVATRAO MHASKOJIRAO—APPLICANT.

Criminal Procedure Code (Act V of 1898), s. 195 (6)—Sanction to prosecute confirmed on appeal—Revision summarily rejected by High Court—Period of six months, commencement of.

The period of six months, during which a sanction to prosecute remains in force under clause (6) of section 195 of the Code of Criminal Procedure, begins to run either from the time the original sanction was given or from the date of some subsequent order made by a competent Court which confirms the giving of the sanction or itself specifically gives a sanction. An order of the High Court summarily rejecting an application in revision does not approve or confirm the order of the Court below and therefore does not furnish a starting point for the period of six months to run from. [p. 577, col. 2; p. 578, col. 2.]

Criminal application for revision from an order passed by the Special First Class Magistrate, Malegaon.

Mr. *A. G. Desai*, for the Applicant.

Mr. *G. S. Rao* (with him Mr. *S. M. Varde*), for the Opponent.

JUDGMENT.

HEATON, J.—This application raises a point of difficulty about which there has been—and perhaps is likely to be—difference of opinion. A sanction to prosecute was given under section 195 of the Criminal Procedure Code and an appeal against the sanction was made to the Superior Court and that appeal was dismissed. Then the applicant approached the High Court in its revisional powers asking it to interfere with the sanction and the High Court summarily rejected the application. Originally the sanction had been given on the 23rd of July 1916 and the order of the High Court was made on the 1st of February 1917. By this time, therefore, more than six months had elapsed since the date when the sanction was given by the Original Court. But a further delay ensued. It was not until the 10th of July 1917, more than six months after the order of the Appellate Court confirming the sanction and more than five months after the High Court had refused to interfere, that the complaint was presented to the Magistrate by the person who had obtained the sanction. The accused person, *i. e.*, the applicant, then contended that the sanction by that time was spent in consequence of the latter part of clause (6) of section 195, which says: "No sanction shall remain in force for more than six months from the date on which it was given." The applicant urged this objection before the Magistrate who considered it and wrote a judgment disposing of it. He thought that the words which I have quoted must be construed so as to give the complainant six months from the date of the order of the High Court.

I think the Magistrate was wrong. The matter presents difficulties in two phases. The first is whether the six months begin to run from the date of the order of the Appellate Court where there has been an appeal. For the moment I will assume that it is so. Then the second phase which is to be considered is this: does the period of six months similarly run from the date of the order of the High Court when there is a revisional application made to the High Court and that application is summarily rejected?

As regards the second phase of the case I do not myself feel any doubt. It is quite clear to my mind that an order by the High Court summarily rejecting an application such as was made in this case does not constitute a date from which the period of six months begins to run. My reason for so thinking is this: The words which I have already quoted and the relevant words of the rest of section 195 show conclusively to my mind that the six months must run from either the time the original sanction was given or from the date of some subsequent order made by a competent Court which confirms the giving of the sanction or itself specifically gives a sanction. In other words, there must be an order which definitely either approves and confirms or itself gives a sanction. But, as I understand, an order of this Court summarily rejecting an application in revision does not approve or confirm the order of the Court below. It is a refusal of the High Court to interfere and nothing more. In practice—and here I am speaking from a good many years' experience of this Court—a great many revisional

applications are summarily rejected, certainly not because this Court affirms or even approves the order against which the application in revision is directed, but because this Court will not permit the law as to appeals to be violated. That law would be most seriously violated, in my opinion, if this Court exercised its revisional powers in such a way as to permit every applicant to obtain from this Court a consideration of the merits of his case and a decision of this Court upon those merits. The reason is that such a method would be to introduce a most elaborate and comprehensive system of what would in reality be appeals where the Criminal Procedure Code declares that no appeal shall be allowed. I am, therefore, satisfied that in this case the Magistrate's order is wrong, because the latest order from which the period of six months could run is either the original order or the order in appeal. This sanction is long since spent and cannot be made the basis of a prosecution.

I think, therefore, that the correct order for the Magistrate now to make is to dismiss the complaint before him.

SHAH, J.—In this case the original sanction was granted by the trial Court on the 24th of July 1916. The application made to the District Court of Poona for the revocation of that sanction was dismissed on the 23rd of October 1916. Against that order there was an application to this Court in revision, which was summarily rejected on the 1st of February 1917, on the main point as to the revocation of the sanction, and a Rule was granted only for the limited purpose of considering the order made by the lower Courts as to costs. The subsequent order on this revisional application was made on the 4th April 1917. We are not concerned now with that order. The present complaint was filed on the 10th of July 1917.

The point that arises on the present application is whether the complaint made on the sanction thus granted can be entertained or, in other words, whether the sanction had not become inoperative at the date of the complaint in consequence of the lapse of time. Undoubtedly the complaint was made more than six months after the date of the original sanction given by the trial Court. It was also made more than six months after the order was made by the District Court of Poona. But it is within six months from the date of order of this Court rejecting the application on the main point.

The point urged on behalf of the applicant is that the date contemplated by section 195, clause (6), of the Criminal Procedure Code is the date on which the sanction is given, *i. e.*, in this case the date on which it was granted by the trial Court, and that the order made by the District Court of Poona in October 1916 was merely an order refusing to revoke the sanction granted by the trial Court. It is not necessary for the purposes of this application to express any opinion as to whether the date mentioned in clause (6) is the date of the original sanction or the date of the order of the District Court of Poona, as the complaint was filed more than six months after either of these dates. It seems to me that there is considerable force in the argument urged on behalf of the applicant that the word "given" must refer either to the sanction given by a Court of the first instance or to a sanction granted by the Superior Court though refused by the Subordinate Court in the first instance and that it cannot refer to an order by the Superior Court refusing to revoke a sanction granted by the Subordinate Court. It is not necessary, however, to decide the point in this case. It is clear that the mere fact that there was an application in revision made to this Court and that it was rejected on the 1st of February 1917 does not give the present complainant a fresh starting point for the six months provided in sub-clause (6) of section 195. I do not think that the provision in section 195, sub-clause (6), as to the six months from the date on which the sanction is given can apply to an order made by the High Court in revision under section 439 of the Criminal Procedure Code rejecting the application. The sanction "given" must refer either to the sanction granted by the first Court or by the Superior Court in appeal. The question whether any order by the High Court on an application under section 439 of the Criminal Procedure Code for the exercise of the powers under section 195

of the Criminal Procedure Code, made after issuing a Rule and after hearing both parties, will have the effect of making the time run from that date does not arise in this case, and I express no opinion on that point. We are only concerned with the case of an application in revision which is rejected summarily.

On behalf of the complainant, however, an oral application is made in the course of the argument that we should extend the time under the powers given to this Court under clause (6). But there is no affidavit explaining the delay; and there is no attempt made to show any good cause for the extension of time. I do not think that under the circumstances the time could be extended.

I am clearly of opinion that the sanction was not in force at the date of the complaint, and that the Magistrate cannot take any cognizance of the complaint.

I, therefore, agree that the Magistrate should now dismiss the complaint.

Complaint dismissed.

PATNA HIGH COURT.

CRIMINAL REVISION No. 93 OF 1916.

June 5, 1916.

Present:—Mr. Justice Sharfuddin and Mr. Justice Roe.

GANESH LAL—PETITIONER

versus

EMPEROR—RESPONDENT.

Press Act (I of 1910), s. 3—Press exempted from depositing security—Subsequent order requiring security, validity of—Procedure, proper.

An order under section 3 (2) of the Press Act can be passed only by the Local Government. [p. 579, col 2.]

The keeper of an old press on the passing of the Press Act made the necessary declaration but was exempted from depositing security under section 3 (1) of the Act. Subsequently the District Magistrate directed him to deposit security within fifteen days:

Held, (1) that the District Magistrate had no power to issue such an order; [p. 580, col. 1.]

(2) that the proper procedure for the District Magistrate was to issue a notice to the keeper of the press to show cause why the order exempting him from security made at the time of the filing of his declaration should not be cancelled or varied in such manner as may seem good to the District Magistrate. [p. 580, col. 1.]

Messrs. *S. Sinha, Rajendra Prasad* and *Dhirendra Nath Dutta*, for the Petitioner.

The Government Advocate, for the Crown.

JUDGMENT.—In this case we are asked to interfere under section 107 of the Government of India Act of 1915. The facts briefly are that a press is owned by the petitioner and alleged by the petitioner to have been working since 1889. From 1889 to 1914 it appears to have worked without any such declaration as was required by section 4 of Act XXV of 1867, but on a notice being issued under Act I of 1910, he filed the necessary declaration on the 24th June 1914. At the time of filing that declaration no security was deposited. The proceedings in regard to this matter are not before us, and we are, therefore, not in a position to say whether or not reasons were then recorded for exempting the petitioner from depositing the security. The present proceedings were taken on account of the publication of two pamphlets, which in the opinion of the district authorities contained objectionable phrases likely to excite disaffection. On the 3rd April 1916 the petitioner appeared before the District Magistrate to show cause why he should not be called upon to give a security under section 3 of Act I of 1910. The terms of the notice served upon him are as follows:—

"Issue notice to proprietor of the Behar Angel Press to deposit Rs. 2,000 as security under section 3 of the Indian Press Act, 1910, within 15 days as he allowed such objectionable pamphlets to be printed in his press as *Jivan Jagya* and *Swavalamban*. If he fails to comply with the order he will be prosecuted under section 23 of the Act."

It is pointed out to us by the learned Counsel for the petitioner that if this is meant to be an order passed under section 3, clause 2, only the Local Government has power to make such an order. The matter is very much one of form We have not before us, as I have said, the previous proceedings under section 3, and it would undoubtedly have been better if the learned Magistrate had framed his notice so that it was clear that he was acting under section 3, clause 1, and proposing to cancel

or vary the order made under the first part of that clause, and in cancelling or varying that order was calling upon the petitioner to show cause why he should not be ordered to make a substantial deposit. Inasmuch as great subsequent difficulty may arise in the matter of prosecutions under section 23 or proceedings in connection with the forfeiture of the deposit, we think it best to set aside the order made on the 17th April 1916 and to direct that the Magistrate start afresh with a simple order upon the petitioner to show cause why the order exempting him from security, made at the time of the filing of his declaration in June 1914, should not be cancelled and that order varied in such manner as may seem good to the District Magistrate.

Rule made absolute.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 548 OF 1917.
CRIMINAL REVISION PETITION No. 429 OF 1917.
January 24, 1918.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Napier.

CHIDAMBARAM PILLAI AND OTHERS—ACCUSED—PETITIONERS

versus

MUHAMAD KHAN SAHIB—COMPLAINANT—RESPONDENT.

Penal Code (Act XLV of 1860), s. 430, essentials of —Diminishing supply of water used for agriculture—Prevention of waste and storage of water for sale, whether 'mischief'—Cutting bund *erected on channel.*

An offence under section 430 is committed when a person without any sort of right takes water to which another is entitled, whereby the latter is deprived of the full supply that he has a right to claim. Such taking, in the absence of a *bona fide* claim of right, evidences an intention to cause wrongful loss. [p. 581, col. 2.]

Neither the prevention of the water from running waste, nor the storing of it with the intention of selling it to other landowners makes the act of taking any the less an offence when deprivation is caused to the person legally entitled to the water. [p. 581, col. 1; p. 582, col. 1.]

The cutting of a *bund* erected on a channel, whereby a person is wrongfully deprived of the use of water, constitutes an offence under section 430 of the Penal Code. [p. 582, col. 1.]

Vattu Karan, In re, 1 Weir 507, distinguished.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate, Palghat, in Criminal Appeal No. 51 of 1917, preferred against the judgment of the Court of the Stationary 2nd Class Magistrate, Palghat Taluq, in Calendar Case No. 15 of 1917.

Dr. *Swaminadhan* and Mr. *K. S. Vydyanadha Aiyar*, for the Petitioners.

Mr. P. *S. Narayanaswami Aiyar*, for the Respondent.

Mr. *C. Narasimha Chariar*, for the Crown.

ORDER.

NAPIER, J.—The accused were convicted by the Stationary 2nd Class Magistrate of Palghat under section 430, Indian Penal Code, and this conviction has been upheld on appeal. The facts found are that they entered on the lands of the complainant, cut three *bunds* which had been erected in a channel that runs through the complainant's land, with the result that the water in that channel ran down another channel off the complainant's land and was utilised by the 1st defendant for sale to ryots holding lands lower down. Dr. Swaminadhan applies to us to set aside the conviction and sentence on various grounds, the two chief grounds being that where water is in fact utilised for agricultural purposes and not allowed to run to waste, no offence under section 430, Indian Penal Code, is committed, the other, that even if it would have been an offence, if the complainant had intended to utilise the water for his own fields, it is no offence if the intention was to sell the use of it to the other persons. The first ground is one of importance, for it amounts to this, that the section is only intended to penalise the waste of water and not the deprivation of a person having the right to use it. The language of the section is as follows:—

"Whoever commits mischief by doing any act which causes, or which he knows to be likely to cause, a diminution of the supply of water for agricultural purposes, or for food or drink for human beings, or for animals which are property, or for cleanliness or for carrying on any manufacture, ..."

The section begins by saying 'whoever commits mischief' and it is, therefore, unnecessary to ascertain from section 425 what 'mischief' is. Section 425, Indian Penal Code, is as follows:—

"Whoever, with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, commits 'mischief.' "

Now there cannot be any doubt that the removal of the *bund* is such a change in the situation of property as destroys its utility in a case where that *bund* has been erected for the purpose of holding up water, and that a person who so removes a *bund* must know that he is likely to cause wrongful loss to any person who is entitled to the use of that water. It has been found by a Civil Court that the complainant in this case is entitled to the use of the whole of the water in the channel in question, and that finding has been accepted by both the Magistrates. *Prima facie*, therefore, on the facts, an offence of mischief is made out, but it is argued that, there being no waste, there is no mischief under section 430. I see no reason why the Legislature should be supposed to have wished to import this limitation. Further, the language of the section is against it. The water referred to is not only for irrigation but is for other useful purposes, and I think that these clearly have reference to the actual utilisation of the particular water by particular persons and animals who are deprived of it by the mischief complained of. Such supply for drinking and for cleanliness is a common system in the Presidency. Again, with regard to 'any manufacture' it is impossible to argue that it means that a Court should have to find that no part of the water was used for any manufactory anywhere. Obviously it must mean the particular manufactory which was deprived of the water.

Turning to decisions, Dr. Swaminadhan was able to adduce one case which he claimed to be in support of his contention, Criminal Revision Case No. 134 of 1881, reported as *Vattu Karan, In re* (1). The passage in the judgment relied on is to this effect: "The act of the accused in diverting water to their own fields did not diminish or tend to diminish the usefulness of the water. It merely diverted it to the use of the defendants' fields instead of to that of the complainant." Taken apart from the facts of the case, this language seems to lend some support to the learned Counsel's contention. But the facts in that case were the channel was a Government channel and was not shown to be appropriated to the use of the complainant to the exclusion of the defendants through whose fields it passed. There was no evidence that any loss had been sustained by the complainant and as the sole right of the complainant was to have his accustomed supply from Government, it followed that the act of the accused in taking water, whether they had a right to do so against Government or not, did not cause wrongful loss to the complainant, and as it was utilised by the accused, did not cause wrongful loss to the public. This case is, therefore, no authority for the proposition contended for.

The leading case in our Court on section 430 is *Ramakrishna Chetti* v. *Palaniandi Kudambar* (2). That was a decision of the Full Court, which laid down as follows:— "It is not part of the definition of the offence that the act of the accused should be in common language a mere wanton act of waste. Under section 430, Indian Penal Code, the physical requisites of the act are the doing of the act which causes... or is likely to cause a diminution of supply. He also fulfils the mental requisites when he does this with intent to cause wrongful loss, and the intention is properly held to be such when he takes it without any sort of right." This case clearly establishes two propositions, that the taking of water, which can only mean taking without any sort of right, is within the section and that such taking evidences the intention to cause wrongful loss. This decision was applied in a case in *Chengama Naidu* v. *Emperor* (3), where the Court held that the petitioners in taking water in violation of the order as to turns issued by the

(1) 1 Weir 507.

(2) 1 M. 262 (F. B.); 1 Weir 502; 1 Ind. Dec. (N. S.) 174.

(3) 12 Ind. Cas. 527; (1911) 2 M. W. N. 349; 12 Cr. L. J. 551.

Tahsildar, so as to cause a diminution of supply to other ryots, were guilty of an offence under section 430, Indian Penal Code. The same view was taken by the High Court of Calcutta in *Emperor* v. *Sheik Arif* (4). The accused in that case cut the embankment of a water channel in order to irrigate their own fields and thereby deprived the complainant, who owned a factory, of the use of water. One of the learned Judges held that an offence under section 430, Indian Penal Code, had clearly been committed; the other learned Judges had some doubts whether, in view of the claim of right, the matter should have been disposed of in the Criminal Court. He did not, however, dissent from the conviction under section 430, Indian Penal Code. Neither of the learned Judges had any doubt that, in the absence of a *bona fide* claim of right, the facts would constitute an offence under section 430, Indian Penal Code. The learned Counsel's contention, therefore, fails on this point.

The next point urged is that the water was not being supplied for agricultural purposes. I asked the learned Counsel if he would contend that water taken down a channel and stored in a tank was not supplied for agricultural purposes and he was not prepared to go to this length. The evidence of the complainant shows that he put up the *bunds* to store water for irrigating his own lands and for selling it to other landowners. This point, therefore, fails on the facts. But, even if the water had been stored for sale to the other landowners, I fail to see how it was not being supplied for agricultural purposes if those landowners used it for such purposes.

The petition fails on the point of law, but I think that the sentences are too severe. The fines will be reduced to one of Rs. 50 on the 1st accused, Rs. 100 on the second accused and Rs. 5 each on accused Nos. 3, 4and 5, who are coolies.

ABDUR RAHIM, J.—I agree.

Conviction affirmed;
Sentence reduced.

M. C. P.

(4) 35 C. 437; 12 C. W. N. 1534; 7 Cr. L. J. 367.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 1029 OF 1917.

January 29, 1918.

Present:—Mr. Justice Tudball.

LACHHMI NARAIN—APPLICANT

versus

BINDRABAN—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 195—Sanction to prosecute—Appeal, temporary dismissal of, legality of—Procedure.

Accused preferred a charge under section 406 of the Penal Code against one *B.* which was dismissed. *B.* then applied for sanction to prosecute accused for perjury, but that application was rejected. In the meantime accused brought a civil suit to recover the sum of money in respect of which he had preferred the charge in the Criminal Court. That suit was pending, when *B.* appealed to the District Magistrate against the order refusing sanction to prosecute. The latter dismissed the appeal till the decision of the civil suit, but after its determination granted the sanction:

Held, (1) that the order of the District Magistrate granting sanction was illegal, inasmuch as the Magistrate became *functus officio* when he passed his order dismissing the appeal, there being no such thing known to law as a temporary dismissal of an appeal; [p. 583, col. 1.]

(2) that the proper procedure for the District Magistrate would have been to have postponed the decision of the appeal till the decision of the civil suit. [p 583, col. 1.]

Criminal revision from an order of the District Magistrate, Bareilly.

Mr. *Sital Prasad Ghosh*, for the Applicant.

Mr. *M. L. Agarwala*, for the Opposite-Party.

JUDGMENT.—The applicant in this case on the first of September 1916 preferred a charge under section 406 of the Indian Penal Code against Bindraban in a Criminal Court. He was given sufficient opportunity of producing preliminary evidence but he failed to do so and finally in the beginning of January the complaint was dismissed. He at once put in a fresh complaint and finally the case was tried by a Bench of Honorary Magistrates, who dismissed it again in the presence of the accused. Bindraban then applied to the Bench for sanction to prosecute Lachhmi Narain for the offence of perjury. The Bench of Magistrates did not think it advisable to grant sanction and rejected the application. In the meantime Lachhmi Narain had brought a suit in the Civil Court to recover the sum of money in respect of which he had preferred the charge in the Criminal Court. That suit

was pending when Bindraban appealed to the District Magistrate against the order of the Bench refusing sanction to prosecute. The District Magistrate wrote a strange order. It runs as follows:—"The appellant admits that the respondent has got a civil suit now pending to recover the money, he alleges he paid to appellant, about which he filed his complaint, under section 406 of the Indian Penal Code, which was dismissed. It would be obviously improper to grant sanction to a prosecution for a false case at this stage. If, when the civil suit is finished, the appellant still thinks that he has good ground for asking for a prosecution, he can apply again to this Court for a revision of the lower Court's order. Till that time this appeal stands dismissed." On the 14th of September 1917, Bindraban again applied to the District Magistrate, the civil suit in the meantime having come to an end. It had been dismissed and he furnished the Court with copies of the judgments of the first Court and the Appellate Court in that suit. Notice was issued by the District Magistrate to Lachhmi Narain and then the District Magistrate passed the following order:—"Having now seen the judgments of the lower and Appellate Civil Courts in this matter, in both of which Courts the respondent in this case entirely failed to substantiate his claim, I think this is a proper case in which to grant sanction to prosecute, as apart from the personal enmities between the parties, the interest of the state demands that such prosecutions, on biased and unreliable evidence, should be stopped. I set aside the order of the lower Court and grant the sanction asked for." Lachhmi Narain has come to this Court in revision against this latter order. Such things as temporary dismissals of appeals are unknown to law and so far as the appeal is concerned, practically the District Magistrate was *functus officio* when he passed his order of the 22nd of September. His proper course would have been to have postponed the decision of the appeal until the decision of the civil suit. The case, however, *appears to be* one in which some action might be taken as regards Lachhmi Narain and his witnesses but in which the prosecution should not be left in the hands of a private person, as it would simply be used as a weapon of extortion. I, therefore, allow this application and set aside the order of the District Magistrate of the 22nd of September 1917. I direct the record to be returned to the Magistrate with direction that, *if he thinks fit*, he may take up the case *suo motu* and issue notice and, if necessary, direct the prosecution of Lachhmi Narain and his witnesses so as not to leave the prosecution in the hands of a private person. The District Magistrate will understand that I do not seek to fetter his discretion in any way.

Order set aside.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 613 OF 1917.
CRIMINAL REVISION PETITION No. 482 OF 1917.
January 22, 1918.
Present:—Mr. Justice Abdur Rahim and Mr. Justice Napier.

KUMARASAMI CHETTY—COMPLAINANT—PETITIONER

versus

KUPPUSAMI CHETTY AND OTHERS—ACCUSED—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 345—Composition of offence, effect of—Complainant, whether can retract—Composition before complaint, enforceability of—'Accused' in s. 345 (6), meaning of—Incomplete agreement, effect of.

Section 345 of the Criminal Procedure Code deals only with the *lawful* compounding of offences. The principles which apply to the offence also apply to the exception. [p. 586, col. 2.]

The section is not limited to acts done in Court or to cases in which the parties continue to be of the same mind until the case comes on for further hearing before the Court. Once a composition has been effected, the matter is at an end and the person injured cannot effectively resile from the agreement. If he chooses to do so, it is for the Court to enquire into the accused's allegation that the offence was compounded out of Court and to direct an acquittal under the section if it so finds. [p. 586, col. 1: p. 584, cols 1 & 2.]

Mahomed Kanni v. Pattani Inayathulla Sahib, 31 Ind. Cas. 819; 38 M. 946: 2 L. W. 1200; 18 M. L. T. 602; 16 Cr. L. J. 803; *Murray v. Queen-Empress*, 21 C. 103; 10 Ind. Dec, (N S.) 701 and *Kusum Bewa v. Bechu Bewa*, 3 C. W. N. 322, followed.

A composition made before the filing of a complaint in Court is covered by the provisions of section 345, the offence being complete when the

acts constituting it have been committed apart from whether any complaint or charge has been laid before the Court or not. [585, col. 1; p. 586, col. 2.]

The word 'accused' in paragraph 6 of the section only describes the character of the person accused of the offence at the time of the trial when the question of the effect of the composition is under consideration. [p. 585, col. 1.]

To operate as an acquittal, the compounding must have been completed and any incomplete agreement would not amount to an acquittal within the meaning of the law. [p. 586, col. 2.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-Divisional Magistrate, Usilampatti, in Criminal Appeal No. 66 of 1917, preferred against the order of the Court of the Stationary 2nd Class Magistrate, Periakulam, in Calendar Case No. 306 of 1917.

Mr. *R. L. Thornton*, for the Petitioner.

Messrs. *K. N. Aiya*, *K. Sankara Subba Aiyar* and *A. Narayanasami Aiyar*, for the Respondents.

The Public Prosecutor, for the Crown.

ORDER.

ABDUR RAHIM, J.—This is an application to revise an order of acquittal passed by the Sub-Divisional Magistrate in appeal in a case in which the accused were convicted by a 2nd Class Magistrate of offences under sections 147, 355 and 323 of the Indian Penal Code. The Appellate Magistrate found that the charge of rioting could not be sustained upon the evidence and thereupon acquitted the accused of that offence. That acquittal must, in my opinion, stand, as no sufficient reason has been made out for interference with that part of the order of the Appellate Magistrate. He has acquitted the accused of charges under sections 323 and 355, on the ground that there had been a valid composition of those offences within the meaning of section 345, Criminal Procedure Code, before the complainant laid the charge in Court. There are two questions of law which arise in connection with this matter. First of all, a doubt has been expressed by Oldfield, J., who admitted this application, with regard to a decision of mine in *Mahomed Kanni* v. *Pattani Inayathulla Sahib* (1), in which it was laid down that it was not necessary for section 345, Criminal Procedure Code, to operate that the complainant, after the composition has been arrived at, should still be of the same mind and join the accused in asking the Court that the case should be dismissed as there has been a valid composition. Once there has been a composition of an offence compoundable under the Criminal Procedure Code, the matter is at an end and the person injured cannot afterwards effectively resile from the agreement If he chooses to do so, it is for the Court to enquire into the allegation of the accused that the offence was compounded out of Court and if it finds that it was so compounded, to acquit the accused under the provisions of section 345. In holding this view I followed a ruling of the Calcutta High Court in *Murray* v. *Queen-Empress* (2). There is also another ruling of the same Court, *Yusum Bewa* v. *Bechu Bewa* (3), which proceeds upon the same principle. Both the learned Public Prosecutor and the learned Counsel who appeared for the petitioner urged no arguments against the decision in *Mahomed Kanni* v. *Pattani Inayathulla Sahib* (1) and on giving the question my best consideration again, I do not find any sufficient reasons for taking a different view.

The next point of law that has been discussed relates to the question whether a composition, which takes place before any complaint has been laid in Court by the person injured, is covered by the provisions of section 345. In its first part, the section says that the offences described in the table attached, may be compounded by the persons mentioned in the 3rd column of the table. Looking at the 3rd column, we find that the persons who can compound these offences are, generally speaking, the persons injured and not a person who has already laid a charge in Court. When the person injured has entered into a composition, that composition is complete, and paragraph 6 of the section lays down what the effect of such a composition is. It says that "the composition of these offences under this section shall have the effect of an acquittal of the accused." It is argued that the use of the words 'offence' and 'accused' shows that the composition

(1) 31 Ind. Cas. 819; 39 M. 946; 2 L. W. 1200; 18 M. L. T. 602; 16 Cr. L. J. 803.

(2) 21 C. 103; 10 Ind. Dec. (N. S.) 701.

(3) 3 C. W. N. 322.

which is contemplated is one arrived at after a complaint has been laid and there is an accused person before the Court. I cannot accept this argument as at all sound. An offence is complete when the acts constituting it have been committed, apart from whether any complaint or charge has been laid before the Court or not. The allusion to 'the accused' in paragraph 6 of section 345 only describes his character at the time of the trial when the question of the effect of the composition is under consideration. As regards certain classes of offences which may be compounded, the Legislature provides that they may be compounded only with the permission of the Court. In those cases, the operation of the composition is necessarily suspended until the Court sanctions it. But in the other cases, no such permission is needed and no reason is apparent to me or has been suggested why the Legislature, having permitted certain classes of offences to be compounded by the parties themselves without any reference to Court, should insist that that composition should be arrived at after the person alleged to have committed the offence has been brought before the Court. In the absence of clear language showing that that was the intention of the Legislature, I should not be prepared to impute to it any such intention. I think it is quite clear upon the interpretation of section 345 that the contention on behalf of the complainant on this point cannot be sustained. It is unnecessary, therefore, to discuss the English Law on the subject to which some reference has been made at the Bar. But I may point out that so far as I have been able to go into the matter, the case of *Keir* v. *Leeman* (4) supports the view which I have indicated as the one adopted in the Criminal Prosedure Code rather than otherwise. This was a judgment of Lord Denman, C. J., and he after reviewing the cases at some length laid down the following proposition on the subject of compromise of offences:—"We shall probably be safe in laying it down that the law will permit a compromise of all offences, though made the subject of a criminal prosecution, for which offences the injured party might sue and recover damages in an action. It is often the only manner in which he can obtain redress. But, if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it." The exact point we have to consider here was not before the learned Judges in that case, but the proposition seems to imply that a composition of an offence of a particular description would not be the less valid because it took place before any complaint was laid in Court. Then the exception to section 214 of the Penal Code exempts from the provisions of sections 213 and 214 cases of compounding offences which may be lawfully compounded. If the contention submitted on behalf of the prosecution in this case were sound, the compounding of particular offences dealt with under sections, 213 and 214, Indian Penal Code, would be no offence if the compounding took place before the charge was laid. It seems to me that this would be an untenable proposition.

On the facts, however, of this case, I am not satisfied that the Sub-Divisional Magistrate "quite clearly realised whether there was a completed agreement or composition" within the meaning of section 345, Criminal Procedure Code. It appears that there was an arbitration and the arbitrator decided after some parley that accused No. 1 was to pay to the complainant Rs 300. It is argued on behalf of the complainant that he did not accept this composition and had not even agreed to the arbitration. The Sub-Divisional Magistrate does not seem to have arrived at a clear conclusion on these points. A further question arises as to whether the Rs. 300 was to be actually paid before there was any completed composition within the meaning of section 345; or whether the complainant was satisfied with the promise of the accused to pay that amount. The amount was not actually paid before the complaint was lodged in Court. Unless it is found that the compounding was completed before the complaint was made, any incomplete agreement would not amount to an actual acquittal within the meaning of the law. I may say, speaking for myself, that I should ordinarily be very reluctant to

(4) (1844) 6 Q. B. 308; 13 L. J. Q. B. 359; 8 Jur. 824; 115 E. R. 119; 66 R. R. 392.

interfere in a case of this nature. But there is no finding of the Appellate Magistrate on the subject of the charges under sections 323 and 355 of the Penal Code, the acquittal of the accused of these charges being based merely on an alleged composition. The facts found are not enough to show that the Sub-Divisional Magistrate had in this connection quite clear before his mind's eye the elements which would be necessary for a complete and valid composition. I would, therefore, set aside the order acquitting the accused of the charges under sections 323 and 355 of the Penal Code and remit the appeal to be re-heard and disposed of by the Appellate Magistrate on these charges in the light of the above observations.

NAPIER, J.—I agree and wish to add only a few words. With regard to the decision reported as *Mahomed Kanni* v. *Pattani Inayathulla Sahib* (1) which has been referred to in the admission order, I desire to say that I am in entire accord with it. It lays down that the composition referred to in section 345, Criminal Procedure Code, is not limited to acts done in Court nor to cases in which the parties continue to be of the same mind until the case comes on for further hearing before the Court: that view seems to me to be entirely warranted by the language of the section. The sole question to be ascertained is whether there was a contract and once that has been ascertained, there is nothing on principle which allows a party to resile from his contract and lay a charge which he had agreed for consideration not to lay. A further question has been argued whether such a composition can be made before any complaint has been made to a Magistrate or any proceeding taken in Court. Considerable stress has been laid on the words "offence" and "accused" in the section; and the learned Public Prosecutor has pointed out that it must be difficult to say whether a composition was lawful or unlawful unless the facts had been considered by the Court; the difficulty will arise, however, in the actual offence compounded. It is clear from the very earliest authorit es that the offence of compounding a felony could be committed before any charge had been laid. With reference to compounding theft, the language of Lord Coke is quoted in *Reg.* v. *Burgess* (5), which language is reproduced in Archibold's 'Pleading and Evidence in Criminal Cases' in the section dealing with compounding offences. The offence known as *theft bote* is committed "where the owner not only knows of the felony, but taketh of the thief his goods again or amends for the same to favour or maintain him, that is, not to prosecute him to the intent that he may escape." It is reproduced by Blackstone in his Commentaries as follows: "the offence of *theft bote* which is where the the party robbed not only knows the felon but also takes his goods again or other amends upon agreement not to prosecute." This is the language of the earliest authorities and there cannot be the slightest doubt that the *offence* of illegal compounding is one that can be committed in relation to a matter which has *not* been brought before the Court. Now the connection between illegal compounding and legal compounding is very close, because in the Penal Code the exception to section 214 says that "the provisions of sections 213 and 214 do not extend to any case in which the offence may lawfully be compounded." Of course lawful compounding is that which is dealt with under section 345, Criminal Procedure Code. So the principles which apply to the offence must necessarily apply to the exception. I am, therefore, satisfied that a composition made to prevent a case going into a Court is just as much a composition under section 345 as one made after the case has come into Court. As my learned brother has pointed out, it will have no effect as a plea in bar of conviction in cases covered by clause (2) unless the Court has given its sanction. But where a composition has been made out of Court and at a certain stage in the proceedings the Court gives the sanction required by clause (2), then it is a good composition.

On the facts of this case, it seems to me that the Sub-Divisional Magistrate has entirely misunderstood the alleged position. He seems to have thought that because P. W. No. 2 representing P. W. No. 1 agreed to abide by the decision of the arbitrators and there was a decision of a certain sort, that amounted necessarily to a contract not to prosecute. Speaking for myself, I think that the

(5) (1886) 16 Q. B. D. 141; 55 L. J. M. C. 97; 53 L. T. 918; 34 W. R. 306; 15 Cox C. C. 779; 50 J. P. 520,

evidence is perfectly clear on that point: but I do not wish to decide this case on a question of evidence, because we are sitting in revision of an order of acquittal. What the Sub-Divisional Magistrate should have done was to examine the evidence and see whether the *panchayatdars* decided that the complainant was to accept the promise of the accused to pay or whether the decision of the *panchayatdars* was that if the accused did pay, no complaint should be laid.

I agree with my learned brother that this is a matter to which the Sub-Divisional Magistrate must direct his attention. I agree with the order proposed.

Order set aside; Case remitted.

M. C. P.

PATNA HIGH COURT.

(CRIMINAL APPEAL No. 172 OF 1917.

August 20, 1917.

Present:—Mr. Justice Atkinson and Mr. Justice Jwala Prasad.

BALAK SINGH—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 284, 285—Trial with aid of only one official assessor, legality of.

The trial of an accused person was fixed for a certain date when only one duly qualified assessor was present in Court and capable of acting as such, whereupon the Judge ordered another person who happened to be present in Court but who was not on the official list of assessors, to act as an assessor:

Held, (1) that having regard to the provisions of section 284 of the Code of Criminal Procedure the trial was illegal; [p. 587, col. 2.]

(2) that section 285 of the Code was inapplicable to the case, inasmuch as the trial started with only one duly qualified assessor and was altogether abortive and contrary to law. [p. 587, col. 2.]

Criminal appeal from an order of the Assistant Sessions Judge, Saran, dated the 3rd July 1917.

Mr. *S. Sinha*, for the Appellant.

Mr. *Fakhruddin* (Government Pleader), for the Crown.

JUDGMENT.

ATKINSON, J.—In this Criminal Appeal No. 172 of 1917 a very ingenious point has been taken by Mr. Sinha on behalf of the accused person Balak Singh, who was charged and convicted under sectin 467 of the Indian Penal Code of forgery, in respect of a handnote for a sum of Rs. 200. The trial of the accused was fixed for a certain date when only one duly qualified assessor was present in Court and capable of acting as such; whereupon the Judge ordered any other person who happened to be present in Court, whether on the official list of assessors or not, should be required to act as an assessor. A certain gentleman who was present in Court was brought before the Judge and was compelled, though not an official assessor, to act as an assessor. The person who acted as such assessor was not a person summoned or chosen from among the official list of persons appointed to act as assessors for the year 1917 prepared by the District Magistrate in conjunction with the District Judge. The trial started thus with only one person as an official assessor and the trial proceeded and terminated with only one person presuming to act as an assessor.

It is quite clear that a trial instituted in such a form is clearly illegal. Section 284 provides that "when the trial is to be held with the aid of assessors, two or more *shall be* chosen, as the Judge thinks fit, from the persons summoned to act as such."

Now clearly under the provisions of section 284 of the Code of Criminal Procedure the trial was not valid; and Mr. Fakhruddin on behalf of the Crown frankly admits that only one person acted as assessor throughout the trial and that the other person who purported to act as an assessor was not upon the official list of persons appointed for the year 19 7, though he had been an assessor in the previous year and was not summoned to act as such for the year 1917.

Mr. Fakhruddin attempted to rely upon section 285. Obviously section 285 has no application to the facts of the present case. That section provides that if in the course of a trial with the aid of assessors, at any time before the finding, any assessor is from sufficient cause prevented from attending throughout the trial, or absents himself,

and it is not practicable to enforce his attendance, then the trial may proceed with one assessor. Here the trial proceeded with only one official assessor, and not with two duly qualified assessors, hence the trial was utterly abortive and contrary to law. The cases of *Khub Singh* v. *Emperor* (1) and *Man Singh* v. *Emperor* (2) are authorities on the point and clearly govern the case. Mr. Fakhruddin does not seem to controvert the facts stated by Mr. Sinha and upon the facts as stated it is quite clear that the conviction of Balak Singh, the petitioner, cannot stand. We think that the proper order that we should make is that the conviction and sentence pronounced by the Assistant Sessions Judge on the 3rd July 1971 be quashed and that the conviction and sentence be set aside, and we direct that the District Magistrate shall take such steps as he may be advised to try Balak Singh again on the charge of forgery.

JWALA PRASAD, J.—I agree.

Conviction set aside.

(1) 8 Ind. Cas. 874; 13 O. C. 337; 11 Cr. L. J. 724.
(2) 21 Ind. Cas. 894; 35 A. 570; 11 A. L. J. 930; 14 Cr. L. J. 654.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 479 OF 1916.

August 5, 1916.

Present:—Mr. Justice Shah Din and Mr. Justice Chevis.

EMPEROR—APPELLANT

versus

WAZIR SINGH—ACCUSED—RESPONDENT.

Opium Act (I of 1878), s 9—Illegal possession of opium—Joint possession—Evidence Act (I of 1872), s. 25—Excise Officer, whether Police Officer—Confession to Excise Officer, admissibility of.

A person found in possession of a quantity of opium in excess of what he can lawfully possess for his own personal use is guilty of an offence under section 9 of the Opium Act, and the fact that he used to give opium to the other members of his family to eat does not make them joint possessors of the opium with him. [p. 589, col. 1.]

An Excise Inspector is not a Police Officer, and, therefore, a confession made to him is admissible in evidence against the accused. [p. 588, col. 2.]

Appeal from the order of the Magistrate, First Class, Ferozepore, dated the 18th December 1915.

Mr. *C. Beuan Petman*, Government Advocate, for the Appellant.

JUDGMENT.—This is an appeal by the Local Government under section 417, Criminal Procedure Code. The respondent Wazir Singh was sent up for trial under section 9 of Act I of 1878 (Opium Act) upon a charge of having in his possession 7 *tolas* 1½ *mashas* of opium, which was discovered in an almirah in his house on the 5th December 1915. He was acquitted by the Magistrate on the ground that the opium in question was owned jointly by him and the other members of his family consisting of his father and his minor sons.

It is contended by the learned Government Advocate that the order of acquittal is erroneous and must be set aside, and in support of his contention he has cited *Queen-Empress* v. *Salaru* (1), *Crown* v. *Sadiq* (2) and *King-Emperor* v. *Buta Singh* (3). On the strength of these authorities he argues that the respondent is guilty of the offence with which he was charged in the Magistrate's Court, because he was found in possession of a quantity of opium in excess of what he could lawfully possess for his own personal use, it being perfectly immaterial whether other alleged members of the family used to consume opium along with the respondent or not.

The record shows that the respondent admitted before the Excise Inspector that the opium found in his almirah belonged to him, and since the Excise Inspector is not a Police Officer, this statement, which amounts to a confession in this case, is admissible against him. Apart from this confession, the fact of the respondent being in possession of the opium is fully proved and his defence that he was in joint possession of it on behalf of his father and his two minor sons cannot be

(1) 13 P. R. 1897 Cr.
(2) 31 P. R. 1902 Cr.
(3) 34 P. R. 1905 Cr.; 147 P. L. R. 1905; 2 Cr. L. J. 713.

accepted as sufficient in view of the principle laid down in the decisions mentioned above. It is obvious that the respondent's minor children could not have been in joint possession of the opium with him, and it is equally clear that his father who, as the Magistrate says, is an old man of about ninety and half witted, could not possess the opium jointly with the respondent. The mere fact that the respondent gave opium to his father and his children to eat is of itself insufficient to show that he alone was not in possession of the quantity discovered in his almirah.

Following the principle laid down in the above-mentioned decisions, we accept this appeal and setting aside the order of acquittal convict the respondent of an offence under section 9 of the Opium Act and sentence him to one month's rigorous imprisonment.

Appeal accepted.

PATNA HIGH COURT.

CRIMINAL REVISION No. 271 OF 1917.

August 6, 1917.

Present:—Mr. Justice Roe and Mr. Justice Jwala Prasad.

RASHBEHARI SINGH AND OTHERS —PETITIONERS

versus

JAGNARAIN RAI—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898, ss. 107, 144—Order under s. 144 restraining party from entering upon land, renewal of, validity of—Breach of peace, apprehension of—Procedure, proper.

Where a party who has once been restrained under section 144 of the Code of Criminal Procedure from entering upon certain land insists upon such entry and there is an apprehension of a breach of the peace, the proper course is to take proceedings under section 107 of the Code and not to issue a fresh order under section 144 [p. 590, col. 1.]

Section 144 of the Criminal Procedure Code should not be used as a permanent expedient The Legislature did not intend that a man may be restrained once under section 44, and that then if he states his intention of again doing the same thing a further order under the same section may be made against him. [p. 589, col. 2.]

Criminal Revision against an order of the Sub-Divisional Magistrate, Arrah, dated the 6th June 1917.

Mr. *Athar Hussain*, for the Petitioners.

Mr. *Manohar Lal*, (Assistant Government Advocate), for the Crown.

JUDGMENT.—We are invited in this case to set aside an order made under section 144 of the Criminal Procedure Code restraining the petitioners Rashbehari Singh and others from entering upon land of which they were formerly lessees under the Collector. This land has now been settled by the Collector with another party. On the 2:th February 1917 a similar order was made against these same petitioners. That order came before this Court in review and by the decision of Mr. Justice Mullick, dated the 24th April 1917, it was held that there had not been any illegal assumption of jurisdiction nor an excess of jurisdiction on the part of the Deputy Magistrate in issuing the order. The application was, therefore, rejected. That order, being dated 28th February 1917, expired on the 28th April last; the order now complained of was issued on the 6th of June and expired to-day. We are asked to set it aside on the ground that it was in fact a continuation of the first order and that under the terms of section 144 itself any continuation of an order beyond a period of two months requires the sanction of the Local Government. The ground upon which this fresh order was issued was that the second party insisted upon going and ploughing the land in question in spite of their having been previously restrained under section 144. The reason for which they insisted upon ploughing the land is that they were accused in a criminal case of rioting with regard to crops cut from the land on the 25th February and have been acquitted upon that charge on the ground that they grew those crops and were entitled to take them away. It is much to be regretted that this case did not come before us earlier. We view with disapproval the use of section 144 for anything of the nature of a permanent expedient. It is idle to suggest that the Legislature intended that a man may be restrained once under section 144, and that then if he states his intention of again doing the same thing a further order may be made against him. The logical conclusion to such a

suggestion would be that if a Magistrate chooses to allow one day to elapse between the expiry of one order and the issue of another he is at liberty to continue *ad libitum* to extend an injunction under section 144 without the sanction of the Local Government.

In the case before us there does not seem to have been any deliberate intention to usurp jurisdiction. Inasmuch as the order has this day expired, we do not think it necessary to set it aside or to say more than we have done. We would ask the District Magistrate himself to give his attention to this matter and to look into the real rights of the parties. If the applicants are likely to commit a breach of the peace and are clearly in the wrong, the proper course is to take proceedings under section 107. This has been so frequently said in the Calcutta Court that we should have thought it was not necessary to repeat it. It does seem necessary, however, and we wish it to be understood that if this order is again repeated, the Court will have no hesitation in setting it aside.

Application rejected.

BOMBAY HIGH COURT.

CRIMINAL REVISION APPLICATION NO. 256 OF 1917.

October 31, 1917.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

ABDUL HAMID RAJABALI AND OTHERS —ACCUSED—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Bombay District Police Act (IV Bom. of 1890), s. 44, order under, form of—Technical errors, effect of.

An order under section 44 of the Bombay District Police Act must relate to certain persons or parties and to an actual or intended occurrence. [p. 591, col. 1.]

Where an order under section 44 of the Bombay District Police Act set out the occurrences which had led to the order, its purpose and the particular occasion to which it was to apply, but its operative part was in the following terms: "No one shall obstruct religious or ceremonial processions passing with music in front of any Masjid within the Municipal limits of the Haliyal town":

Held, that the errors in the form of the order were so purely of a technical character as not to render the order invalid. [p. 591, col. 1.]

Criminal application for revision against an order passed by the Sessions Judge, Kanara, in Criminal Appeal No. 30 of 1917, confirming the convictions and sentences passed by the First Class Magistrate at Haliyal, in Criminal Case No. 39 of 1916.

The Hon'ble Mr. *Jinnah* and Mr. *Vellani*, (with them Mr. *Ratanlal Ranchhoddas*), for the Applicants.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

HEATON, J.—In this case certain persons were convicted under section 188 of the Indian Penal Code for disobeying an order promulgated by the District Magistrate of Kanara under section 44 of the Bombay District Police Act. The order had reference to the ensuing Laxmi worship and Kartik festivals and it provided as follows: "No one shall obstruct religious or ceremonial processions passing with music in front of any Masjid within the Municipal limits of the Haliyal town." The accused did in fact obstruct a Hindu procession passing a mosque with music. It has, therefore, been found that they disobeyed a lawful order and, therefore, are guilty of an offence under section 188, and the Sessions Judge in appeal upheld these convictions. The applicants have come to us in revision.

On reading the judgments of the lower Courts I think that they found with unmistakable clearness that there was an obstruction of the procession and, therefore, disobedience of the order. It has been contended that even on the facts found by the Magistrate and the Judge there was not an obstruction within the meaning of the section. That argument, however, does not appeal to me, and the only point of genuine importance in the case, I think, is a different matter altogether. It is whether the order made by the District Magistrate was or was not a lawful order. It is a very carefully drafted order. It sets out in a series of paragraphs the occurrences which had led to the order, its purpose and the particular occasion as to which it was to apply. But what is called the operative part of the order is as I have already quoted, and it is this

operative part of the order which has been subjected to so much criticism. The first criticism is this: the order says:—"No one shall obstruct" instead of providing as section 44 requires that the order shall relate to certain persons or parties, it not being contemplated by section 44, it is argued, that an order should be issued in such general terms. The second criticism is that there is no time limit to the order, and that whereas section 44 only admits of an order relating to an actual or intended occurrence, the order in fact (that is, the operative portion taken by itself) is purely general and does not mention any actual or intended occurrence. This criticism is perfectly legitimate, but it has failed to persuade me that the order is not a valid order, because when I take it as a whole and read the whole of it, I do not feel any doubt whatever that the order relates to the Hindus and Musalmans of the Halyal town as regards persons and to the ensuing Laxmi worship and Kartik festivals as regards the occasion. I do not think that anybody was misled, or was likely to be misled, by the order. It would, no doubt, have been better if the operative part of the order had been confined to Hindus and Musalmans of the town of Halyal or such other classes of persons as the District Magistrate had in view, and to the occasion of the ensuing Laxmi worship and Kartik festivals. So framed the order would have been more correct in form. Yet it seems to me that the error in form is so purely of a technical character as not to render the order an invalid order. In short, I see nothing substantially wrong with the order. But I would suggest for the consideration of the District Magistrate that out of regard for the Courts before whom very acute and ingenious criticism is likely to be placed, it would be better if in future orders were made more specific as regards the persons affected and the occasions to which the orders are to apply. From what I have said it will be perfectly clear that the order is now long since spent, that it has not and cannot have any operative effect whatever now that the Laxmi worship and Kartik festivals contemplated are over.

For these reasons I think that the convictions are correct, and as the sentences have been served by those who were convicted, there is no need for us to concern ourselves with them. I think the Rule should be discharged.

SHAH, J.—I agree.

Rule discharged.

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 26 OF 1918.
January 25, 1918.
Present:—Mr. Justice Chitty and
Mr. Justice Smither.

ABINASH CHANDRA MANDAL AND OTHERS—PETITIONERS
versus
LOKENATH GANI—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 107, 144, 145—Proceedings, simultaneous, whether proper—Dispute as to possession of land—Proceedings, proper.

It is inconvenient that proceedings under section 107, Criminal Procedure Code, and also under section 144 or 145 should be going on at the same time. [p. 591, col. 2.]

Where on the application of the petitioners for the assistance of the Magistrate in the matter of possession of a piece of land, an injunction was issued under section 144, Criminal Procedure Code, and the petitioners were called on under section 107:

Held, (1) that the procedure was bad, as in effect it debarred the petitioners from giving evidence of possession; [p. 592, col. 2.]

(2) that if on the expiry of the injunction under section 144 there was any apprehension of a breach of the peace, the more appropriate procedure would be to take proceedings under section 145, Criminal Procedure Code, rather than under section 107. [p. 592, col. 2.]

Babus *Manmatha Nath Mukerji* and *Panna Lal Chatterjee*, for the Petitioners.

Babu *Haro Prasad Chatterjee*, for the Opposite Party.

JUDGMENT.—In this case we have read the explanation of the Magistrate and have heard the learned Pleader for the opposite party but we think that the Rule should be made absolute. It is inconvenient that proceedings under section 107 and also under section 144 or 145 should be going on at the same time. In this case it appears that Moti Lal Mandal, one of the petitioners, was the first to go to the Magistrate and apply for his assistance in the matter of possession of this land and the thatching of grass thereon.

Then proceedings were taken and an injunction was issued under section 144 and the petitioners were called on under section 107, a procedure which in effect debarred them from giving evidence of the possession which they had been the first to allege. The injunction under section 144 will, we understand, expire at the end of this month. It will be no more appropriate, if there is any present apprehension of a breach of the peace, for the Magistrate to take proceedings under section 145 rather than under section 107. The question of possession can then be gone into and properly decided. We accordingly make the Rule absolute and direct that section 145 proceedings, if any proceedings are now necessary, be substituted for the proceedings under section 107.

Rule made absolute.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 1019 OF 1917.

January 19, 1917.

Present:—Mr. Justice Tudball.

SATOLA AND OTHERS—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

U. P. Municipalities Act (II of 1916), s. 326 (1), applicability of, to criminal proceedings—Cattle Trespass Act (I of 1871), s. 22—Illegal seizure of cattle—Compensation.

Section 326 (1) of the U. P. Municipalities Act has nothing to do with proceedings in a Criminal Court. It relates only to suits of a civil nature in a Civil Court. It does not, therefore, apply to prosecutions under the Cattle Trespass Act.

Accused, servants of a Municipality, seized and impounded cattle belonging to the complainant which had not done any damage to Municipal trees:

Held, that the seizure was illegal and unjustified and that the accused were liable to pay compensation under section 22 of the Cattle Trespass Act.

Criminal reference made by the District Magistrate, Jhansi.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—This case has been referred to this Court by the District Magistrate of Jhansi. The facts are simple on the evidence and as found by the Magistrate. The accused persons are certain Municipal servants who illegally and without justification seized and impounded cattle belonging to the complainant. A complaint was made before a Joint Magistrate under section 22 of the Cattle Trespass Act, and it was transferred by him to the Court of the Third Class Magistrate for decision. The Magistrate found the accused guilty and directed them to pay Rs. 10 as compensation to the complainant under section 22 of the Act. The District Magistrate admits in his order of reference that the case is trivial, but is of opinion that the lower Court's order was illegal and irregular, because the accused persons were servants of the Municipality and quite within their rights in impounding cattle damaging Municipal trees, and that the Court ought to have acted under section 326 (1) of the Municipalities Act. The District Magistrate at the end of his reference expresses what to me is an astounding opinion. He says: "the lower Court may or may not believe the evidence, but I think it is exercising a very unwise discretion in fining them." In the first place, section 326 (1) of the Municipalities Act has nothing to do with the proceedings in a Criminal Court. It relates only to suits of a civil nature in a Civil Court. The wording of the section is plain and it has nothing to do with prosecutions under the Cattle Trespass Act. In the next place, it is very material indeed whether the evidence for the prosecution in the case was worthy of belief or not. The Magistrate has given his reasons and they are fairly cogent for holding that the seizure of the cattle was without justification and that no damage whatever had been done to the Municipal trees. No Municipal servant is authorised in these circumstances to seize and impound cattle. It is only where the latter are damaging or have damaged the Municipal trees, that these servants would be at all justified in impounding them. I must say I am surprised that the learned Sessions Judge should have sent up a reference of this nature without any remarks and without any expression of opinion. There is absolutely no force whatsoever in it and the time of this Court and other persons has been unnecessarily wasted in a very trivial matter. Let the record be returned.

Record returned.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 414 OF 1915.

December 18, 1916.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Newbould.

UPENDRA NATH GHOSE AND OTHERS —PLAINTIFFS—APPELLANTS

versus

DWARKANATH BISWAS AND ANOTHER —DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), s. 50 (2), presumption under—Kabuliyat *stipulating enhanced rent, whether rebuts presumption.*

Where in a *kabuliyat* executed in 1840 there was an express stipulation that the tenants would pay enhanced rent according to the Pargana rate

Held, that the *kabuliyat* might be considered either as a new contract under which the tenants agreed to pay enhanced rent or as a contract containing recitals of the incidents of the tenancy which was in existence before. In either view the *kabuliyat* showed that the rent was enhanceable. Therefore the presumption under section 50 (2) of the Bengal Tenancy Act was rebutted.

Appeal against the decree of the Special Judge, Faridpore, dated the 15th December 1914, reversing that of the Assistant Settlement Officer of that District, dated the 13th July 1914.

Babu *Amarendra Nath Bose*, for the Appellants.

Babu *Priyasanker Mozumdar*, for the Respondents.

JUDGMENT.— Defendants Nos. 1 and 3, who purchased the tenure in suit from defendant No. 4, appear to have paid rent for about 37 years and the rent was accepted from them. Plaintiff, therefore, is not entitled to obtain *khas* possession of the tenure, as his right to do so is barred by limitation. That being so, the plaintiff cannot ignore the right of defendants Nos. 1 and 3 who were entered in the Record of Rights as tenants. We do not see, however, why the plaintiff should not get a decree for rent at the enhanced rate of Rs. 90 odd. It is true there is a presumption under section 50 (2) of the Bengal Tenancy Act arising from the payment of rent at the same rate for more than twenty years; but the plaintiff has produced a *kabuliyat* of the year 1840 executed by the predecessor-in-interest of the defendant No. 4, the vendor of defendants Nos. 1 and 3. There is an express stipulation in the *kabuliat* that the tenants would pay enhanced rent according to the Pargana rate. The *kabuliyat* may be considered either as a new contract under which the tenants agreed to pay enhanced rent, or as a contract containing recitals of the incidents of the tenancy which was in existence from before. In either view of the matter it shows that the rent was enhanceable. That being so, the enhancement allowed by the Court of first instance will stand; and to that extent only the decree of the Court of first instance is varied.

The result is that the decree of the lower Appellate Court is set aside and the decree of the Court of first instance affirmed with respect to the amount of rent payable by the defendants. The entry of the names of defendants Nos. 1 and 3 in the Record of Rights will stand. Under the circumstances of the case, we direct that each party do bear its own costs in all the Courts.

Decree varied.

PATNA HIGH COURT.

CUTTACK CIRCUIT.

CIVIL APPEAL No. 11 OF 1916.

July 18, 1917.

Present:—Mr. Justice Mullick and Mr. Justice Atkinson.

SHIBA DAS—APPELLANT

versus

GAJENDRA NATH DAS—RESPONDENT.

Orissa Tenancy Act (II B. & O. of 1913), ss. 57, 215, 220, 221—Incumbrance, under-raiyati *interest, whether is—Ejectment of under*-raiyat—*Procedure.*

An under-*raiyat* in occupation of land is an incumbrancer upon such land within the meaning of section 215 of the Orissa Tenancy Act. [p. 594, col. 2.]

A purchaser at an auction-sale has one, and only one, remedy open to him for annulling an incumbrance, namely, that prescribed by section 221 of the Orissa Tenancy Act, and in cases where this remedy is not followed and a year is allowed to elapse by the purchaser without taking steps to annul the incumbrance affecting the lands or interest he has purchased, he is not entitled to eject the under-*raiyat* under section 57 of the Act. If the purchaser does take the steps open to him to annul the incumbrance and the under-*raiyat* refuses to give up possession consequential thereon, he can be ejected under section 57, but if the purchaser does not avail himself of the only remedy which is open to him he is not entitled to eject the under-*raiyat* in any other way. [p. 595, col. 1.]

SHIBA DAS *v.* GAJENARA NATH DAS.

Civil Appeal from a decision of the Collector, Balasore, dated the 2nd September 1916, modifying that of the Deputy Collector, Balasore, dated the 21st June 1916.

Mr. *S. N. Sen Gupta*, for the Appellant.

Mr. *B. N. Singh*, for the Respondent.

JUDGMENT.—The plaintiff in this suit seeks to eject the defendant from the land in suit of which he is in occupation as an under-*raiyat*.

The facts shortly are as follows:—

The plaintiff purchased the occupancy right in the land in suit at a rent-sale held on the 1st of February 1915. The original tenant fell into arrear in the payment of his rent; and one of the co-sharer landlords instituted a suit for the recovery of the arrears of rent due, making the other co sharer landlords defendants with the tenant, and obtained a decree for, it is alleged, part of the total rent. We must take it, having regard to the course which the case has pursued in both the lower Courts, that the decree which was obtained in the suit against the original tenant was a rent decree; and that the sale which took place on the 1st of February 1915 was a sale in pursuance of a rent decree. At the sale the plaintiff became the purchaser of the occupancy interest in this holding. At the date of sale there was on the holding an under-*raiyat* who was in possession of the entire holding and who is now the defendant in this suit. The holding was about 10 to 11 acres in area; and the learned Deputy Collector has found that the entire holding of the original tenant was sold at the sale held on the 1st of February 1915. The present plaintiff seeks to eject the defendant from the lands in suit relying upon section 57 of the Orissa Tenancy Act; and he alleges that he has served the notice required by section 57 of the Orissa Tenancy Act upon the under-*raiyat* and that therefore he is entitled to maintain this action for ejectment.

The case put forward by the defendant, the under-*raiyat*, is that this action is not maintainable having regard to the special provisions of section 215 read in conjunction with sections 220 and 221 of the Orissa Tenancy Act.

The learned Collector, disagreeing with the opinion of the Deputy Collector, has held that the plaintiff is entitled to seek relief under section 57. The Deputy Collector on the contrary held that the provisions of section 57 did not apply; and that the rights of the parties were governed by the true interpretation of sections 220 and 221 of the Orissa Tenancy Act.

Section 215 of the Orissa Act defines what an "incumbrance" is; and undoubtedly an under-*raiyat* in occupation of land is an incumbrancer upon such land within the meaning of section 215 of the Orissa Tenancy Act, and upon this point there seems to be no controversy. Therefore, we may take it that over the lands in suit there was an incumbrance to the extent of the interest of the under-*raiyat* therein. That being so, sections 220 and 221 regulate in what way and in what manner the incumbrance can be got rid of by an auction purchaser. He is not in the same position as the original intermediate landlord, *viz.*, the original tenant. The Act has provided that his rights are to be something less. But it appears that if an auction-purchaser desires to annul an incumbrance, the Act specifically prescribes what steps are to be taken by him for doing so and the Act is careful to specify that by no other steps and by no other means can the incumbrance be annulled or got rid of. Section 220, sub-section (2), runs as follows:—

"The purchaser at a sale under this section may, in manner provided by section 221, and not otherwise, annul any incumbrance on the holding."

I take that section to mean that it is incumbent upon the auction-purchaser, if he desires to annul an incumbrance, to follow strictly the procedure prescribed by the section. Section 221 prescribes that when a purchaser desires to annul an incumbrance he must do so by serving a notice within one year from the date of sale, or the date upon which he first had notice of the incumbrance, through the Collector upon the incumbrancer. Now it is not contended here for one moment that the procedure prescribed by section 221 was followed. On the contrary, it is contended by the plaintiff that he has served a notice within the meaning of section 57 and that no other notice is necessary, and that he is entitled to maintain the present suit. This is a case of

first impression; but it appears to us upon a fair and reasonable interpretation of the Orissa Tenancy Act that what was intended was that a purchaser at an auction sale had one, and only one, remedy open to him for annulling an incumbrance, namely, that prescribed by section 221; and that in cases where this remedy is not followed and a year is allowed to elapse by the purchaser without taking steps to annul the incumbrance affecting the lands or interest he has purchased, the purchaser is not entitled to eject the under *raiyat* under section 57 of the Act. No doubt, if the purchaser did take the steps open to him to annul the incumbrance and the under-*raiyat* refused to give up possession consequential thereon, the under-*raiyat* could be ejected as a trespasser under section 57 of the Act; but if, as in this case, the purchaser does not avail himself of the only remedy which is open to him he is not entitled to eject the under-*raiyat* in any other way. The opinion which we have formed corresponds with the interpretation given to the corresponding enactment in the Bengal Tenancy Act in *Janaki Nath Hore* v. *Prabhasini Dasi* (1).

We think that the conclusion at which the learned Deputy Collector arrived was right. No doubt his judgment leaves much to be desired as to its form and method of expression; but upon a careful consideration of the law and the facts we think that he was right in dismissing the plaintiff's suit.

We accordingly set aside the order of the lower Appellate Court and allow this appeal with costs.

Appeal allowed.

(1) 30 Ind. Cas. 893; 43 C. 173; 22 C. L. J. 99; 19 C. W. N. 1077.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 413 OF 1915.

December 12, 1916.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Newbould.

UPENDRA NATH GHOSE AND OTHERS —PETITIONERS—APPELLANTS

versus

GOPI CHARAN SAHA AND OTHERS— OPPOSITE PARTY—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), s. 50 (2), presumption under, rebuttal of—Landlord and tenant—Amalgamation of tenures, whether creates new tenancy.

Where four separate tenures were amalgamated into one by a *kabuliyat* of 1853, which expressly stated that enhanced rent would be paid according to the rate of enhancement in the village, and there was no suggestion that the other incidents of the tenure as mentioned in the *kabuliyat* were the same as those of the four original tenures:

Held, that the *kabuliyat* created a new tenancy in 1853, so that the presumption arising under section 50 (2) of the Bengal Tenancy Act was rebutted. [p. 596, col. 1.]

Appeal against the decree of the Special Judge, Faridpur, dated the 7th December 1914, affirming that of the Assistant Settlement Officer, Rajbari, dated the 24th July 1914.

Babus *Mohendra Nath Ray* and *Amarendra Nath Bose*, for the Appellants.

JUDGMENT.—This appeal arises out of a suit for enhancement of rent of a tenure. Defendants proved payment of rent at the same rate for a period of 20 years before the institution of the suit and the learned Subordinate Judge held that a presumption arose under section 50 (2) of the Bengal Tenancy Act that the rent was being paid at that rate from the time of the Permanent Settlement. Plaintiff produced a *kabuliyat* of the year 1260, corresponding to 1853, and relied upon it as showing that the tenants had agreed to pay enhancement of rent. It appears that there were originally four separated tenures which were amalgamated into one by the *kabuliyat* of 1853. The main question for our consideration is whether there was the creation of a new tenancy under the *kabuliyat* or merely a recognition of the previously existing tenures. The learned Subordinate Judge was of opinion that there was no new tenancy created by the *kabuliyat*, although the tenant expressly stipulated to pay enhanced rent. He relied

upon the case of *Bisseswar Ray Chowdhry* v. *Rajendra Kumar Singha* (1) in support of the proposition that, notwithstanding that the *kabuliyat* showed a variation of rent, it was merely a recognition of a previously existing tenure. The judgment in that case, however, shows that that was not so. The learned Chief Justice, in referring to the *kabuliyat* in that case, observes: "The true meaning of this document has been the subject of considerable discussion before us, but this at least emerges clearly from the discussion that the document is the recognition of a previously existing interest and not the creation of a new one." There is nothing to show that the rent was a variable one or that the tenant had agreed to pay enhanced rent in that case. In the present case the *kabuliyat* expressly states that enhanced rent would be paid according to the rate of enhancement in the village. Then, again, there is no suggestion that the other incidents of the tenure as mentioned in the *kabuliyat* were the incidents of the four original tenures. That being so, we think, upon a proper construction of the *kabuliyat*, that it created a new tenancy although the four original tenures were amalgamated into one, and that if there was a new tenancy created in the year 1853, the presumption under section 50 (2) of the Bengal Tenancy Act is rebutted. The result is that the decrees of the Courts below are set aside and the case is sent back to the Court of first instance in order that the question of the amount of enhancement may be gone into. Costs will abide the result.

Case remanded.

(1) 25 Ind. Cas. 228; 18 C. W. N. 949.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 225 OF 1915.

December 14, 1917.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

MOTI CHAND AND OTHERS—PLAINTIFFS—APPELLANTS

versus

LALTA PRASAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 68—Mortgage-deed—Attestation, proof of—Witness summoned, but not examined—"Called," meaning of—Document incorporated in subsequent deed, effect of—Transfer of Property Act (IV of 1882), s. 59—Mortgage, proof of.

Defendants executed a mortgage in favour of plaintiffs, but it was discovered that the scribe had erroneously entered a lower rate of interest in the deed than was agreed upon between the parties. A fresh deed was thereupon drawn up and executed, which described the correct rate of interest and incorporated some clauses of the previous deed. In a suit on the mortgage it was found that one of the attesting witnesses of the first deed was dead. The second attesting witness was summoned but not examined:

Held, (1) that the first deed could not be used in evidence as an independent document either requiring attestation or in fact attested, inasmuch as the provisions of section 68 of the Evidence Act had not been complied with; [p. 599, col. 2.]

(2) that the second deed having been duly attested and executed and having incorporated the prior deed, the prior deed was admissible in evidence as part of the second deed. [p. 602, col. 1.]

The word "called" in section 68 of the Evidence Act means tendered for the purpose of giving evidence. [p. 598, col. 1.]

A mortgage need not be contained in one or any other particular number of documents. It may be collected from a variety of documents so long as the effective document is a duly signed, attested and registered instrument in accordance with section 59 of the Transfer of Property Act. [p 602, col. 2; p. 603, col. 1.]

First appeal from a decree of the Third Additional Subordinate Judge, Aligarh.

Sir *Sundar Lal*, the Hon'ble Dr. *Tej Bahadur Sapru* and Mr. *Radha Kant Malaviya*, for the Appellants.

The Hon'ble Mr. *Motilal Nehru* and Mr. *Surendra Nath Sen*, for the Respondents.

JUDGMENT.

WALSH, J.—The facts of this case are remarkably simple, though the questions which have been raised and discussed before us have covered a wide area. The plaintiffs, who brought this suit in the Court of the Third Additional Subordinate Judge of Aligarh to enforce a mortgage or rather, as they alleged, two mortgages dated respectively the 15th of May and the 21st of July 1909, carry on business as bankers and commission agents in the city of Benares. The defendants at or about the time carried on business as saltpetre merchants and were in the year 1909 obviously in considerable difficulties. Through the medium of an agent or general-attorney of the plaintiffs, one Beni Prasad Dube, it was arranged between the

plaintiffs and one of the defendants, Sri Krishn Chand, that inasmuch as a considerable sum was already due from the defendants to the plaintiffs in respect of commission and other dealings which had taken place between them, the plaintiffs instead of pressing for payment should render assistance to the defendants by treating the existing debt as a loan and taking security over their property. The present defendants were members of a joint Hindu family and carried on business together as such, Lalta Prasad being father and Sri Krishn Chand and Jhabbu Lal being the two sons. There was a good deal of delay in the completion of the necessary formalities to carry out the transaction, due apparently to some discussion with regard to the amount of the outstanding account between the defendants and the plaintiffs at that date. This, however, is not material because the amount of the debt was agreed and there is in fact no dispute as to the substantial effect of the transaction which was entered into. The whole difficulty that has been raised is one of form. A document was prepared by a Pleader, which was intended to be a mortgage, to carry out the arrangement which had been agreed upon. It was written by a scribe of the name of Mukundi Lal and the plaintiffs' general attorney, Beni, Prasad, according to his own account, with certain other persons who were to act as witnesses attended at one of the defendants' places of business in Farrukhabad. The father was absent. It is suggested that he was keeping out of the way on account of the pressure of his creditors. However that may be, it is clear that he was not present on the occasion when the parties met with a view to executing the document, and it was signed only by the two sons above mentioned and by Sheobandhan Dube and Janki Das as attesting witnesses. It was also signed by his own hand by the scribe, in the sense that it contained a clause in his own handwriting stating that he had written the document on the 15th of May. And undoubtedly at one time it was suggested, and one of the grounds raised in the memorandum of appeal was, that if there was any defect in the document by reason of the absence of sufficient attestation, that was cured by the clause containing the signature of the scribe. That argument, however, was not seriously pressed; the scribe's evidence shows that he did not purport to attest and no further reference need be made to it. The document having been thus executed by the two sons whose signatures are said to have been attested by these two men, Sheobandhan Dube and Janki Das, it appears to have been originally intended to have the document registered in accordance with law as quickly as possible. But the plaintiffs, the mortgagees, required the signature of the father and the document was sent to him for signature and returned to the son, Sri Krishn Chand, duly signed by the father on the 31st of May 1909, after a delay of some 13 or 14 days. What happened when the father affixed his signature does not appear. It is, however, quite clear that his signature was not attested by either of the attesting witnesses to the deed. The document, having been thus executed and registered and being at that time clearly regarded by everybody as a complete, valid and properly executed mortgage-deed in accordance with the strict provisions of the law, was discovered to contain a slip by the scribe. The agreement had been for a rate of interest at eight annas per cent. per mensem, but only eight annas per cent. per annum was provided in the interest clause. It became necessary to correct this blunder and by consent of everybody a fresh deed was entered into on the 21st of July 1909 with this object. The terms and effect of that deed it will be necessary to consider with some care hereafter. It was duly signed by Lalta Prasad, the father, and by both his sons in the presence of two attesting witnesses. It was duly attested by Janki Das, one of the attesting witnesses to the former deed, and by Makundi Lal, the scribe, and it was registered according to law on the 16th of November 1909. Default having been made the plaintiffs instituted this suit on the 18th of April 1914. Substantially there was very little contest about the merits. The main controversy turned upon the question of the attestation and the admissibility of the deed of the 15th of May 1909. One of the defendants Jhabbu Lal put in no appearance. The other two, the father

and one of the sons, admitting their signatures and denying that the amount entered in the deed was correct, alleged that the deed had not been duly executed and that the signatures had not been attested according to law. The first Court held that the document was inadmissible under section 68 of the Evidence Act for the following reasons. At the trial it appeared that Sheobandhan Dube was dead. Janki Das was in Court. He was not called. The document was one which was required by law to be attested and no attesting witness, although one was alive, was called, as required by section 68 of the Evidence Act. He had been summoned and was present in Court. The expression "called" used in the section clearly means tendered for the purpose of giving evidence. The learned Judge, therefore, had no alternative but to reject the document, and we agree with the course which he took and with the reason wich he gave for so doing. Very little attention, judging from the evidence and from the judgment, appears to have been paid to the supplementary or second deed of the 21st of July 1909. But relying on certain authorities which the learned Judge refers to in his judgment he gave effect to the deed of the 15th of May 1909, which he had rejected as inadmissible as a mortgage, as evidence of a covenant to pay, and passed a personal decree against all three defendants for the amount due. Thereupon an appeal was brought to this Court by the plaintiffs, challenging the decision upon three grounds.

1. That the execution of the deed had been proved.

2. That the evidence of the scribe who had in fact been called was sufficient as that of an attesting witness and

3. That the learned Judge had not properly weighed the evidence.

There was a difficulty in serving the respondents with the notice of appeal. Ultimately substituted service was ordered by means of advertisement in the newspapers, and whether or not they had knowledge of the proceedings they did not in fact appear, although the order for substituted service was duly carried out at the hearing of the appeal, which was opened before my brother Piggott and myself on the 29th of March 1917. During the discussion in the opening of the appeal it was pointed out amongst other things that there was some difficulty in appreciating the grounds upon which the learned Judge had given effect to the deed as a covenant to repay the money, while rejecting it as inadmissible under section 68, and it was urged upon us with some force that if the failure of the suit resulted from the omission to call Janki Das during the trial, that was an omission which might, subject to certain penalties, be repaired without injustice to the defendants, if we were to afford an opportunity to the plaintiffs of producing him as a witness in this Court. We made an order on the 29th of March 1917 in the following terms:—"Without discussing further the question of law raised by this appeal, we think it sufficient to say that, under the circumstances, the appellants are entitled to an opportunity of producing before this Court for examination the witness Janki Das, who should perhaps have been produced by them in the Court below. Assuming that the appellants are prepared to deposit the necessary fees and expenses we order that this case be put upon any near convenient date, and summons to issue for the attendance of the said witness, Janki Das son of Khiali Ram, caste Mahajan, resident of Muhalla Mufti Saheb, in Farrukhabad, in this Court on such date." Difficulties arose in carrying out that intention owing to the illness of Janki Das. Adjournments were applied for from time to time, which were granted in the hope that the whole thing might be settled by hearing the evidence of this witness, who might have been tendered in the Court below. Unfortunately the witness got worse and died and it was, therefore, impossible for the appellants to call him. The case, therefore, came on for re hearing before us in the condition in which it was, when it was originally opened before us in appeal with the addition which we had made by the order we passed on the 29th of March 1917. On this occasion the respondents put in an appearance and several questions have been argued in attack upon and in support of the decision of the Court below.

The real question which we have to decide

is whether in fact the plaintiffs, in the events which have happened, have been able to establish by legal evidence the execution in their favour of a mortgage for this debt over the property of the defendants, and whether they are entitled to an order enforcing it in this suit. Now it is abundantly clear that the loan was made, that it was obtained by the defendants offering a substantial and valuable security, that the money is still due, and that the defendants have no merits of any kind. The case is an illustration of the pitfalls which the prudent provisions of the Legislature made for the protection of ignorant and foolish persons may possess for the ordinary men of business and the use that knaves may make of them. There are, in evidence, some copy letters dated one of the 19th of May 1909 and two each of the 1st of June 1909. These, if genuine, are conclusive as to one material fact in dispute, namely, the attestation of the father's signature. Due notice to produce the originals of these letters was given to the plaintiffs through the Court on the 25th of January 1915. Beni Prasad, the general attorney of the plaintiffs, was cross-examined with a view to explaining the absence of the originals which were not forthcoming. He explained that after some short period it was the practice in the plaintiff's business to weed out and destroy letters, and the topic was pursued no further. Clear notice was given to the plaintiffs of the existence of these letters. They were called upon to produce them and the defendants were entitled to use their copies. We have examined the defendants' press copy letter book, in which these copies are contained. It is, relatively speaking, well kept and we are both satisfied that it is a genuine book.

These copy letters show three things. *Firstly*, that after being written out the day before, the document of the 15th of May 1909 was signed by the two sons and attested by Sheobandhan Dube if not by Janki Das, but that on the 19th of May the father had not signed it. *Secondly*, that registration was delayed until after the 31st of May 1901, when the document was received back by Sri Krishn Chand from his father with the father's signature upon it, and that if the plaintiffs had not insisted upon the father's signature the defendants would have registered the document without it regarding the execution as then complete, and *thirdly*, that the defendants were in need of money, that they were in profound misery, that their honour was in jeopardy and that they were anxious to do all they could to complete the security.

What happened at the trial as to the failure to call the attesting witness has been clearly stated in the judgment of the first Court and has already been referred to above. The only living attesting witness was present in Court and was deliberately not called. This fact alone prevents the document by virtue of the provisions of section 68 of the Evidence Act from being "used as evidence," and if the plaintiffs' case rested upon the document of the 15th of May alone, it must fail. We see no escape from this conclusion.

It was urged that the events which happened in this Court on the 29th of March 1917 and the death of the missing witness have removed this case from the operation of section 68. We cannot agree with this view. We ordered that the plaintiffs-appellants should be given an opportunity of producing the witness. It seems to us that that order had none of the attributes of finality. It was made at an *ex parte* hearing. The respondents ought not to be allowed to improve their position by the fact of their absence. But it appeared to us that, apart from the debatable point as to whether the learned Judge ought, in the circumstances, to have given a decree for the principal money at all, it was possible that the omission of the plaintiffs in the first Court was a mere error of judgment which it was not too late to repair and that by allowing them to repair it justice might be done by penalizing by some order in respect of costs for their error. But it now appears perfectly clear that their act in refraining from calling Janki Das was due to their deliberate decision as to the conduct of their case. The letters of the 19th of May and the 1st of June 1909, though on the file, had not been printed in this Court's book and had unfortunately been ignored in the judgment of the first Court and had

not been considered relevant by the appellants in their presentation of the evidence. When we made the order of the 29th of March 1917, we had no notion of their existence. They now make it plain that the plaintiffs' general attorney endeavoured to prove the due attestation of the document of the 15th of May by the grossest perjury. He swore that the signatures of the father and the two sons were affixed in his presence and in that of Janki Das, Sheobandhan Dube and the scribe. "Jhabbu Lal," he said, "read the document and the other defendants (that includes the father, there can be no mistake about it) heard it." The fact is that the father was not there. Further, he said in cross examination: "nobody signed the document on the day it was written. The signatures of the witnesses and the executants were affixed on the following day. Lalta Prasad was not present on the day the document was written. He came the next day, and the signature was affixed on the same day." These statements are clearly deliberate falsehoods. Moreover, the evidence of Beni Prasad made an unfavourable impression upon the learned Subordinate Judge, who was not inclined to believe that Beni Prasad was present even when the document was signed by the sons, and in this conclusion he is very likely correct. Makundi Lal was even more specific both in examination-in-chief and in cross examination. He lied with elaborate and vivid detail and identified Janki Das as having attested all the three signatures on the same afternoon. He described in minute detail the process of execution and stated that Lalta Prasad affixed his signature first of all.

What the condition of Janki Das's mind may have been it is idle to speculate, but he could not, if called, have stated, what the contemporaneous documents now show to have been the facts, without destroying the plaintiffs' case and casting discredit upon both their general attorney and the scribe. Had we known on the 29th of March the real state of the evidence on the record, it is unlikely that we should have granted any indulgence to the plaintiffs who had conducted their case with such materials. We think it was open to this Court at any time to hear further argument and finally to refuse to allow additional evidence to be given. Our previous order, made by us under a misapprehension, cannot be used to enable the plaintiffs to avail themselves of section 69. We hold, therefore, that the document of the 15th of May cannot be used in evidence in the sense contemplated by section 68, that is to say, as a mortgage which is required by law to be attested and has in fact been attested.

The three letters to which I have referred further show that the document was not in any case duly attested, one of the signatories having clearly signed it at another place and on some date subsequent to the attestation by the only witnesses who are alleged to have attested. It was urged with great force by Sir Sunder Lal on behalf of the appellants that it might be treated as a document duly signed, attested and executed by two members of a joint Hindu family dealing with joint family property and that the consent of the remaining member of the family, in this case the father, who alone could object, could be proved by any method known to the law. Speaking for myself I do not think it necessary to decide whether this contention is sound or not, because in either view the provisions of section 68 not having been complied with, the document cannot be used as evidence at all as a document either requiring attestation or in fact attested.

But this does not, in the events which have happened, prevent it from being used in evidence as something else or for any other purpose. It is obvious that section 68 is subject to some limitation, *e. g.*, if the document were tendered in some other proceeding for the purpose of proving the handwriting of the scribe, it could not seriously be objected to upon the ground that, no attesting witness being called to prove it, it could not be used in evidence at all. The second deed of the 21st of July, as I have pointed out, was signed by all the parties to the transaction in this suit, duly attested and duly registered. It treated the document of the 15th of May as a valid mortgage-deed and repeated some, at any rate, of its stipulations as being the terms which were to

govern the new contract. We think it quite clear that we are entitled to look at the document of the 15th of May identified by reference, as it clearly is, in the document of the 21st of July in order to ascertain what these stipulations were. If they had been contained in some other kind of document, clearly identified, to which the parties agreed that reference should be made for the purpose of interpreting their rights and obligations, such a document would clearly be made admissible by the act and contract of the parties, even though as an independent legal document it was itself inadmissible. It derives its admissibility from another source which binds the parties. This would apparently be so according to English Law, under what is described in Taylor on Evidence as the sixth exception to the rule of inadmissibility due to the absence of an attesting witness, if the party objecting to it took some benefit from the latter document which treated the earlier one as valid. This is not the case here, the party objecting clearly undertook a greater burden. But I think in truth that it is not really an exception to the rule at all, but merely an illustration of a document to which the rule in England is inapplicable, and that the rule in India, that is to say, section 68 is equally inapplicable in the present case for the purpose of deciding whether the earlier document is admissible as a document to which the parties have referred otherwise.

The case before us on this point bears a remarkable similarity to the case of *Fishmongers' Company* v. *Dimsdale* (1). In that case the decision of the Chief Justice Tindal, as reported in the statement of facts at page 57 of the Law Journal Report, is precisely the objection now raised to the admissibility of the document of the 15th of May, but an exceptionally strong Court of the Exchequer Chamber overruled this objection and held that the document was admissible. The case occurred before the Common Law Procedure Act of 1864, and the rule of law which had to be dealt with, namely, with regard to the necessity of calling a subscribing witness in order to render a document admissible at all, in substance did not differ from section 68. Baron Parke in giving judgment gave as the reason that the memorandum endorsed, which corresponds in this case to the document of the 21st of July, incorporated the original argument. I prefer the judgment of Coleridge, J., as reported in the Law Journal Report, who added his own reason in these words.—"There is a complete identification by words of reference." It is somewhat remarkable that when a similar case arose at a later stage with reference to its admissibility having regard to the stamp, the Chief Justice was overruled for treating the earlier document as incorporated thereby, following the dictum of PARKE, B. (*vide* 22 L. J. C. P.). But the principle is clear, although the language in which if is expressed in the published report of the judgment may not be scientifically accurate. And we find it difficult to draw any distinction between that case and the case before us. We were referred to a further decision which is also very much in point. In 1885, the question arose as to the due registration of a deed of conveyance. There had been an earlier deed of 1873, which was not registered. The transaction was sought to be carried out and put in force through a subsequent deed, namely of 1878, which, no doubt, did a little more than the document of the 21st of July does, actually re-affirmed and repeated in its entirety the deed of 1873, referring to it in express terms and setting it out in a schedule as part of itself, namely, the deed of 1878. When presented for registration, the memorandum of registration was written not on the first sheet but at the end of the deed which was annexed as a schedule to the deed of 1878. I take that statement from the judgment of Sir Barnes Peacock, and it would appear from that that the deed of 1873 had actually been copied out or itself annexed as a schedule to the subsequent deed of 1878. But there can be no difference in principle whether the document is incorporated by actual physical annexation, or by reference in unmistakable terms of identification. The High Court in that case had held that the registration was insufficient because the latter document had not been registered and the endorsement upon the deed in the schedule, being upon a document which in itself could not be proved, could not be looked at.

(1) (1848) 18 L. J. C. P. 55; 6 C. B. 896; 136 E. R. 1500; 77 R. R. 526.

The Privy Council overruled that contention in these words, "that document (that is, referring to the earlier document) was not proved. It could not be proved because it could not be given in evidence. But the fact that the deed itself could not be given in evidence was no reason why the deed of 1878 should not be given in evidence and that deed (referring to the deed of 1873) was proved to have been executed and duly registered." That language covers, in our view, in almost express terms, the point raised in this case, namely, as to whether the document of the 21st of July having been duly executed and attested does not in sufficient terms refer to the earlier document which was inadmissible in itself, so as to make it admissible as part of the latter document.

The question of interpretation remains. This, of course, is totally distinct from the question of admissibility. What is the effect of these two documents, bearing in mind that we are not entitled to treat the document of the 15th of May as a mortgage at all or even as a document in itself binding upon the parties for anything? On the whole we think that the document of the 21st of July 1909 hypothecates the property described in the specification for interest at eight annas per cent per mensem on the sum of Rs. 32,914-3-9 from the 15th of May 1909. We also think, although we feel some doubt about it, that it sufficiently hypothecates the property for the principal sum. It clearly repeats or incorporates the clauses in the deed of the 15th of May, which relate to interest. It says, "we shall pay interest on the debt due to the Babu Sahibs at Rs. 6 per cent. per annum, which is equal to eight annas per cent. per mensem, in accordance with the stipulation laid down in the aforesaid mortgage deed." The document must, at any rate, therefore, be construed as having contained within it, in express terms, at least clauses 1, 2 and 3 of the document of the 15th of May. Clause 2 provides that if the interest is not paid within 6 months, the executants shall be liable to pay compound interest at eight annas per cent. per mensem, and further that (after fulfilment of certain provisions which involve a reference to the body of the document to ascertain the meaning of the words "the above term") "the said Babu Sahibs will be at liberty to recover the entire amount payable to them by taking proper proceedings, from our person, the property mortgaged and other property, moveable as well as immoveable, belonging to us, the executants." The indebtedness for the principal is clearly acknowledged by the deed of the 21st of July, and we find it difficult to give effect to clauses 1, 2 and 3 which are thus clearly incorporated and accepted in the document of 21st of July, as governing the payment of interest together with the consequences for non-payment without also giving effect to those parts of them which govern the payment of the principal. The two are indissolubly connected. The property mortgaged is clearly specified in the later document of the 21st of July: clause 2 can only mean that a power of sale is to be exercised by the Babu Sahibs for non-payment, and clause 3 refers to realisation which can only be read, having regard to the provisions of clause 2, as meaning sale. The terms of section 58 defining a mortgage are, "a mortgage is the transfer of an interest in specified immoveable property for the purpose of securing an existing debt."

"Where a mortgagor binds himself personally to pay the mortgage money and agrees expressly or impliedly that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the property to be sold and the proceeds of sale to be applied in payment of the mortgage money, the transaction is called a simple mortgage."

We think that that is what all three executants impliedly did when they signed the document of the 21st of July. Their intention is obvious. The only doubt is as to whether they carried it out. It was unnecessary that they should repeat in express terms all that they had agreed to in the previous transaction, for both parties treated the previous deed as binding upon them, but it so happens that out of extra precaution they did repeat and reiterate those terms which we have mentioned and thereby impliedly gave the mortgagee a power to sell not only for the new rate of interest but for the principal. A mortgage need not be contained in one or any other particular number of

documents. It may be collected from a variety of documents so long as the effective document is a duly signed, attested and registered instrument in accordance with section 59 of the Transfer of Property Act. We think that this is the real legal effect of the document which was duly executed and attested on the 21st of July and that, therefore, the plaintiffs are entitled to succeed in this suit upon that ground. It is not the ground upon which the case was first launched in the plaint, nor upon which the case was fought in the first Court, nor is it the ground upon which the plaintiffs by their memorandum of appeal sought relief in this Court, but, we think, it is the ground which gives effect to the real transaction between the parties, and which does substantial justice in spite of the mistakes the plaintiffs have made. The plaint and the memorandum of appeal must be treated as having been duly amended for the purpose of raising the claim in this form based upon the subsequent document of the 21st of July 1909. But we do not think that the omission by the plaintiffs in the conduct of their suit ought to stand in the way of our doing what nobody can doubt is substantial justice in the case.

On the other hand, we feel it impossible to pass by without marking our sense of the conduct of the plaintiffs in presenting their case to the Trial Court. As one would expect, no attempt has been made by their representatives in this Court to defend or justify it. We think that so far as that is concerned, the justice of the case will be met by altering the decree of the Court below and giving them a decree for sale of the mortgaged property without costs either of the suit or of this appeal.

PIGGOTT, J.—I agree generally. The only difficulty I have felt is with reference to the principal of the mortgage-debt. I may put my point in this way: as regards the interest at six per cent. per annum it seems to me that, when the parties entered into the contract embodied in the agreement of July the 21st, 1909, it was a definite part of the intention of the executants of that document to charge the extra rate of interest on the property, which they conceived to have been already mortgaged by the deed of the 15th of May. They may have done this only by way of extra precaution; but on the terms of the deed of July the 21st, 1909, even considered by itself alone, it seems to me that a hypothecation of the property specified at the foot for payment of the interest therein covenanted for is made by necessary implication. If the intention of the parties had been otherwise, I do not believe there would have been any specification of the property in this deed at all. As regards the principal my difficulty is this, that the parties conceived themselves to have already effected a valid mortgage of the same property as security for the re-payment of this principal, and it was presumably no part of their intention on the 21st of July 1909 to make a fresh hypothecation for that purpose. At the same time I agree with what has been said as to the anomaly of drawing any distinction between the effect of the transaction of July the 21st in respect of the principal and its effect as regards the interest. Broadly speaking, what the law requires is a registered instrument, duly executed and attested, in order to effect a mortgage; we have such an instrument before us in the so-called agreement of July the 21st, 1909. I think that we are entitled to read it in connection with the earlier document to which it refers, and that the results stated in the judgment of my learned colleague necessarily follow.

BY THE COURT.—We allow this appeal and direct that in lieu of the simple money-decree passed by the Court below a decree for sale be drawn up in the proper form in respect of the property specified in the plaint. Interest must be calculated at the rate of six per cent. per annum on the amount claimed up to the date fixed for payment, which we hereby fix at six months from this date. The decree will embody the usual provisions as to the consequences of payment or non payment on the part of the judgment-debtors, and the same decree will carry future interest at six per cent. per annum from the date fixed for payment until realisation. For reasons which we have already stated we

leave the parties to bear their own costs in both Courts.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 86 OF 1917.

February 4, 1918.

Present:—Mr. Justice Teunon and Mr. Justice Newbould.

Hon'ble BROJENDRA KISHORE ROY CHOUDHURY—DECREE-HOLDER—APPELLANT

versus

DIL MUHMUD SARKAR AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 182, cl. (5)—Step-in-aid of execution—Filing list of witnesses, whether step-in aid of execution.

A decree-holder applied for the execution of his decree and the judgment-debtor put in an objection to execution. The Court directed both parties to adduce evidence in support of their respective cases on a certain date. On that date the decree-holder filed a list of his witnesses who were present in Court, and intimated to the Court that he was ready to proceed with his case:

Held, that the conduct of the decree-holder implied an application to the Court to take the evidence which he was prepared to adduce to repel the objection of the judgment-debtor and should be taken to be an application to the Court to take some step-in-aid of execution. [p. 605, col. 1.]

Pran Krishna Das v. *Protap Chandra Dalai*, 38 Ind. Cas. 536; 21 C. W. N. 423, relied upon.

Appeal against the order of the Subordinate Judge, Mymensingh, dated the 16th of December 1916, affirming that of the Munsif, Jawalpur, dated the 4th June 1916.

FACTS appear from the judgment.

Babu *Jogesh Chandra Roy* for Babu *D. N. Chackravarty* (with him Babu *Ramani Mohan Chatterjee*), for the Appellant.—There were three applications for the execution of the decree, and the Courts below were wrong in holding that as the second application was not within time, the third, *i. e.*, the present application, is barred by the three years' rule of limitation. After the first application for execution had been made the judgment-debtor filed his objections to the execution of the decree, and thereafter both parties were directed by the Court to adduce evidence in support of their respective cases. On the day fixed for the hearing of the case the decree-holder filed his *hazira* and list of witnesses present in Court and informed the Court that he was ready to proceed with the case. The above acts of the decree-holder should be construed to be steps in-aid of execution taken by him, and the present application for execution having been made within three years from the date when the last step-in-aid of execution was taken is not barred by limitation. See *Pran Krishna Das* v. *Protap Chandra Dalai* (1).

Babu *Debendra Nath Mandal*, for the Respondents.—The filing of *hazira* by the decree-holder is not a step-in-aid of execution of the decree, and the period of three years is to be counted, not from the date when the case was considered and heard by the Court for the last time, but from the date of the last application made in accordance with law. Refers to Limitation Act, Article 182 clause (5), *Umesh Chunder Dutta* v. *Soonder Narain Deo* (2), *Madan Mohun Dey* v. *Ganga Chandra Roy* (3), *Maganlal Mulji* v. *Doshi Mulji* (4), *Sadananda Sarma* v. *Kali Sankar Bajpai* (5). Appearance in Court by filing a *hazira* cannot be taken to be a step-in-aid of execution of the decree. Even appearance of the decree-holder to oppose any objection by the judgment-debtor to the execution of the decree is not a step-in-aid of execution within the meaning of Article 182 of the Limitation Act. Refers to *Troyloka Nath Bose* v. *Jyoti Prokash Nandi* (6), *Sheo Prasad* v. *Indar Bahadur Singh* (7).

Babu *Ramani Mohan Chatterjee* in reply.

JUDGMENT.—This is an appeal against an order of the Subordinate Judge of Mymensingh dismissing an application for execution on the ground that it is barred by limitation. The decree is dated the 31st March 1908. The first application for execution was on the 20th January 1911, the second on the 22nd August 1914 and the third or the present application on the 6th October 1915. There is no dispute that

(1) 38 Ind. Cas. 536; 21 C. W. N. 423.
(2) 16 C. 747; 8 Ind. Dec. (N. s.) 495.
(3) 13 Ind. Cas. 189; 17 C. L. J. 422 at p. 425.
(4) 25 B. 631; 3 Bom. L. R. 255.
(5) 10 C. W. N. 28; 3 C. L. J. 95.
(6) 30 C. 761; 8 C. W. N. 251.
(7) 30 A. 179; A. W. N. (1908) 74; 5 A. L. J. 258.

if the second application was within time, the third application was also within time from the date of the second, and the only question, therefore, that has been argued before us is whether the second application for execution filed on the 22nd August 1914, was or was not barred by the three years' rule of limitation.

Now, it appears that after the first application for execution had been made, the judgment-debtor put in an objection to the effect that the properties attached and sought to be sold were not transferable, and secondly, that the said properties were his own personal and individual properties and not the properties of the father, the original judgment-debtor. On that objection proceedings continued from the 7th June to the 8th January 1912 and we find that on the 25th November 1911, both parties having in the meanwhile been directed to adduce evidence in support of their respective cases, the decree-holder filed a list of witnesses and intimated to the Court that he was ready to proceed with his case. On the application of the judgment-debtor the case was, however, adjourned to the 16th of December in order to enable the judgment-debtor to produce one of his witnesses. We are of opinion that this act of the decree-holder, namely, the filing of the list of witnesses and intimating to the Court that he was ready to proceed with the case, implied an application to the Court to take the evidence which he was prepared to adduce and to repel the objection taken by the judgment-debtor. In effect, therefore, we think that on a reasonable interpretation, this should be taken to be an application to the Court to take some steps in aid of execution; and in this view we are fortified by the decision reported as *Fran Krishna Das* v. *Protap Chandra Dalai* (1).

We, therefore, decree this appeal and remand the case to the original Court with directions that the decree-holder be now at liberty to proceed with the execution.

As, however, this appeal has succeeded on a point not taken in either of the Courts below we make no order as to costs.

Let the record be sent down to the lower Court without delay.

Appeal allowed.

MADRAS HIGH COURT.

CIVIL APPEAL No. 255 OF 1916.

October 29, 1917.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Kumaraswami Sastri.

GANESA AIYAR AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

AMIRTHASAMI ODAYAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Alienation by manager of joint family—Prospective trade, whether justifies alienation—Necessity—Purchase, intended, of fresh property—Adult co-parceners joining in sale, effect of, on minor members—Partition, suit for, by co-parceners after setting aside alienation—Vendor describing himself as guardian of co-parcener, effect of—Limitation—Limitation Act (IX of 1908), Sch. I, Arts. 44, 126—Mesne profits, claim for, nature and extent of.

The fact that a Hindu father executes a sale-deed as guardian of his son will not take the case out of Article 126 of the Limitation Act and bring it under Article 44, which applies to cases where property belonging to a minor is transferred by his guardian. [p. 606, col. 1.]

Lachmi Narain Prasad v. *Kishan Kishore Chand*, 33 Ind. Cas. 913; 38 A. 126; 14 A. L. J. 25, *Ramkishore Kedarnath* v. *Jainarayan Ramrachpal*, 20 Ind. Cas. 958; 40 C. 966; 25 M. L. J. 512; (1913) M. W. N. 661; 15 Bom. L. R. 867; 14 M. L. T. 163; 17 C. W. N. 1189; 18 C. L. J. 237; 11 A. L. J. 865; 10 N. L. R. 1; 40 I. A. 213 (P. C.), *Soundararajan* v. *Saravana Pillai*, 34 Ind. Cas. 794; 30 M. L. J. 592, *Kishan Lal* v. *Shib Narain*, 3 Ind. Cas. 505; 6 A. L. J. 614, *Asaram* v. *Ratansingh*, 32 Ind. Cas. 242; 12 N. L. R. 12, followed.

The starting of a prospective trade is not a justifiable ground for alienation of family properties by the manager, whether the family is a trading or non-trading one. [p. 607, col. 1.]

The sale or mortgage of ancestral lands for the purpose of purchasing other lands can only be justified if there is clear benefit to the family. [p. 607, col. 1.]

When evidence as to the necessity for a sale is clear, the fact that all the adult members of the family joined in it would have an important bearing on its validity, but when there is no justifying necessity, the mere fact that all the adult co-parceners joined would not give any additional weight to the transaction. [p. 607, col. 2.]

In cases of unwarranted alienations by the manager the other co-parceners are not, as of right, entitled to mesne profits from the date of the alienation. Mesne profits being in the nature of damages, each

case must be dealt with on its own merits. [p. 603, col. 1.]

Appeal against the decree of the Court of the Temporary Subordinate Judge, Tanjore, in Original Suit No. 21 of 1915.

Mr. *T. R. Venkatarama Sastri*, for the Appellants.

Messrs. *S. T. Srinivasa Gopalachari*, *G. S. Rama Chandra Iyer*, *T. V. Gopalasami Mudaliar* and *S. Muthiah Mudaliar*, for the Respondents.

JUDGMENT.

KUMARASWAMI SASTRI, J.—The plaintiffs, who are the appellants, sued for a partition of the properties specified in the plaint between themselves and their father, who was the first defendant, after setting aside the alienations made by the first defendant to the other defendants, The alienations complained of were made under four sale deeds, Exhibits B, C, D and F. The Subordinate Judge held that the alienation under Exhibit C was binding on the plaintiffs and dismissed the suits as regards the items comprised therein. He found that the alienations under B, D and F were not binding, but passed a decree in favour only of the 2nd plaintiff for his share of the items. holding that the 1st plaintiff's claim was barred by limitation. The plaintiffs appeal in so far as the decree is against them.

As regards the question of limitation, the case so far as the 1st defendant's alienation is concerned clearly falls under Article 126 of the Limitation Act, which provides for a period of 12 years for suits by a Hindu governed by the law of the Mitakshara to set aside his father's alienation in ancestral property. The fact that the father executes the document as guardian of his son will not take the case out of Article 126 and bring it under Article 44, which applies to cases where property belonging to a minor is transferred by his guardian. In the case of joint family property the father is co-owner with the sons. He sells property as the managing member of the family and the mere fact that he describes himself as guardian of the sons would not take the case out of the express terms of Article 126. In *Lachmi Narain Prasad* v. *Kishan Kishore Chand* (1), which was a case where property had been conveyed by the father and grandfather, the Article that was held applicable was Article 126 and the suit was dismissed on the ground that the alienation was more than 12 years before suit. In *Ramkishore Kedarnath* v. *Jainarayan Ramrachpal* (2) their Lordships of the Privy Council treated a suit by the sons to set aside a partition by the father giving to a stranger properties as a suit governed by Article 126. I might also refer to *Soundararajan* v. *Saravana Pillai* (3) and *Kishan Lal* v. *Shib Narain* (4) and *Asaram* v. *Ratansingh* (5). The plaintiff is, therefore, entitled to a decree so far as his one-third share in the properties covered by Exhibits B and C is concerned.

As regards the alienation under Exhibit C, I am unable to agree with the Subordinate Judge. The 1st defendant and his father, who died before 1909, conveyed about 46 acres 45 cents of Nanja land and 3 acres 65 cents of Punja for Rs. 5,000. The recital as to consideration runs as follows:—"Owing to the distance between the said Palli Vialkam village and Mudikondan village where we live, the cultivation and other business have been interrupted and a great deal of loss has been occasioned. Intending, therefore, to discharge the present small debts of our family and to purchase lands in the village where we reside and to better our prospects by carrying on money dealings you and we entered into an agreement on the 29th October last, and under this we receive Rs. 500 in cash, and the amount received by us this day from you is Rs. 1,500 and the the amount with which we are debited under the agreement to receive in the presence of the Sub-Registrar of Nannilam from you is Rs. 3,000."

The distance between the village where the lands sold are situate and the 1st defendant's village is admitted to be within 10 miles, and it is difficult to see why cultivation should be interrupted and a great deal of loss occasioned because of the distance. Families often own lands few miles away and this would not justify a Hindu father in alienating the lands.

(1) 32 Ind. Cas. 913; 38 A. 126; 14 A. L. J. 25.

(2) 20 Ind. Cas. 958; 40 C. 966; 25 M. L. J. 512; (1913) M. W. N. 661; 15 Bom. L. R. 867; 14 M. L. T. 163; 17 C. W. N. 1189; 18 C. L. J. 237; 11 A. L. J. 865; 10 N. L. R. 1; 40 I. A. 213 (P. C.).

(3) 34 Ind. Cas. 794; 30 M. L. J. 592.

(4) 3 Ind. Cas. 505; 6 A. L. J. 614.

(5) 32 Ind. Cas. 242; 12 N. L. R. 12.

So far as the debts are concerned, all that is stated is that there were some "present small debts," and there is no evidence either as to the extent of the debts or as to any debts having been paid off. The transaction was not very old and the existence of debts could easily have been proved. The family was not a trading family or one carrying on moneylending business and the starting of prospective moneylending transactions is no ground for alienating family properties. The observations of the Privy Council in *Palaniappa Chetty* v. *Sreemath Deivasikamony Pandara Sannadhi* (6) apply with equal force to sales of joint family properties by non-trading families. Though there is nothing said in the sale deed as to any difficulties having been experienced owing to the want of irrigation facilities, from evidence of the defendants' witnesses the sale does not seem to be justified. The lands sold consisted of 46 acres 45 cents of wet land and it appears from the evidence of 3rd defendant that irrigation supply was improved by Government in 1904 or 1905 (prior to the sale Exhibit C). He wants to make out that because the silt was not cleared by the Public Works Department, the harvest was poor for 4 or 5 years and that when the department removed the silt, the harvests were good. Defendants' 4th and 5th witnesses want to make out that the water supply was bad till shutters were fitted up to the irrigation channel and improved afterwards. It is not disputed that the Government completed the irrigation channel over two years before the sale. If all that was required to make the channel a success was the removal of the silt or the putting up of shutters, I cannot say that it was a prudent act to sell the lands after irrigation facilities were completed, as it was almost certain that the Government would do the needful to give a good supply of water. The sale or mortgage of ancestral lands to purchase other lands can only be justified if there was clear benefit to the family: *Krishnasawmi Doss, In re* (7), *Subramania Nadan* v. *Ramasami Nadan* (8), *Adikesavan Naidu* v. *Gurunatha Chetti* (9), and having regard to the ease with which such recitals can be made by an improvident father in order to raise money, I think Courts ought to be slow to find necessity unless on clear proof that the transaction was one manifestly for the benefit of the family. So far as the price of the lands is concerned, I do not think Exhibit 11, which is relied on by the Subordinate Judge, is a safe criterion. Thamarai Selvam Pillai, the purchaser under Exhibit 11, admits that he got the lands cheap. Subramania Iyer, the vendor, D. W. No. 4., admits that he purchased the lands for Rs. 3,600 and that he sold the lands for Rs. 3,000 as he had debts to the extent of Rs. 3,600. The sale deed shows that Rs. 3000 went to discharge debts and the price at which a needy debtor sells is no safe criterion as to value. Having regard to the other sale-deeds filed in the case the value per acre is certainly much more than the price for which the lands have been sold under Exhibit C.

I am not unmindful of the fact that the 1st defendant's father also joined in the sale-deed. When evidence as to necessity is not clear, the fact that all the adult members of the family joined would have an important bearing, but when there is no justifying necessity the mere fact that all the adult co-parceners joined would not give any additional weight to the transaction.

I am of opinion that the sale of the land under Exhibit C is not binding on the plaintiffs. As, however, it is proved that the lands covered by Exhibit 11, dated 9th April 1908, were purchased for Rs. 3,000 out of the sum of Rs. 5,000, the consideration for Exhibit C, the plaintiffs, if they seek to avoid the alienation under Exhibit C, cannot get any share of the lands purchased by 1st defendant under Exhibit 11. Their claim to these lands, items Nos. 2 to 27 specified in schedule B to the plaint, is, therefore, dismissed and the property will be declared to be the separate property of the 1st defendant.

As regards the claim for mesne profits,

(6) 39 Ind. Cas. 722; 40 M. 709; 21 C. W. N. 729; 15 A. L. J. 485; 1 P. L. W. 697; 33 M. L. J. 1; 19 Bom L. R. 567; 22 M. L. T. 1; (1917) M. W. N. 477 & 507; 26 C. L. J. 153; 6 L. W. 222 (P. C.).

(7) 13 Ind. Cas. 648; (1912) M. W. N. 167; 11 M. L. T. 182.

(8) 21 Ind. Cas. 656; 25 M. L. J. 563.

(9) 39 Ind. Cas. 358; 40 M. 338; 32 M. L. J. 180; (1917) M. W. N. 171; 5 L. W. 425; 22 M. L. T. 300.

I do not think plaintiffs are of right entitled to mesne profits from the date of alienation. Mesne profits are in the nature of damages and each case must be dealt with on merits. I think the correct principle has been laid down in *Bhirgee Nath* v. *Narasingh Tewari* (10).

In the result, the degree of the Subordinate Judge will be modified by decreeing to the plaintiffs a third share in the properties alienated under Exhibits B and C in addition to a third share decreed to the 2nd plaintiff. The decree of the Subordinate Judge dismissing the suit as regards alienation of the items covered by the sale-deed Exhibit C is set aside, the plaintiff getting $\frac{1}{3}$rd share in the said items (the 1st plaintiff getting 1/6th share). As plaintiffs elect to take the lands in Al schedule to the plaint which represent lands exchanged for some of the family lands covered by Exhibit C they will get $\frac{1}{3}$rd share of the lands covered by schedules A and A1 to the plaint. The plaintiffs' suit as regards items covered by the sale deed Exhibit VII (B schedule properties) will be dismissed. The alienees defendants Nos. 2 to 6 will have a charge on the properties covered by Exhibit VII, except those alienated under Exhibit F, to the extent of a third of the consideration paid by them under Exhibit C. There will be a preliminary decree for partition on the above terms. Each party will bear his own costs of the appeal.

WALLIS, C. J.—I agree and will only say that I concur in what my learned brother has said as to the question of mesne profits in a case like this being determined upon a consideration of all the circumstances of the case.

Decree varied.

M. C. P.

(10) 35 Ind. Cas. 475; 39 A. 61; 14 A. L. J. 1161.

ALLAHABAD HIGH COURT.

STAMP REFERENCE.

January 8, 1917.

Present:—Mr. Justice Tudball.

RATAN SINGH—PLAINTIFF

versus

KHEM KARAN—DEFENDANT.

Court Fees Act (*VII of* 1870), *Sch. II, Arts.* 5, 17 (iii) —*Agra Tenancy Act* (*II of* 1901), *s.* 95—*Suit for declaration of occupancy rights—Court-fee payable.*

A suit for a declaration of occupancy rights under section 95 of the U. P. Tenancy Act falls under Article 5, Schedule II, of the Court Fees Act and the plaint in such a suit should bear a Court-fee of eight annas. [p. 609, col. 1.]

Article 17 (iii) of Schedule II, of the Act has no applicability to such a suit. [p. 609, col. 1.]

Office Report:—The suit being for declaration of the nature of tenancy under section 95 of the Tenancy Act a Court-fee of Rs. 10 must be paid by the plaintiff-appellant on this appeal irrespective of valuation, as held by this Court in Second Appeal No. 475 of 1912, dated the 16th of January 1913, *Piare Lal* v. *Ganga Ram*. This appeal is, therefore, insufficiently stamped by Rs. 7-12 0. There is also a deficiency of Rs. 9-8-0 due from the defendant-respondent on his appeal to the lower Appellate Court.

Objection to Office Report.—The Stamp Reporter's report absolutely overlooks the provisions of the Court Fees Act, Schedule II, Article 5. A Court-fee of 8 annas only was payable on the memorandum of appeal.

The earlier case referred to by the Stamp Reporter contains no reference to this provision, consequently the decision cannot be accepted as it is contrary to an express provision of law.

Office Report:—With reference to the objection taken by the learned Vakil for the plaintiff-appellant that a plaint or memorandum of appeal in a suit brought under section 95 of the Tenancy Act is governed by Article 5, Schedule II, of the Court Fees Act, I have grave doubts. This question came up once before when Mr. Burkitt was the Taxing Officer. He referred a similar question to the Hon'ble Mr. Justice Aikman as Taxing Judge, who held that a memorandum of appeal in a suit under section 95 of the Tenancy Act must be stamped with a fixed fee of Rs. 10. The same view was taken by the Hon'ble Sir H. D. Griffin as a Judge of this Hon'ble Court (both rulings are put up). If you think that these rulings are not binding in

this case in view of the objection taken by the appellant's Vakil the matter may be referred to the Hon'ble Taxing Judge for a third decision.

Taxing Officer's Report.—This is a suit under section 95 of the Tenancy Act for declaration of occupancy rights, on which a Court-fee of 8 annas has been paid. Office objects that the fixed fee of Rs. 10 for a declaration without consequential relief should be paid, while the appellant points to Article 5 of Schedule II of the Court Fees Act. I see no reason why the suit should not be held to come under that Article both in the lower Courts and in this Court, but as the two rulings placed below, though for some reason they do not consider this specific question, appear to be against me, I put the case up for your orders under section 5 of the Court Fees Act.

JUDGMENT.—This is an appeal in a suit brought by the appellant for a declaration, under section 95 of the Tenancy Act, that he has occupancy rights in a certain holding. The suit is purely a declaratory suit. The question is, what is the Court-fee payable on the appeal. *Prima facie* the suit falls clearly within Schedule II, Article 5, of the Court Fees Act, which lays down that on a plaint or memorandum of appeal in a suit to establish or disprove a right of occupancy a Court-fee of eight annas should be paid. The only difficulty in the case arises by reason of two previous Judges of this Court having in similar cases directed that a fee of Rs. 10 was payable. In neither of these decisions was Schedule II, Article 5, apparently considered. The suit is not one to which Article 17 (*iii*), Schedule II, of the Court Fees Act is applicable. As I have said above, it is purely a declaratory suit, and nothing more, in which the plaintiff seeks to establish that he has a right of occupancy. In my opinion the law is plain and the appeal is governed by Schedule II, Article 5, of the Court Fees Act and the Court-fee payable is eight annas according thereto. I so direct.

Order accordingly.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CIVIL APPEAL No. 256 OF 1917.

December 3, 1917.

Present:—Mr. Saunders, J. C.

MEGHRAJ RAMNIRANJANDAS—APPELLANT

versus

THAKURDAS—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 20 (c)—Suit on contract—Cause of action—Place of suing—Jurisdiction.

Where in a suit on a contract it appears that the place where the contract was made, is not within the jurisdiction of the Court, the Court still has jurisdiction if the place where the contract was to be performed, or where in its performance the money to which the suit relates was expressly or impliedly payable, is within the jurisdiction of the Court. [p. 610, col. 1.]

Mr. *J. C. Chatterjee*, for the Appellant.

Mr. *D. Dutt*, for the Respondent.

JUDGMENT.—This was a suit upon a promissory note. The suit was filed in the District Court, Mandalay, and the plaintiff alleged that the note had been executed in Mandalay. The defendant denied that he had been present in Mandalay at the time, or had executed the note.

In the course of the hearing the Judge had reason to believe that the note was not executed in Mandalay, and framed an issue accordingly. The plaintiff produced one witness who gave evidence that the note was executed in Taunggyi, and upon this the District Judge returned the plaint under Order VII, rule 10. The plaintiff now comes to this Court in appeal.

The point does not appear to be free from difficulty, and the rejection of the plaint did not necessarily follow as a matter of course, as the District Judge appeared to think, upon proof that the note had been executed outside the jurisdiction of the Court.

Section 20 of the Code of Civil Procedure provides that a suit may be brought in a Court within the local limits of whose jurisdiction the cause of action wholly or in part arises. What was meant by this was explained in the third explanation to the corresponding section 17 of the old Code, and although that explanation has been omitted in the present Code, it has been omitted because the present Code expressly gives jurisdiction where the

cause of action wholly *or in part* arises. Explanation 3 to section 17 of the old Code settled the signification of the term "cause of action" in the case of suits arising out of contract, see *Salig Ram* v. *Chuba Mal* (1). It is true that the place where the contract in the present suit was made was not within the jurisdiction of the Court; but the Court still had jurisdiction if the place where the contract was to be performed, or where in its performance the money to which the suit relates was expressly or impliedly payable, was within the jurisdiction of the Court.

It is apparently urged by the plaintiff-appellant that the cause of action did arise in Mandalay because it was not merely the promissory note but previous transactions. But it appears to be clear that the plaint as it stands was based upon a promissory note only; as it was filed within three days of the expiry of the period of limitation, the previous promissory note in substitution of which the note sued upon is said to have been executed would not have afforded a cause of action, nor would the previous transactions in the course of which the money became due.

The main contention of the plaintiff-appellant, however, is that the contract was to be performed in Mandalay or that in its performance the money to which the suit related was impliedly payable in Mandalay. It is clear that the money was not expressly made payable in Mandalay and the Court certainly did not have jurisdiction from any express agreement that the contract was to be performed there.

The only question, therefore, which remains was whether the money was impliedly payable in Mandalay. The only Indian case which I have been able to find is that of *Raman Chettiyar* v. *Gopalachari* (2) but this case appears to be exactly in point. There a note payable on demand and not payable at any specified place—a description to which the note in the present suit answers—had been executed within the local limits of the jurisdiction of the Tanjore Court by the defendant, who resided at Tanjore; the plaintiff, residing at Kumbakonam, brought his suit in the Kumbakonam Court, and the question was, had that Court jurisdiction. Both the Judges held that it had not. Sir Arnold White, C. J., said, "I do not think it necessary to decide whether the question of the implication of payment in a particular place is to be considered only with reference to the terms of the contract, or whether the circumstances in which the contract was made may also be taken into account. I assume that, for the purpose of applying explanation 3" (section 17 of the old Code of Civil Procedure) "you must look at the contract and at the facts which existed at the time the contract was made, and then determine whether, having regard to the terms, the contract was one which ought to be performed within the jurisdiction." And the Judge went on to say that in deciding that the Court had jurisdiction, the District Judge appeared to have had only in mind the ordinary rule that a debtor should follow his creditor. He said: "I do not think this general rule can be relied on as controlling the express words of a Statute prescribing the conditions which give a Court local jurisdiction....Such a view would involve the proposition that unless the contract or the circumstances in which the contract was made, gives rise to a contrary implication, a creditor may sue in any Court within the local jurisdiction of which he happens to be when his right to sue arises"—a conclusion which, I think there can be no doubt, would be quite inconsistent with the express provisions of section 17.

Miller, J., was also of the same opinion and said: "But it seems to me clear that by the phrase 'expressly or impliedly payable' we are to understand payable according to the terms of the contract, which are expressed or can be inferred on a construction of the language, or from the circumstances."

Both Judges held that illustration (*b*) to section 17, which is repeated as illustration (*b*) to section 20 of the present Code, was a useful guide in interpreting the meaning of the section, since if the plaintiff's place of residence gave rise to an implication as to the place where the money to which the suit relates was payable, *A* would have been entitled to sue *B* and *C* at Simla (Sir Arnold White, C. J.); or,

(1) 11 Ind. Cas 712; 34 A. 49; 8 A. L. J. 1160.
(2) 31 M. 223; 4 M. L. T. 97.

as Miller, J., remarked the framers of the Code had an excellent opportunity of making it clear in drafting illustration (*b*) that a plaintiff should be allowed to sue at his place of residence to recover debts due to him in pursuance of contracts made elsewhere in the absence of a contract to the contrary, and the fact that they did not avail themselves of the opportunity supported, in his opinion, the view taken.

I think there is no doubt that this view is correct. The fact that the defendant had previously bought goods from the plaintiff in Mandalay and had paid for them in Mandalay, if it is a fact, though the evidence of the witnesses called by the defendant to prove transactions which had taken place outside the jurisdiction of the Court seems to throw some doubt on it, was not sufficient in my opinion to show that there was an implied contract to pay the money in Mandalay. The plaintiff's only witness says that as the plaintiff asked him to write to the defendant to pay a debt on an old on-demand note, he took a form from the plaintiff and sent it to the defendant to Taunggyi who returned it from Taunggyi duly filled in, and he then sent the defendant the old on-demand note.

This is the contract sued on and the circumstances are not sufficient in my opinion to prove an implied contract to pay in Mandalay.

I may add that, although it is true that under section 64 of the Negotiable Instruments Act, where a promissory note is payable on demand and is not payable at a specified place, no presentment is necessary in order to charge the maker thereof, the ordinary rule that a debtor must seek his creditor is not given effect to in section 70 of the same Act, which provides that a promissory note not made payable at a specified place must be presented for payment at the place of business, if any, or at the usual residence, not of the holder but of the maker.

I see no reason to interfere and dismiss this appeal with costs.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 158 OF 1916.

September 11, 1917.

Present:—Mr. Lindsay, J. C.

BALWANT AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAM DAT AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu law—Alienation by Hindu female—Reversioners, consent of—Presumption as to legal necessity, strength of—Consent—Attestation mere, whether proof of consent.

Where it is clearly proved that the nearest reversioners for the time being gave their *real* consent to an alienation made by a Hindu female, *i. e.*, they did so with a full knowledge of the effect of their consent upon their interests and with an intelligent intention to consent to the production of that effect, there is a strong presumption that there was legal necessity in fact, or that the alienee acted with circumspection and made inquiries which induced the honest belief that such legal necessity did in fact exist, and the alienation is valid and binding on the actual reversioners if the said presumption is not rebutted by very cogent proof. [p. 615, col. 1.]

Mere attestation of the deed of transfer is not sufficient proof of consent to the alienation, there must be clear proof of real consent. [p. 615, col. 1.]

Appeal from the decree of the Additional Subordinate Judge, Bara Banki, dated the 6th September 1916.

The Hon'ble Pandit *Gokaran Nath Misra*, Pandit *Jagmohan Nath Chak* and Pandit *Harkaran Nath Misra*, for the Appellants.

Babu *Bisheshwar Nath Srivastava*, for the Respondents.

JUDGMENT.—These four appeals arise out of two suits which were tried together by the Additional Subordinate Judge of Bara Banki. The defendants in both the suits consisted of the same parties, 16 defendants in all. These defendants represent a joint family and the principal member of the family who figures in these cases is one Suraj Bali. He is the defendant who has given evidence in the case and professes to know the full details of the transactions which are called in question. There are two sets of plaintiffs. One suit was filed by a plaintiff Ram Adhin alone. That suit was numbered 21/35 of 1916 in the Court of the Subordinate Judge. The claim of Ram Adhin was decreed in part and both parties appealed to the District Judge against the decision of the Subordinate Judge. Those appeals have been called up to this Court for decision. In the other suit which

was numbered 20/34 of 1916, there were six plaintiffs, the principal ones being Ram Dat and Ram Ratan. These claims were brought for the recovery of shares of certain immoveable property which once belonged to a person named Dal Chand. Dal Chand died many years before these suits were brought. The exact date of his decease has not been ascertained, but there is reason to believe that he died at least 30 years before the present cases were instituted. Dal Chand left two widows *Musammat* Hansa and *Musammat* Janaka and he also left a son named Asharfi Lal, who died very soon after he came into possession of his father's property. *Musammat* Hansa and Janaka both lived long after the decease of Asharfi Lal. Janaka was the mother of Asharfi Lal and it seems that after the latter's death she took possession of the estate, but admitted her co-widow *Musammat* Hansa to possession over the property. Hansa died before *Musammat* Janaka and the latter died in the year 1904. The precise date of Janaka's death was one of the matters in dispute in the lower Court and was of importance, because one of the pleas set up by way of defence was that both the suits were barred by limitation, having been brought more than 12 years after the date of *Musammat* Janaka's death. The plaintiffs in the two suits claimed to be the reversioners who were entitled to the property after Janaka's death. Of the property which was in possession of this lady the plaintiff Ram Adhin claims a one-third share whilst the plaintiffs in the other suit, that is to say Ram Dat and others, claim the remaining two-thirds.

The main defence put forward by the defendants was a defence of title based upon a conveyance which was executed in favour of one of the defendants Balwant on the 1st of December 1897. This deed is marked Exhibit A 10. It was executed by two persons, namely, Ram Adhin the plaintiff in one of the suits before me and the widow *Musammat* Janaka. The document was registered on the 2nd of December 1897 and the case for the defendants shortly put is this, namely, that by this deed of sale they acquired an absolute title to the property in dispute and that the plaintiffs are not in a position to maintain any claim for recovery of any portion of it. As against the plaintiff Ram Adhin it is pleaded that he was a party to this transfer and cannot now be allowed to impeach it. As against the other plaintiffs Ram Dat and Ram Ratan, the defence was that they were also debarred from bringing this suit inasmuch as their fathers, two men named Baij Nath and Debi Din respectively, were attesting witnesses to the deed of transfer just named and had given their consent as reversioners to the transfer which was made by *Musammat* Janaka. The other plaintiffs in the suit to which Ram Dat and Ram Ratan were parties were said to have no title to the property as reversioners, as they were lower in degree than the reversioners who were in existence at the time when *Musammat* Janaka died.

The Court of first instance decreed both the claims in part. Dealing with the document of transfer of the 1st of December 1897 the Subordinate Judge came to the opinion that a part of the consideration represented debts which had been incurred by *Musammat* Janaka for legal necessity, and decrees were given subject to the payment by the plaintiffs of their shares of the sum so found. With regard to the suit in which Ram Dat and five others were concerned, the Subordinate Judge held that only the first two plaintiffs Ram Dat and Ram Ratan had any claim to a share in the property. The claims of the other plaintiffs were dismissed on the ground that they had no title. There are cross-appeals against the decisions in each of the two suits and it will be convenient to deal with the cases together.

I will take first the appeals filed by the defendants which are respectively No. 158 of 1916 and No. 29 of 1917. Three points have been argued on behalf of the defendant-appellants in these two appeals, the first being the question of limitation. The point taken for the appellants is that the lower Court ought to have found that the claims were time-barred. The limitation which governs both the suits began to run admittedly from the date of *Musammat* Janaka's death. It was the case for the defendants that Janaka died on the 25th of March 1904 and that as these suits were not brought till the 6th of April 1916 they had been put in after the expiry of the period of 12 years. On the other

hand the case for the plaintiffs was that *Musammat* Janaka died on the 15th of April 1904 and that the suits were consequently just within time. So far as this question of limitation is concerned, I think the decision of the learned Subordinate Judge was perfectly correct and that the defendants-appellants cannot hope to succeed here on this issue. A good deal of criticism has been offered concerning the evidence which was put forward by the plaintiffs in the Court below to establish the date of *Musammat* Janaka's death. I do not think it necessary for me to discuss all this evidence, or to consider the question whether some of it, and in particular an entry in the Chaukidar's register of deaths, was admissible in evidence. There is one piece of evidence which, in my opinion, is conclusive of the matter and that is the statement of the plaintiffs' witness No. 5, the village Patwari, a man named Ram Adhin. It is proved beyond all doubt that very shortly after the death of *Musammat* Janaka, a claim for mutation was made in the Revenue Courts in respect of her property. The original record of these proceedings was before the Subordinate Judge, and Exhibit 3 on the record is a certified copy of the statement which was made by the Patwari Ram Adhin before the Revenue Court. Ram Adhin in his evidence in the Court below stated that, some 5 or 6 days after the death of *Musammat* Janaka, he was taken to the Tahsil by the plaintiff Ram Adhin. He deposes that an application for mutation was made and that his statement was recorded in connection with that application. According to what we find in Exhibit 3, the copy of the statement made by the Patwari in the mutation case, *Musammat* Janaka died on the 15th of April 1904. As the learned Subordinate Judge observes this is a very important piece of evidence for it cannot be suggested that at the time these mutation proceedings were taken, it was to the interest of anybody and least of all to the interest of this Patwari to make a false statement regarding the date of *Musammat* Janaka's death. There can, I think, be no reason whatever for doubting the statement of the Patwari to the effect that he made this statement only a few days after Janaka had died and while the event was still fresh in his memory. I am satisfied, therefore, that for the purposes of this case it must be taken that *Musammat* Janaka died as deposed to by the Patwari on the 15th of April 1904 and that consequently the suits were within time. I need only add that the evidence put forward by the defendants in support of their case relating to the date of Janaka's death consisted of the statement of a solitary witness, a man named Mahabir. I regard his evidence as absolutely untrustworthy and consider that the Subordinate Judge was right in rejecting it.

I may deal here shortly with a defence by way of estoppel which was raised against the two plaintiffs Ram Dat and Ram Ratan. It was argued that these men in the year 1911 received from the defendant Suraj Bali grants of land in consideration of their giving up any claims they professed to have to a share of the property which had been in Janaka's possession. Two documents were produced on behalf of the defence, namely, Exhibits A 18 and A 19. These documents show that grants of 4 *bighas* were made (1) to Ram Dat and (2) to Ram Ratan and his brother Sant Bakhsh, who has since died. The plaintiff Ram Dat gave evidence as to the transactions evidenced by these two documents. He admitted that these deeds had been executed and that these grants had been made, but his story was that they had been in consideration of his and Ram Ratan's undertaking not to sell their rights of redemption with respect to certain property which was held in mortgage by the defendant Suraj Bali. On the other hand, the defence produced three witnesses for the purpose of showing that these grants were made with the object of buying off claims which Ram Dat and Ram Ratan threatened to make in respect of the property now in dispute. The learned Judge of the Court below disbelieved the evidence produced for the defence on this issue and I am satisfied that his decision was correct. The man who gave the most detailed evidence regarding this part of the case was the defendants' witness Lalta. He deposed

that in consequence of the threats which were being made by Ram Dat and Ram Ratan it was decided to have the matter settled amicably between them and Suraj Bali. Lalta says that he and two other men were called in as Punches to settle the dispute and that it was on their suggestion that Suraj Bali made these grants of 4 *bighas* to Ram Dat and Ram Ratan. This witness Lalta fared badly in cross-examination, and as for the evidence of Puttu Lal and Ram Prasad it was, if anything, worse than that of Lalta. In short the whole story told by these witnesses seems on the face of it to have been concocted for the purposes of this case. We are asked to believe that Ram Prasad who was one of the Punches and the other man Puttu Lal, who also acted in the same capacity, decided this dispute between the parties without knowing what the dispute was about. As is pointed out by the Court below, there is not a word in either of the documents Exhibit A 18 or A 19 relating to the grants of these lands to indicate in any way that this property was given for the purpose of satisfying the claims of Ram Dat and Ram Ratan with respect to the property now in dispute. It was on the pleadings for the defendants to establish the estoppel against these two plaintiffs. I agree with the Court below that they have failed to do so.

I come now to what is really the principal issue in the case. It has been mentioned that Ram Adhin was a party to the document Exhibit A10, which was executed on the 1st of December 1897. It is also proved, and that fact is no longer in dispute, that this conveyance was attested by Ram Adhin's two brothers Baij Nath and Debi Din. Baij Nath is dead and is now represented by Ram Dat, the first plaintiff in one of the suits. Debi Din is likewise dead and was represented in the same suit by his two sons Ram Ratan and Sant Bakhsh, of whom the latter died after the suit was instituted. The defendants' plea was that by reason of Ram Adhin joining in the execution of this deed of transfer and by reason of the fact that Baij Nath and Debi Din attested the document the transfer is binding and cannot be called in question either by Ram Adhin himself or by the representatives of his two brothers Baij Nath and Debi Din.

It is now admitted that at the time when *Musammat* Janaka died Baij Nath, Ram Adhin and Debi Din, who were all brothers, were the nearest reversioners to the last male owner of this property. It was indeed sought to be made out in the Court below that there existed a family custom by which not only the nearest reversioners but also the more remote reversioners were all admitted to succeed together, and it was on the strength of this custom that three of the plaintiffs in the suit brought by Ram Dat and others were joined as parties. The object of raising this plea of custom was of course to show that Baij Nath, Ram Adhin and Debi Din between them could not by their consent affect the interests of other reversioners who were entitled to succeed with them. However, it is sufficient to say that no reliable evidence of this unusual custom was produced before the Court below. The Subordinate Judge found that no such custom existed and although an attempt has been made to press the point here it was only very faintly argued. I dismiss this part of the case at once with the remark that no custom of this kind was established.

We have it, therefore, that at the time when the succession opened the three reversioners who would have been entitled to the property once belonging to Asharfi Lal were Ram Adhin and his two brothers Baij Nath and Debi Din; and what we have to consider now is the legal effect of these persons having taken part in the execution of the sale-deed upon which the defendants base their title. Ram Adhin, as has already been said, was one of the executants of this document, while it is proved beyond all doubt that Baij Nath and Debi Din affixed their signatures to the deed as attesting witnesses. Consequently the defence is that the consent of the nearest reversioners having been obtained to this transfer long before the succession opened, the validity of the transfer can no longer be called in question. The law on this part of the case may for the sake of convenience be briefly referred to here. It has, in my opinion, been very clearly expounded in the judgment of a Full Bench

of the Calcutta High Court reported as *Debi Prosad Chowdhry* v. *Golap Bhagat* (1). It was there held that an alienation made by way of mortgage by a Hindu widow of a portion of the estate of her deceased husband, without proof either of legal necessity or of reasonable inquiry and honest belief as to its existence, but with the consent of the next reversioner for the time being, is valid and binding on the actual reversioner if the presumption of legal necessity or of reasonable inquiry and honest belief raised by such consent is not rebutted by more cogent proof. Where the consent of the nearest reversioners is given to an alienation made by a Hindu female the consent is evidence, and strong evidence, to show either that there was legal necessity in fact, or that the transferee acted with circumspection and made inquiries which induced the honest belief that such legal necessity did in fact exist. Before this presumption can be raised, it must be well established as a fact that the consent of the reversioners was given to the transaction. Mere attestation of the deed of transfer is not sufficient proof of consent to the alienation. There must be clear proof of real consent, and for this purpose it is necessary to show that the consent was given with a knowledge of its effect upon the interest of the person who gave it and it should, moreover, be established that there was an intelligent intention to consent to the production of that effect. The strength of presumption does, of course, vary with the circumstances and would, for example, be much stronger in the case where the reversioner was actually a party to the conveyance than in the case where he merely signed the document as an attesting witness. In the cases now before me we have it that one of the parties, namely, Ram Adhin, joined in executing the deed. Then again the presumption arising from consent would be very much stronger in cases where it was shown that consideration was given for the consent of the reversioners. In the present case an attempt was made by the defendants to show that the two attesting witnesses Debi Din and Baij Nath were paid Rs. 500 each in consideration of their consent to the transaction. But I agree with the learned Subordinate Judge that this is a point upon which the defendants' case broke down. It will be necessary now to discuss the evidence in some detail, but it is to be observed that the record is for the most part a welter of perjury and it is almost impossible to extract the few grains of truth which lie hidden under a huge mass of false testimony. There are, however, certain circumstances which assist us in coming to a decision upon which side the balance of truth lies. Of the persons who took part in the execution of this document only Ram Adhin and the defendant Suraj Bali are alive. All the attesting witnesses, four in number, are dead. There is in addition the evidence of the scribe, a man named Mohammad Ishaq, who drew up the deed and who was examined as a witness for the defence. According to Mohammad Ishaq's evidence upon which I do not wish to lay any great stress, although the Subordinate Judge seems to have accepted it, the terms of this document of transfer were fully explained not only to the executants Janaka and Ram Adhin but also to the two attesting witnesses Baij Nath and Debi Din. It is probable that this document was read over and explained to the parties, but it seems to me, after a consideration of some of the other facts which have been brought to light, that there was very little need to explain the operation of this deed of transfer to Ram Adhin and his two brothers, for I am convinced from other evidence in the case that they knew perfectly well what was being done and what the result of the transaction on their own interests was likely to be.

Ram Adhin has given evidence in the case, and all that I can say about his statement is that it is a tissue of falsehoods from beginning to end. He has lied in the most unblushing way and given a denial to practically every fact which was suggested for the purpose of showing that he was fully cognizant of all that took place when the sale-deed was written out and registered. It is to be noted that the deed of transfer conveys not only the property which was in possession of *Musammat* Janaka but also a certain small share amounting to $1\frac{1}{2}$ pies which belonged to Ram Adhin himself and which he had acquired in a pre-emption suit to which the defendant Suraj Bali was also a

(1) 19 Ind. Cas. 273; 40 C. 721; 17 C. W. N. 701; 17 C. L. J. 499.

party. Ram Adhin got this 1½ pies under a decree by which he was made liable to pay Rs. 900 for the privilege of pre empting. There is no doubt that he borrowed this money from the defendant Suraj Bali in order to deposit it in Court and that at the date of the execution of this sale-deed this 1½-pies share stood mortgaged to Suraj Bali for Rs. 900, which the latter had advanced by way of a loan.

A few remarks regarding the contents of the deed will not be out of place here, for I have to record my emphatic dissent from the finding which the Subordinate Judge has come to, namely, that the intention and the operation of this deed was to transfer only the life-interest which was held by *Musammat* Janaka as a Hindu female. That opinion is utterly erroneous and I find some difficulty in following the reasoning by which the Subordinate Judge arrived at this conclusion. If there ever was a document in which the language clearly imported the intention to transfer an absolute estate and not a mere life-interest, this is that document. It would, I think, be superfluous for me to elaborate the point by referring to the various clauses in the deed. It is sufficient for me to say that it was stipulated that the purchaser was to redeem the mortgages already existing on the property and was to take possession as a proprietor. And further it is important to note that in the document it was declared that the sale was being effected with the consent of the heirs and relations (*warisan o aizzae*) of the family. I am satisfied, therefore, that it never occurred to anybody acquainted with the negotiations which ended in the execution of this deed that *Musammat* Janaka was only transferring the minor interest in the property which she had as a Hindu female. As for Ram Adhin's story that he knew nothing about this transaction and that he was only interested so far as the transfer of his own share was concerned, this has been rejected with scorn by the Subordinate Judge, and rightly so. It is an absolutely untrue story and I do not propose to say anything more about it except this, that it is proved that a considerable time before the deed was executed the stamp for the conveyance had been purchased by Ram Adhin himself. No one could possibly accept what Ram Adhin says now, namely, that he and his two brothers, the attesting witnesses, knew absolutely nothing about the circumstances attending the transfer of Janaka's share. It is proved that not only did they know that Janaka was transferring but it is shown that Debi Din and Baij Nath took a much more lively interest in the proceedings than that of mere attesting witnesses. Ram Adhin presented the document for registration on the 2nd of December 1897 and Baij Nath and Debi Din both attended the registration office and assisted in the identification proceedings. So far as Ram Adhin's own interest in this document is concerned, I have already mentioned that his share was mortgaged to the defendants' family for a sum of Rs. 900. Ram Adhin has had to admit that when this document was executed he was paid a sum of Rs. 1,400 although Suraj Bali stated that the amount was Rs. 1,470. Ram Adhin asked the Court to believe that the sum of Rs. 1,400 received by him represented the value of his 1½-pies share. On the contrary Suraj Bali's evidence was that out of this sum Rs. 500 had been paid to Ram Adhin for his consent to the transfer of Janaka's share. While I am not prepared to accept many statements of Suraj Bali as gospel in this case, I am inclined to believe that this part of the story is true. I do not believe that the 1½-pies share which Ram Adhin was disposing of was worth Rs. 1,400. As I have said above Ram Adhin got it under a pre-emption decree and paid only Rs. 900 for it; and I think it highly probable that this sum of Rs. 900 represented as much as the property was worth. I am disposed, therefore, to hold that so far as Ram Adhin is concerned, he was paid a sum of Rs. 500 for joining as a co-executant in this deed.

The case against the two attesting witnesses Baij Nath and Debi Din is of course not so strong, but there is other evidence which to my mind excludes any theory that they were ignorant of the terms of the transaction and of what the result on their interests would be. I have mentioned in an earlier part of the judgment that Dal Chand, the man who once owned the share in dispute, died more than 30 years before these cases were brought. His son Asharfi

Lal succeeded him only for a short time and after his death there were left three persons at least who had claims to be maintained out of this property, namely, Dal Chand's two widows and *Musammat* Makhana, the widow of Ram Charan who was a son of Dal Chand and predeceased his father. The plaintiffs' own evidence establishes one fact beyond all doubt, and that is that after the death of Asharfi Lal Ram Adhin and his two brothers took over the management of the property which was in the hands of these widows. There can be no doubt that Ram Adhin, Baij Nath and Debi Din all lived as members of a joint family. They occupied a house close to the house inhabited by the widows and we have the statements of two daughters of Dal Chand, namely, *Musammat* Lallo and *Musammat* Chhogar, to show that Ram Adhin and his brothers looked after the whole of the management of the estate. It is impossible therefore to imagine that during the years that elapsed after the deaths of Dal Chand and his son Asharfi Lal these three brothers could possibly have remained in ignorance of the condition of the family left by Dal Chand. Dal Chand, so far as I can gather from the record, cannot have been in very affluent circumstances. He had but a small share in this village and he had a very large family consisting of six daughters and two sons, one of whom predeceased him. The defendants gave evidence to show that at the time when Dal Chand died, his two daughters *Musammat* Lallo and Chhogar were not married and that money had to be borrowed by the widows to defray the marriage expenses. A strong attempt was made on behalf of the plaintiffs to make out that these two girls were married before their father's death and the two women themselves gave evidence to that effect, which the Subordinate Judge has rejected. I think after a careful perusal of the record that he was right in doing so, for the evidence of these two women, apart from its being highly interested, is extremely vague and unsatisfactory. They have no notion of time or of numbers and the impression which I have gathered from a perusal of their statements agrees with the impression which was made upon the mind of the lower Court, namely, that they had been tutored and put forward to give false evidence in the case. On the other hand, the defence seems to me to be more reliable in this respect and it indicates these two girls were married after their father's death. I have mentioned these facts for the purpose of showing that these widows, after they came into possession of this property, were in all probability pressed for money and that was a fact which was well understood by Ram Adhin and his two brothers who were looking after the widows' interest.

Further, there is abundance of evidence on the record to show that various documents executed by the widows for the purpose of raising loans were attested by Ram Adhin and in one, if not in two instances, there is proof that one of the other brothers also attested documents of a similar kind. Ram Adhin was confronted with several documents to which he had put his name as a witness and was called upon to explain why he had attested them. He took refuge in a lie by saying that he either remembered or knew nothing about the circumstances. These facts appear to me to lend support to the conclusion at which I am arriving, namely, that Ram Adhin and both his brothers were fully alive to the legal consequence of the execution of this deed of transfer, Exhibit A 10.

I now come to what appears to be the most conclusive piece of evidence, which is to be found in two documents on record, namely Exhibits A30 and A31. I have in an earlier part of the judgment referred to the mutation proceedings which took place in the Revenue Courts after the death of *Musammat* Janaka. In the course of those proceedings Ram Adhin was examined in the Revenue Court and Exhibit A 30 is a certified copy of his statement. The original record was, as I have mentioned, before the Court below. In the course of that statement Ram Adhin deposed as follows:— "About four years ago *Musammat* Janaka sold the property to Suraj Bali of Gursel and she sold it with our consent (*ham logon ki razamandi se*)." He made a further statement saying, "We people have made no claim", and then he wound up by adding, "we are about to sue for cancellation of the sale-deed." It is important to observe who are meant by the 'we' referred to in the statement. This is explained by Exhibit A31, from which it appears that Baij Nath, Debi Din (the

brothers of Ram Adhin), Mata Din and Ganga Ram were also examined before the Revenue Court. Mata Din was one of the collateral relations of Asharfi Lal and he is now represented by Bachchu Lal, who is the sixth plaintiff in the suit brought by Ram Dat and others. Ganga Ram, according to the pedigree, is the man who appears in the same suit as plaintiff No. 4. These four men were examined by the Revenue Court and Exhibit A 31 is a certified record of their statements. What they said is this: "Our story is the same story as has been told by Ram Adhin." The record shows that the signature of each one of the four persons is attached to the deposition. These documents were pressed strongly on the attention of the learned Subordinate Judge. He admitted that so far as Ram Adhin was concerned, his statement Exhibit A 30 was a strong piece of evidence against him for the purpose of showing that he had consented to the transfer with a full knowledge of all the facts. But so far as Baij Nath and Debi Din were concerned, the Subordinate Judge treated the Exhibit A31 as not containing any admission made by them to the effect that they too had consented to the transfer. In this the Subordinate Judge appears to me to be clearly wrong. There can be no doubt whatever that Ram Adhin's statement was made in the presence and hearing of these four others and that they expressed their assent to every statement which was made by him, including the statement that they had been consenting parties to the transfer made by *Musammat* Janaka in favour of Suraj Bali. I can conceive no stronger evidence of a true and full consent on the part of Debi Din and Baij Nath than what is contained in this deposition which was made more than seven years after the transfer had taken place; and I decline altogether to accept the view taken by the Subordinate Judge that Debi Din and Baij Nath, although they put their names as witnesses to the deed, cannot be treated as having had that full knowledge which is essential in order to make out a case of real consent. Indeed in dealing with this question the Subordinate Judge has involved himself in contradiction. I find in one part of his judgment that he says that he has no doubt that Ram Adhin and his brothers were aware on the 1st of December 1897 that *Musammat* Janaka was about to sell her property, and he further says that they were well aware that they were the next reversioners and that their action in connection with the execution of this document amounted to more than a mere attestation. Afterwards, however, he proceeds to evolve a theory for the purpose of showing that, although these reversioners were aware that a transfer was being made by *Musammat* Janaka, they must have been under the impression that what she was transferring to Suraj Bali was merely her limited interest in the property. In the earlier part of his judgment on this issue the learned Judge set down the law regarding consent of the reversioners quite correctly and in much the same sense as that in which I have referred to it above. But having in some way or other come to the opinion that the document represented only a transfer of *Musammat* Janaka's limited interest, the Subordinate Judge proceeded at a later stage to lay down some rules of Hindu Law which have no merit except perhaps that of novelty. He says that in dealing with questions of consent by reversioners to transfers made by Hindu females there are two kinds of consent to be considered, namely, one where the reversioners assent to the alienation by a widow of her limited interest. Where this is the case, says the Subordinate Judge, the consent of reversioners is evidence of the propriety of the transaction and of the legal necessity. Then he goes on to say that the other kind of consent is where the reversioners agree to the destruction of their rights in expectancy and allow the widow to pass absolute title. From this statement it appears to me that the Subordinate Judge has not properly understood the law on this subject. I know of no authority for the proposition invented by the learned Judge of the Court below that the reversioners' consent is required to the alienation by a widow of her limited estate in the property of her husband. I have already expressed my opinion before, that no question arises here of the transfer of life-interest. On the face of it the deed clearly conveys a full estate and was intended to do so.

Turning now to the two statements Exhibits A30 and A31, Ram Adhin, as might be expected from the tenor of the

rest of his evidence, attempted to give the lie to his previous statement. He was confronted with his own statement as recorded in Exhibit A30 and he had the impudence to assert that the record was not correct. He asked the Court to believe that the statement he made before the Revenue Officer was that the transfer had been made not with, but without, his consent. Bachchu Lal the sixth plaintiff in the other case, who is the son of Mata Din, one of the other men who made a statement to the Revenue Court in Exhibit 31, also had the audacity to depose in the same terms as Ram Adhin. This evidence may be disregarded altogether as being entirely false. With regard to Bachchu Lal the only observation I need make for the purpose of explaining his false evidence is that he is the person who has found the funds for the prosecution of both these suits with which I am now dealing. We have it then that Ram Adhin, Debi Din and Baij Nath in the year 1897 were fully aware of all the dealings by the two widows with the property which had been left by Dal Chand. They were themselves parties as witnesses to some of the transfers which had taken place and they were thoroughly acquainted with the financial situation in which these ladies found themselves. We find that with this knowledge they took part in the execution of this deed of the 1st of December 1897 and that more than seven years afterwards, when there was really no occasion for them to make any statement against their own interest, they assured the Revenue Officer who was dealing with the mutation application that this sale in the year 1897 had been effected with their consent. I can imagine no proof more conclusive than this of a consent which the law regards as binding upon the persons who gave it and who at the time the consent was given were the persons entitled to take the property on *Musammat* Janaka's death. It is a fact to be considered that, although *Musammat* Janaka lived on from the year 1897 till the year 1904, none of these reversioners ever took any steps to have the alienation set aside, and in fact it is only when limitation has all but expired that we find them coming into Court, 19 years after the alienation has taken place, for the purpose of having it set aside in their favour. For these reasons I hold that the defendants here have succeeded in establishing, as against Ram Adhin, Debi Din and Baij Nath, that being the nearest reversioners they gave a full and intelligent consent to the transfer which was made in December 1897, and on the authorities I hold that this transfer is binding and cannot be called in question either by Ram Adhin himself, who was one of the executants of the deed or by the other plaintiffs Ram Dat and Ram Ratan, who claim through Debi Din and Baij Nath respectively. In my opinion the Subordinate Judge ought to have held that the transaction was binding and ought to have dismissed both these suits. In view of these findings it is not necessary for me to enter into a discussion regarding the proof of legal necessity, for each of the items which go to make up the consideration of the deed in question. Once the factum of consent by the nearest reversioners has been established and once it has been proved that this consent was given with full knowledge of its effect and with a thorough appreciation of all the circumstances in which it took place, the presumption is so strong as to be practically conclusive. I do not, of course, intend to say that such a presumption is ever conclusive, but it must be overturned by very cogent evidence; and in these suits I can find no evidence of this description whatever. Even the learned Counsel for the plaintiffs will hardly contend that Ram Adhin's statement can in any way be treated as cogent evidence which can be relied on for the purpose of overturning the presumption. I hold, therefore, that the decrees of the Court below are wrong and must be reversed Both the suits should have been dismissed and I now dismiss them both with costs.

The result, therefore, is that the appeals filed by the defendants, namely, First Civil Appeal No 158 of 1916 and First Civil Appeal No. 29 of 1917, are allowed with costs and the appeals filed by the plaintiffs, namely, First Civil Appeal No. 138 of 1916 and First Civil Appeal No. 30 of 1917, are dismissed with costs.

Appeal allowed.

MA KIN NYUN *v.* MA TIN.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 56 OF 1917.

October 15, 1917.

Present:—Mr. Saunders, J. C.

MA KIN NYUN—APPLICANT

versus

MA TIN—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXII, r. 6, O. XXIII, r. 1—Death of defendant before judgment—Judgment, whether can be pronounced—Withdrawal of suit, whether can be allowed.

The provisions of Order XXII, rule 6, of the Civil Procedure Code, though they cover the case where a judgment is delivered in ignorance of the fact that a party has died between the conclusion of the hearing and the delivery of judgment, also provide for the delivery of judgment where the Court is aware of such death, and they make it clear that the death of a party is not sufficient cause for refusing to deliver judgment or allowing the withdrawal of a suit which has been completed in every respect except for such delivery of judgment. [p. 620, col. 2; p. 621, col. 1.]

The provisions of Order XXIII, rule 1, of the Civil Procedure Code should not be arbitrarily applied. [p. 620, col. 2.]

Mr. *S. Mukerjee*, for the Applicant.

Mr. *C. G. S. Pillay*, for the Respondent.

JUDGMENT.—One Ma Tin filed a suit in the District Court, Magwe, sitting at Yenangyaung, against her husband, Maung Po Kan, for divorce and for partition of property. The suit was defended and proceeded to trial, witnesses were examined and arguments heard, and on the 22nd December 1916 was adjourned for judgment till the 3rd January 1917. On that date it was again adjourned for the same purpose till the 20th January 1917. It appears that on the 17th of January 1917 the defendant died, and on the 20th of January the plaintiff applied for leave to withdraw the suit. On this the Judge passed the following order:—"Plaintiff applies to withdraw the suit on the ground that the defendant died on the 17th January 1917. She applies under Order XXIII, rule 1, and asks for permission to institute a fresh suit in respect of the property. Under Order XXIII, rule 1 (*ii*), plaintiff is permitted to withdraw from her suit on payment of the defendant's costs, with liberty to institute a fresh suit in respect of the property claimed." On the 26th of January one Ma Kin Nyun, claiming to be adopted daughter of the deceased, applied for pronouncement of judgment making her legal representative in place of the deceased. This application was refused and she now comes to this Court in revision under section 115 of the Code of Civil Procedure.

The application is in effect that the District Judge acted with material irregularity in allowing the withdrawal of the suit without sufficient grounds. The Judge's order does not state why permission was granted to the plaintiff to withdraw the suit. It is clear that clause (2) (*a*) of Order XXIII, rule 1, did not apply and that he can only have given permission under clause (2) (*b*). This clause lays down that permission may be given where the Court is satisfied that there are other sufficient grounds for allowing a plaintiff to institute a fresh suit for the subject-matter of the suit or part of a claim. It is clear that the meaning of this is that a suit may be withdrawn where there are sufficient grounds for allowing the plaintiff to withdraw from a suit in order to institute a fresh suit for the subject-matter thereof, or to abandon part of a claim continuing the suit as far as the balance of the claim is concerned. It is obvious here that the defendant having died, there could be no question of the plaintiff bringing a fresh suit for a divorce, nor did she desire to abandon a part of her claim continuing the suit for the balance. It would seem, therefore, that Order XXIII, rule 1, under which the Judge purported to act, had no application. Possibly the Judge was under the impression that the suit abated upon the death of the defendant, but if this was so, he would seem to have been in error in view of the terms of Order XXII, rule 6, and if the suit abated, this was clearly not a reason for allowing its withdrawal. The provisions of Order XXIII, rule 1, are not to be arbitrarily applied. They have been framed to allow a plaintiff to obtain an adjudication where, owing to some formal defect, or for other sufficient grounds, which must be *bona fide* grounds, urged in good time and not to the prejudice of the defendant, the plaintiff would but for this rule fail in his suit and be unable to obtain the assistance of the Courts in enforcing a just claim. The provisions of Order XXII, rule 6, though no doubt they cover the case where a judgment is delivered in

ignorance of the fact that a party has died between the conclusion of the hearing and the delivery of the decision, also undoubtedly provide for the delivery of judgment where the Court is aware of such death, and they seem to me to make it clear that the death of a party is not sufficient cause for refusing to deliver judgment or allowing the withdrawal of a suit which has been completed in every respect except for such delivery of judgment. It was pointed out in *Ramacharya* v. *Anantacharya* (1) that the practice in English Courts of Equity was in such cases to disregard the fact of the death of a party occurring while the Court was considering, and to deliver judgment and draw up the decree as though he was still living; and the judgment of the Lord Chancellor of Ireland is quoted with approval in which it is stated that "nothing is better settled than that where a cause is heard and merely stands over for consideration, the Court will pronounce judgment though the plaintiff or defendant died"; and in *Surendro Keshub Roy* v. *Doorgasoondery Dossee* (2), quoted in the same case, the Privy Council, notwithstanding the death of one of the parties pending consideration, delivered judgment and remitted the case to the Indian Courts for disposal without requiring the record to be amended.

It is argued for the respondent that Order XXII, rule 6, merely lays down that judgment may in such case, *i.e.*, after the death of one of the parties, be pronounced. The rule is not mandatory and this Court should not interfere if the Court fails to pronounce judgment, as a discretion is vested in it to deliver or not to deliver judgment. But this discretion must be exercised judicially, and I think it is clear that the Judge did not have the provisions of Order XXII, rule 6, in his mind at all, nor did he purport to act under that rule. The case of *Mahipat Shamla* v. *Nathu Vithoba* (3) may be referred to. It appears to be on the face of it desirable that judgment should be delivered in the present suit, which will then decide various matters in dispute between the parties by which the legal representatives of the defendant will be bound, whereas, otherwise, it will be necessary for one or the other of the parties to bring a fresh suit and to go largely into the same matters though upon a different cause of action.

In allowing the plaintiff to withdraw her suit, the Court acted in the exercise of its jurisdiction with material irregularity within the meaning of section 115 (c) of the Code of Civil Procedure, and there will be an order setting aside the order of the District Court allowing the suit to be withdrawn and directing the Court to proceed to deliver judgment.

The respondent will pay the costs of this application.

Order set aside.

(1) 21 B. 314; 11 Ind. Dec. (N. S.) 212.

(2) 19 C. 513; 19 I. A. 103; 6 Sar. P. C. J. 150; 9 Ind. Dec. (N. S.) 786.

(3) 4 Ind. Cas. 252; 33 B. 722; 11 Bom. L. R. 1109.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 332 OF 1917.

November 21, 1917.

Present:—Mr. Lindsay, A. J. C.

RAM DATT AND OTHERS—PLAINTIFFS—APPELLANTS

versus

DEOTA DIN—DEFENDANT—RESPONDENT.

Mortgage to two persons—Shares in mortgage-money not specified, effect of—Co-mortgagees, position of—Presumption—Redemption, partial, effect of.

Where money is advanced by two co-mortgagees without any specification of shares, the presumption is that each of them advances half the money; and if one of them accepts satisfaction of his interest as mortgagee from the mortgagor, the result is that the only mortgagee interest outstanding is the interest of the other co-mortgagee which extends to one-half of the mortgage-money. [p. 622, col. 2.]

Appeal from the decree of the District Judge, Gonda, dated the 22nd May 1917, affirming the order of the Probationary Munsif, Gonda, dated the 30th April 1917.

Babu *Basdeo Lal*, for the Appellants.

JUDGMENT.—This appeal is up for admission under Order XLI, rule 11. I have heard the learned Advocate for the appellants and I am satisfied that the decision of the lower Appellate Court is correct.

The suit was brought by two plaintiffs who are the appellants here, namely, Ram Datt and Ghirrao. The defendant was one Deota Din and the suit was for possession of certain plots of land and for mesne profits.

It appears that these plaintiffs claimed title under a mortgage which was executed in their favour by one Sukha, who was an occupancy tenant.

The mortgage was a mortgage with possession and was executed on the 11th of January 1912. After the date of this deed the mortgagees were dispossessed by the present respondent Deota Din. They brought a suit against him for recovery of possession and won their case. In that case Deota Din put forward a plea that Sukha had no interest in the property. Later on, that is to say in the year 1915, Sukha the mortgagor executed a deed of gift in favour of Deota Din by which he handed over all his property including the plots which are now in dispute. After this Sukha brought a suit against Deota Din for cancellation of the deed of gift. While this suit was pending, Sukha died and the case was continued by his legal representative who is one of the present plaintiffs, namely, Ram Datt. Eventually Ram Datt and Deota Din settled the case by a compromise. Ram Datt surrendered his interest in all the property of Sukha, including the plots in dispute, in consideration of a payment of a sum of money by Deota Din. Now the present suit has been brought by Ram Datt and Ghirrao mortgagees.

On the facts I have mentiond Ram Datt would appear to be completely out of Court, but he has sought to maintain that when he made the ccmpromise with Deota Din to which I have just referred, he had no intention of surrendering his rights as mortgagee. The suggestion is that all he parted with was his interest in the property as the representative and heir of Sukha. The learned Judge, on the other hand, and rightly in my opinion, has held that Ram Datt intended to divest himself of all his interest in the property in consideration of the money which he was to receive from Deota Din. I am quite clear, therefore, that Ram Datt had no *locus standi* to maintain the suit for possession. On the other hand Ghirrao, who was no party to the compromise, can claim that his interest in the property has not been affected and the Courts below have given effect to his claim and upheld the mortgage to the extent of one-half. Relief has been given to Ghirrao on these terms.

It has been argued here again that Ram Datt did not, by the compromise, divest himself of his interest as a mortgagee in this property, but I am unable to agree. The terms of the *sulehnama*, which I have had read to me, do not suggest that there was any reservation by Ram Datt of any interest in the property.

Then it is said that Ram Datt had no power by entering into this compromise to affect the legal relation which exists between the mortgagor and the joint mortgagees. I am not disposed to yield to this argument. It seems to me that when the money was advanced without any specification of shares, the presumption is that each of the co-mortgagees advanced half the money, and as one of them has accepted satisfaction of his interest as mortgagee from Deota Din, the result is that the only mortgagee interest now outstanding is the interest of Ghirrao, which extends to one-half of the mortgage-money. The decision of the Court below is, in my opinion, correct.

I dismiss the appeal.

Appeal dismissed.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 74 OF 1917.

October 15, 1917.

Present:—Mr. Saunders, J. C.

MAUNG KALA AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MAUNG MEIK AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), Sch. II, para. 1—Arbitration—Court acting as arbitrator—Award, finality of—Appeal, whether lies.

The general principle is that an award is final and cannot be questioned except upon such grounds, as corruption or an illegality apparent upon the face of the award, as are set out in the Second Schedule to the Code of Civil Procedure, and there is no reason for departing from the principle where the Court itself has been appointed and has accepted the office of arbitrator. [p. 623, col. 2.]

Where the Court itself is appointed to act as an arbitrator, no separate award need be passed inviting the parties to put in objections before passing a decree: such an award in itself is a decree. [p. 623, col. 2.]

Where the parties to a suit agreed that after the Judge had examined the documentary evidence and inspected the ground he should give his decision without any witnesses being called, and that they would abide by his decision:

MAUNG KALA *v.* MAUNG MEIK.

Held, that the decision was in the nature of an award and that no appeal lay against it.

Mr. *S. Mukerjee*, for the Appellants.

Mr. *C. G. S. Pillay*, for the Respondents.

JUDGMENT.—This was a suit to recover possession of a certain piece of land, together with mesne profits. The defendant filed a written statement in which he traversed the statements in the plaint, and an issue was framed. The parties then filed a number of maps and an application, in which they stated that they agreed that after the Judge had examined the documentary evidence and inspected the ground, he should give his decision without any witnesses being called, and they agreed to abide by this decision as final. The Judge accordingly visited the site and gave the plaintiff a decree as prayed for. The defendant, Maung Kala, then appealed. The District Judge held that the Judge had been appointed sole arbiter in the dispute, and that the District Court could not question his decision. The defendant now comes to this Court in second appeal under section 100 of the Code of Civil Procedure.

It is urged that the submission by the parties did not amount to a submission to arbitration, that if it was, the award was subject to the procedure laid down in the Second Schedule to the Code of Civil Procedure, that the Judge of the first Court exercised a double function as arbitrator and Judge and that the award did not operate by itself and ripen into a decree, that the plaint should have been dismissed upon the plaintiff-respondent's producing no evidence, that the alleged wrongful dispossession and damage claimed has not been established, and that the Judge of the lower Appellate Court should have decided the appeal upon its merits.

There appears to be good authority for the view taken by the District Court. It was held in *Baikanta Nath Goswami* v. *Sita Nath Goswami* (*Sita Nath* v. *Baikuntha Nath*) (1) that when, after the hearing of the suit had commenced before a Munsif, both parties agreed to leave the questions in dispute between them to the determination of the Court after the Court had made a local inspection, and also agreed not to raise an objection to the same or to prefer an appeal, the decision of the Munsif is in the nature of an award and that no appeal lay to the District Judge. Further that no appeal lay from the decision of the District Judge to the High Court, though the High Court might interfere under section 115 of the Code of Civil Procedure. Much the same view was taken in the Madras case of *Nidamarthi Mukkanti* v. *Thammana Ramayya* (2). At page 117 of Sanji's Law of Arbitration, 1916, it is stated that where the Court itself is appointed to act as an arbitrator, no separate award need be passed inviting the parties to put in objections before passing a decree, such an ward in itself is a decree and an objection to the award can be raised only by way of appeal against the decree to the Appellate Court. The authority for this is said to be *Nimmagadda Peda Naganna, In re* (3), which is not available in this Court. If the law as laid down therein is correctly summarized, this appears to dispose of the objection that the parties should be given an opportunity of putting in objections before passing a decree, and it would seem probable that any appeal could only attack the award upon the grounds set out in the Second Schedule to the Code of Civil Procedure as grounds for invalidating an award. It does not appear that in the District Court any such grounds were set out. The general principle is that an award is final and cannot be questioned except upon such grounds, as corruption or an illegality apparent upon the face of the award, as are set out in the Second Schedule to the Code of Civil Procedure, and I see no reason for departing from the principle where the Court itself has been appointed and has accepted the office of arbitrator. It would seem from a perusal of the maps filed by the parties that they did sufficiently substantiate the plaintiff's case, and I think the District Court was justified in refusing to interfere.

The appeal must, therefore, be dismissed with costs.

Appeal dismissed.

(1) 9 Ind. Cas. 296; 38 C. 421.

(2) 26 M. 76.

(3) 26 Ind. Cas. 355.

FARKHUND ALI *v.* MOHAMMAD SAHIB.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 104 OF 1917.

August 27, 1917.

Present:—Mr. Lindsay, J. C.

S. FARKHUND ALI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MOHAMMAD SAHIB AND OTHERS—DEFENDANTS—RESPONDENTS.

Appeal—Pleadings—New case, whether can be set up.

A new case cannot be allowed to be set up in appeal. [p. 625, col. 2.]

Appeal from the decree of the Second Additional District Judge, Lucknow, dated the 22nd December 1916, upholding that of the Subordinate Judge, Lucknow, dated the 17th January 1916.

The Hon'ble Syed *Wazir Hassan* and Syed *Ali Mohammad*, for the Appellants.

Syed *Shahanshah Hussain Rizwi*, for the Respondents.

JUDGMENT.—Having heard Counsel for the plaintiffs-appellants in these two appeals I consider that the order of the lower Court must be set aside. The facts of the case may be briefly stated as follows:—

The plaintiffs came into Court alleging a right to redeem mortgages affecting certain property described as consisting of a 7 annas share in the village called Purania. I understand at present the matters in dispute between the parties are confined to only 6 annas out of this 7-annas share. There were two plaintiffs in the case, Farkhund Ali and Mahabir Prasad, and they claimed to have derived title to bring this suit for redemption from a person called Ali Bahadur. This Ali Bahadur was represented as having inherited the equity of redemption in 6 annas of the mortgaged property. It is perfectly true that in the pedigree which was filed with the plaint there was an error committed with respect to Ali Bahadur's relationship to one Umrao. He was shown as the son of Umrao, whereas it subsequently turned out that he was not related in this way. He was the son of Umrao's mother's sister. An application was made to the Court sometime after the trial had begun and as a result of this application the true relationship between Ali Bahadur and Umrao was set out in the plaint as amended. It is to be observed that when this order for amendment of the plaint was made, the defendants put in no plea by way of answer to the amended pleading. The inference is, therefore, that they had no answer to give. After the case had been tried out, the Subordinate Judge came to the conclusion that it was established that Ali Bahadur was the heir of Umrao and that for this reason he was able to pass to the plaintiffs a good title which would enable them to maintain this suit for redemption. The result of the case was that a decree for redemption was passed on payment of a particular sum. Both parties brought an appeal to the District Judge. The plaintiffs-appellants objected to the sum which had been declared to be payable in respect of redemption. With that matter I am not concerned at present. The defendants brought an appeal and the gist of their case before the Judge was that Ali Bahadur was not heir of Umrao and that, therefore, he could not transfer to the plaintiffs a good right to redeem the property. For the first time in the history of the case the plea was put forward on behalf of these defendants-appellants that even assuming Ali Bahadur to be related to Umrao in the manner mentioned in the amended plaint, nevertheless one Qasim Hussain who was a brother of Ali Bahadur's mother was a nearer heir and would consequently exclude Ali Bahadur. The learned Judge, for reasons, which I am unable to accept, allowed this new case to be pleaded before him and eventually he gave judgment for the defendants-appellants on the ground that the plaintiffs had failed to prove that Qasim Hussain was dead and that consequently Ali Bahadur was the nearest relative of Umrao. It is complained here, and I think with justice, that the defendants-appellants were allowed to raise a new case in the Court of first appeal. The learned Judge has written a great deal explaining why he allowed this defence to be raised, but I am quite unable to follow the reasons which he gives. It cannot be pretended for a moment that the defendants were in any way prejudiced by the mistake which was made in the pedigree which was filed with the plaint. The learned Judge seems to have thought that the defendants had been misled by this pleading but I am unable to agree with him. There was before the Court a clear statement made

on the 16th of July 1915 that the pedigree contained a clerical error. The true relationship of Ali Bahadur to Umrao was disclosed and, therefore, it is idle for these defendants here to contend that after this they were under any misapprehension as to the real nature of the title which Ali Bahadur was pleading. It is to be noted that in the written statement which was filed in answer to the plaint as it originally stood, these defendants did not merely deny in a general way the title which Ali Bahadur set out, but they took upon themselves the responsibility of naming certain persons who were described as the true heirs of Umrao, namely, Waris Ali and Gauhar Ali etc. Who these "etc." are is, of course, best known to the defendants. There is nothing on the record to show who they are. Perhaps it is suggested now that they include Qasim Husain. Consequently when we find that these defendants undertook to put forward a special defence and named certain persons as the heirs of Umrao they cannot now be heard to make any complaint on the ground that an erroneous pedigree was filed in the Court of first instance which had the effect of misleading them. There was nothing in the pedigree as it stood originally which could have led to the pleas in which were raised the *jus tertii* of "Waris Ali, Gauhar Ali, etc." I am informed by the learned Counsel for the respondents that the defence which was put forward in the lower Appellate Court in connection with the mention of Qasim Husain as a nearer heir was suggested by a statement which was made by Ali Bahadur in a Revenue Court in connection with mutation proceedings in the year 1908. A certified copy of this document is on the record Exhibit A 13. There no doubt it is stated by Ali Bahadur that his mother was *Musammat* Munga and that her sister was Badshah Begam and that both the ladies "had" a brother named Qasim Husain; but there is not a word in the statement to indicate that Qasim Husain was in existence at that time. It is further to be noted that Ali Bahadur was never asked a question about this matter in the course of the trial of the present suit before the Subordinate Judge and so it all comes to this that an obscure passage in the certified copy of Ali Bahadur's statement made in the year 1908 is fastened upon. Not a question is asked from Ali Bahadur in the witness-box in the Court of the Subordinate Judge, but when the case comes up before the Additional Judge in appeal we have Qasim Husain trotted out for the first time as being an heir of Umrao who stood in the way of Ali Bahadur's inheritance. Altogether it seems to me that the lower Court has erred grievously in allowing this new case to be set up and it is for this reason that I accept these appeals and set aside the decree of the Court below. As this was the only point which the learned Additional Judge decided, the result is that both these appeals, namely, Nos. 104 and 106 of 1917, will go back to the Court of the Additional Judge for disposal on the merits. Costs here and hitherto will abide the result.

Cause remanded.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 1 OF 1917.

August 14, 1917.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Bakewell.

BODDULURU NAGAYYA—DEFENDANT No. 1—APPELLANT

versus

BACHU CHENCHURAMAYYA AND OTHERS—PLAINTIFFS AND DEFENDANTS NOS. 2 AND 3—RESPONDENTS.

Easements Act (V of 1882), s. 17—Water discharged over surplus weir of tank—Easement, right of, acquisition of.

Section 17 of the Easements Act implies that a right of easement in connection with the use of water of artificial channels or of water derived from artificial tanks or pools can be acquired by prescription. [p. 626, col. 2.]

A person can acquire a right of easement with respect to water which is discharged over the

surplus weir of a tank and which flows therefrom in a defined channel, if he has been using and enjoying the water for a sufficient length of time and as a matter of right as laid down in section 17 of the Easements Act. [p. 626, col. 1.]

Appeal against the decree of the District Court, Nellore, in Appeal Suit No. 234 of 1915, preferred against that of the Court of the Additional District Munsif, Nellore, in Original Suit No. 281 of 1914 (Original Suit No. 538 of 1914, District Munsif's Court, Kavali).

Messrs. *T. V. Venkatarama Aiyar* and *T. R. Vaidyanatha Aiyar*, for the Appellant.

Mr. *K. Krishnaswami Aiyangar*, for the Respondents.

JUDGMENT.—The appellant is the owner of certain land, through which the water of a tank belonging to another person flows in a defined channel on to the respondents' land. The case of the appellant is that since the water that is turned into this artificial channel is what overflows the surplus weir of the tank in question, therefore no right of easement can be acquired with respect to that water. It must be noted that the owner of the tank has not raised the question, but objection was raised only by the owner of the intermediate land through which water flows before reaching the respondents' land. We think there can be no doubt that a person can acquire a right of easement with respect to water which is discharged over the surplus weir of a tank if he has been using and enjoying the water for a sufficient length of time and as a matter of right, as laid down in the Indian Easements Act.

The learned Vakil for the appellant relied very strongly on *Arkwright* v. *Gell* (1) and *Wood* v. *Waud* (2). These cases enunciate the principle that if a person in using his own land pumps out the drainage water and throws it over another's land, the person on whose land the water is so thrown, cannot acquire an easement by prescription so as to enable him to say to the person from whose land the water is allowed to come by way of drainage that he must be prevented from so altering the user of his land as will stop such drainage water flowing to the lower land. But as pointed out by Lord Abinger in *Arkwright* v. *Gell* (1), the water in that case was pumped and discharged by the owner of the dominant land for his own convenience and for temporary purposes, and he also observes that the question would be different where the owners of intermediate land tried to intercept the flow of water so discharged. Reliance has also been placed on a ruling of the Privy Council in *Ramessur Persad Narain Singh* v. *Koonj Behari Pattuk* (3), where their Lordships cited *Wood* v. *Waud* (2) with approval. The proposition laid down in *Ramessur Persad Narain Singh* v. *Koonj Behary Pattuk* (3) is to the effect that the right to enjoyment of water of an artificial channel or tank can be acquired either by grant or by some arrangement of that nature, but that a grant may be presumed in a proper case. In fact in that case, their Lordships found that there was a grant of the right to enjoyment of water discharged from a large artificial lake. Supposing this case applied, there should be no difficulty in presuming a grant in the present case.

Section 17 of the Easements Act, however, which is in force in this Presidency, implies that a right of easement in connection with the use of water of the artificial channels of of water derived from an artificial tank or pool can be acquired by prescription; and this question has been settled, so far as this Presidency is concerned, by the decision in *Rayappan* v. *Virabhadra* (4) which we have no hesitation in following. The law laid down in that case has not, so far as we are aware, been doubted hitherto. The whole gist of the learned Vakil's argument is based upon the fact that the water that flows on to the respondents' land is what he called the surplus water of the tank. But there is a substantial difference between a case of this nature and the one that is dealt with in *Arkwright* v. *Gell* (1). Here there is a tank which is fed by rain water as well as surface water from neighbouring lands, and the mere fact that the owner of the tank

(1) (1839) 5 M. & W. 203; 2 H. & H. 17; 8 L. J. Ex. 201; 52 R. R. 671; 151 E. R. 87.

(2) (1849) 3 Ex. 748; 18 L. J. Ex. 305; 13 Jur. 472; 77 R. R. 809; 154 E. R. 1047.

(3) 4 C. 633; 6 I. A. 33; 3 Sar. P. C. J. 856; 3 Ind. Jur. 179; 2 Shome L. R. 194; 2 Ind. Dec. (N. S.) 402.

(4) 7 M. 530; 2 Ind. Dec. (N. S.) 952.

does not want more than a certain quantity of water and allows the rest to pass through the surplus weir, does not suggest that nobody else can acquire a right in connection with the water which is allowed to flow therefrom in a defined channel. We may further observe that the system of irrigation by means of connected tanks, which so largely prevails in this Presidency, has been in existence from time immemorial and this is indisputable proof that the law in this Presidency is not as suggested by the learned Vakil for appellant.

We, therefore, dismiss the appeal with costs.

Appeal dismissed.

M.C.P.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 120 OF 1917.

November 2, 1917.

Present:—Mr. Saunders, J. C.

MAUNG NYAN MO—APPELLANT

versus

MA PO AND ANOTHER—RESPONDENTS.

Contract Act (IX of 1872), s. 38—Mortgage—Co-mortgagees, whether joint promisees—Payment to one co-mortgagee, whether discharges debt.

Co-mortgagees are joint promisees and the payment of the mortgage debt to one of them discharges the whole debt. [p. 628, col. 1.]

(Case-law discussed.)

In view of the difference in the conditions of social life in India and in England, it is doubtful whether and to what extent the presumption that when a claim is on a money bond to two or more obligees, they are tenants-in-common and not joint tenants of the debt with the consequence that the discharge by one obligee cannot be set up as a defence against the other obligee suing for his share of the debt, which in England prevails only in cases in which equitable relief is claimed, should have effect given to it in India. [p. 628, col. 1.]

Mr. *M. Johannes*, for the Appellant.

Messrs. *Pillay* and *Pershad*, for the Respondents.

JUDGMENT.—The plaintiff's case was that he had mortgaged certain land to the two defendants and the deceased husband of the 1st defendant, that he had redeemed the mortgage by payment of the mortgage money to the 1st defendant but the 2nd defendant refused to deliver possession. The 1st defendant admitted the claim, while the 2nd defendant stated that as he had not received the mortgage money, he was entitled to retain possession of the land.

The Court of first instance held that the defendants mortgagees were partners and that the 2nd defendant was bound by the payment to the 1st defendant, and decreed the plaintiff's suit. Upon appeal the District Court apparently held that there was fraud and dismissed the suit, and the plaintiff now comes to this Court in second appeal under section 13 of the Upper Burma Civil Courts Regulation.

It is clear that neither in his written statement nor in his examination before issues did the 2nd defendant plead fraud, and there does not seem to be any suggestion throughout the evidence that the plaintiff was acting in collusion with the 1st defendant. There were in fact no grounds whatever for the conclusion arrived at by the lower Appellate Court, which was clearly wrong.

The facts are not in dispute. The mortgage document was produced and admitted, and in it, after the description of the land, it is set out that U Pa Si, Ma Po and Maung Po Mya deliver Rs. 325 to Maung Nyan Mo and receive the said lands in mortgage with possession. "If it is required to redeem the lands, the redemption shall be made only after three years from the date of execution of this document." There is the usual clause as to interference by third parties, and the document is signed by the three persons named as mortgagees.

The evidence does little more than prove the mortgage and the redemption, though it appears from it that the 2nd defendant was son-in-law of the 1st defendant and her deceased husband, that at one time they lived together and that up to the time of Maung Pa Si's death, the 2nd defendant worked with the 1st defendant. The 1st defendant said in her evidence that the 2nd defendant was merely an agent of her husband; she did not attempt to prove it, and he is clearly described in the document as mortgagee. The 2nd defendant gave evidence that the mortgage money belonged jointly to him and to his father-in-law and mother-in-law,

who had a joint income and did joint business and no partition had been made up till the time of suit.

There appears to be no authority for the view taken by the Court of first instance that the defendants were partners, though they may have occupied a position analogous to that of partners. They were co-mortgagees or co-promisees and in the absence of fraud or collusion, the only question which arises is whether the mortgagor is entitled to redeem by making payment to one of them, and whether payment to a co mortgagee has the effect of discharging the joint debt. Upon this question there appears to be a difference of opinion in the Indian Courts. The latest reported case is that of *Umes Chandra Banerjee* v *Dinabandhu Mahanti* (1). It was there held that payment to one of several joint mortgagees was not a good payment as against the plaintiff and another co-mortgagee. Reliance was placed on *Husainara Begum* v. *Rahmannessa Begum* (2), in which it was stated that the principle of law applicable to cases of this description was fully explained. The explanation referred to shows that the principle is based upon the English presumption of equity, that when a claim is on a money-bond to two or more obligees, the presumption is that the obligees are tenants-in-common and not joint tenants of the debt, with the consequence that the discharge by one obligee cannot be set up as a defence against the other obligee suing for his share of the debt, and the doctrine stated by Wills, J., in *Steeds* v. *Steeds* (3) is quoted with approval, that "although the mortgagees take a joint security each means to lend his own money and to take back his own." It was added, "there is nothing to indicate that the intention of the parties was that each of the persons in whose favour the mortgage obligation was created was a creditor for the whole." Whether co-promisees are joint or several is a question of fact. In view of the difference in the conditions of social life in India and in England, it appears to me to be doubtful (as stated in Cunningham and Shephard's Contract Act, 11th Edition, at page 182) whether, and to what extent, this presumption, which in England prevails only in cases in which equitable relief is claimed, should have effect given to it in this country. Although in *Umes Chandra Baner ee* v. *Dinabandhu Mahanti* (1) referred to above, the mortgagees are referred to as joint mortgagees, it was held that in view of the terms of the mortgage instrument which stated explicitly that the mortgagors would pay the loan to the two mortgagees, they were thus under an obligation to tender to both the mortgagees. In the present case there is no such stipulation and the presumption (assuming, but not admitting, that it is applicable in India) that the mortgagees were tenants-in common, which is a rebuttable presumption, appears to me in the present suit to be rebutted by the evidence. Both the mortgagees agree that at the time of the mortgage they were working together, and the 2nd defendant's statement that they held their property jointly and that there was no division, has not been contradicted and may be accepted as correct.

But there appears to be a still further conflict of opinion as to whether in the case of joint promisees, payment to one discharges the debt. In *Mannava Annapurnamma* v. *Uppala Akkayya* (4) the Full Bench, by a majority of two Judges to one, held that one of several payees of a negotiable instrument can give a valid discharge of the debt without the concurrence of the other payees. From this view the Chief Justice dissented, and his opinion has been referred to in the case of *Umes Chandra Banerjee* v. *Dinabandhu Mahanti* (1), quoted above, as a weighty dissent which appeared to the Judges of the Calcutta Bench to enunciate the correct rule on the subject. The learned Chief Justice of Madras held that section 33 of the Contract Act dealt with the case of an offer which was not accepted, and although the last paragraph of the section is general and is not restricted to an offer which has not been accepted, apparently the Legislature were not contemplating the legal consequences of an offer which had been accepted, but the legal consequences of an offer which had

(1) 29 Ind. Cas. 956; 21 C. L. J. 570.
(2) 8 Ind Cas 837; 38 C. 442; 13 C. L. J. 3.
(3) (1889) 22 Q. B. D. 537; 58 L. J. Q. B. 302; 60 L. T. 318; 37 W. R. 378.

(4) 19 Ind. Cas. 12; 36 M. 544; 24 M. L. J. 333; 13 M. L. T. 268; (1913) M. W. N. 328.

been refused; and the Chief Justice thought that it was impossible to infer from this enactment that the Legislature intended to lay down by implication that the acceptance of payment by one of several promisees operated as a discharge of the claims of the others. But I am bound to say that the opinion of the majority of the Bench appears to be more in conformity with reason. If it is admitted that an offer to one of several joint promisees, whether accepted or not, has the same legal consequences as an offer to all of them, the only possible conclusion appears to be that the acceptance of the offer discharges the obligation. It seems to me that the answer to the question can be found within the four corners of the Contract Act, and that it is not necessary, therefore, to look to the general law. Even if this view is not correct, it appears to me that apart from the presumption referred to above, which is of doubtful application in India, there can be no real question as to what the law is: the only question is as to what the facts in each particular case are. I hold, therefore, that the plaintiff was entitled to succeed. If the presumption is admitted to arise that the creditors were tenants-in-common, and not joint tenants, it was rebutted in this case, and if the presumption does not arise, *a fortiori* the mortgagees were joint promisees and the payment to one of them discharged the whole debt.

The appeal must, therefore, be allowed, and the decree of the Court of first instance is restored with costs throughout.

Appeal allowed.

ALLAHABAD HIGH COURT.

CIVIL MISCELLANEOUS REFERENCE NO. 421 OF 1917.

February 5, 1918.

Present:—Mr. Justice Tudball and Mr. Justice Rafique.

Musammat BHANA AND ANOTHER—DEFENDANTS—PETITIONERS

versus

GUMAN SINGH AND OTHERS—PLAINTIFFS—OPPOSITE PARTIES.

Registration Act (XVI of 1908), s. 17—Agreement by reversioner not to enforce right to declaration, whether compulsorily registrable.

An agreement by the reversioners of a deceased Hindu not to enforce their right to a declaration in respect of a gift of the property of the deceased made by the latter's widow is not a document conveying any right, title or interest or purporting or operating to extinguish any right, title or interest, vested or contingent, in immoveable property and is not, therefore, compulsorily registrable. [p. 630, col. 1.]

Civil miscellaneous reference from the Under-Secretary to Government, United Provinces, to this Court.

Mr. *Lakshmi Narain*, for the Petitioners.

Mr. *Damodar Das*, for the Opposite Parties.

JUDGMENT.—This is a reference under Rule 17 of the Rules and Orders relating to the Kumaun Division of 1894. The facts are simple. *Musamamt* Bhana, a Hindu widow having a widow's estate, executed a deed of gift in favour of her husband's sister's sons. The plaintiffs are the presumptive reversioners. After the deed of gift had been executed they were preparing to bring a suit for a declaration that the deed of gift was not binding upon them. The donees and the plaintiffs came to terms. The plaintiffs executed an agreement in favour of the donees, under which they agreed not to enforce their right to the declaration which they were about to seek in consideration of the donees transferring to them half of the property and also undertaking to support *Musammat* Bhana for the rest of her life and to pay off her debts. The donees executed an agreement at the same time, under which they agreed that they would transfer half the property to the plaintiffs and would support *Musammat* Bhana and pay her debts. In spite of this agreement the plaintiffs have brought the present suit, in which they ask for a declaration that they are heirs to the property and that the deed of gift should be set aside as against them. The Court of first instance held that in view of the agreement the plaintiffs' suit was barred and dismissed it, the defendants being fully willing to carry out their terms of the contract. The plaintiffs appealed. The Appellate Court held that the agreement ought to have been registered under section 17 of the Registration Act and as it had not been registered, it was not

admissible in evidence and this evidence having vanished, it gave the plaintiffs a declaration that the deed of gift was not binding upon them. We are asked our opinion as to whether the decree passed by the Commissioner was correct, and if not, what decree should have been passed in the case. We have examined the agreement. In our opinion it was not compulsorily registrable under section 17 of the Registration Act. It conveyed no right, title or interest, nor did it purport or operate to extinguish any right, title or interest, vested or contingent, in immoveable property of the value of Rs. 100. All that the plaintiffs agreed to do was to forego their right to sue for a declaration for a certain consideration. As reversioners they had no transferable right, title or interest in the property, nor did they purport to transfer, any such right They simply agreed not to sue for the declaration for which they have now sought by this suit in Court. The document was clearly admissible in evidence. In the circumstances of the case as stated above, we think that the plaintiffs' suit was rightly dismissed by the Court of first instance. It is nowhere alleged that the defendants have refused to carry out their agreement. In the course of the suit the defendants expressed their willingness to be faithful to their word. There was consideration for the agreement and we think that the plaintiffs were bound thereby. In our opinion the decree of the Appellate Court should be set aside and that of the Court of first instance should be restored and the defendants should have their costs in all Courts including the costs of this reference. The costs in this Court will include Rs. 50, Pleader's fees of the defendants.

Appeal decreed.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 924 TO 926 OF 1916.

November 15, 1917.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

VYSRAVANATH MANAKAL RAMAN SOMAYAJIPAD—PLAINTIFF—APPELLANT

versus

MARAMPURE THALAKKODI MADHATHIL KARNAVATHI KUNHU KUTTI KOVILAMMA AND OTHERS—DEFENDANTS—RESPONDENTS.

Malabar Law—Uralan *and* Samudayi, *position and functions of—Principal and agent—Prescription, acquisition of title by, by* Samudayi *to* Devaswom *properties—Right of suit by* Samudayi—*Possession, proof of—Limitation Acts* 1859, 1871, 1908—*Pleadings, construction of—Litigating large rights in trivial proceedings—Practice—Court, duty of.*

A Samudayi cannot accurately be described in all cases as the agent of the Uralan. There may be a temple in which the Uralan is the person in whom the property and the management vest and such a temple may have a Samudayi who will be the agent of the Uralan. In such a case, the Samudayi will not be entitled to sue or defend actions in his own name. There may be institutions in which an absentee Uralan performs only the functions of a supervisor or controller, leaving the management and legal ownership of the Dewaswom properties in the Samudayi. The Uralan in such a case will have very nearly the powers of a Temple Committee and the Samudayi those of a trustee. The right of suit will be in the Samudayi in these institutions. There may be a temple in regard to which the founder's family which exercised the Uraima right ceased to exist generations ago. In such a case the Samudayi will be the real Uralan. [p. 633, col. 2; p. 634, col. 1.]

In the case of hereditary Samudayis, the declarations and acts of a Samudayi will not bind his successor-in-office belonging to the same family. [p. 636, col. 1.]

Alike under the Limitation Act of 1908 as under the earlier Acts of 1859 and 1871 it was competent for the Samudayi to acquire a title by prescription to the Devaswom properties and to be recognised as a trustee. [p. 635, col. 1.]

Kesava Pillai v. *Pedu Reddi*, 1 M. H. C. R. 258, dissented from.

A Samudayi, therefore, is entitled to sue for recovery of the Devaswom properties on proof of possession adverse to that of the Uralan and of repudiation of his agency. It is not necessary for him to show that he became a trustee. It is enough if he proves possession and the management of the temple affairs. [p. 637, col. 2.]

Per *Napier*, J.—A hereditary Samudayi, whose office entails the doing of many acts of management, is not a mere agent of the Uralan affected by the ordinary principles of agency. [p. 638, col. 2.]

Per *Seshagiri Aiyar*, J.—Courts should, as far as possible, refuse to allow plain plaints to be construed

as containing hidden causes of action and pronounce opinion thereon. Litigants should not convert trivial and innocuous proceedings into suits for adjudication of grave issues and substantial rights. [p. 631, cols. 1 & 2.]

Second appeals against the decrees of the Court of the Subordinate Judge, South Malabar, at Calicut, in Appeal Suits Nos. 875 to 877 of 1914, preferred against the decrees of the Court of the District Munsif, Ottapalam, in Original Suits Nos. 205, 206 and 479 of 1913.

Mr. *K. Srinivasa Aiyangar*, for the Appellants.

Mr. *T. R. Ramachandra Aiyar*, for the Respondent.

These second appeals coming on for hearing on the 1st October and the 1st, 2nd and 5th November 1917 and having stood over for consideration till this day, the Court delivered the following

JUDGMENT.

SECOND APPEAL No. 924 OF 1916.

SESHAGIRI AIYAR, J.—The plaintiff styling himself as the Uralan and Udama of the Kottaseri Devaswom, sues to redeem a Kanom of the year 1898 granted by him to the Tarwad of defendants Nos. 1 to 11. Defendants Nos. 12 to 18 are now in possession of the properties. The 19th defendant obtained a surrender of the properties from defendants Nos. 1 to 11 and claimed to be the real Uralan of the Devaswom. The defendants denied that the plaintiff was the Uralan and disputed his title to recover the demised properties. Both the Courts below, though not for the same reasons, dismissed the plaintiff's suit. Hence this second appeal.

Before dealing with the merits of the case, it is desirable to draw attention to a feature of Malabar litigation which amounts almost to an abuse of the machinery of civil administration. I do not in the least feel influenced by considerations of the quantum of Court-fees paid. If the Legislature has framed its provisions in such a way that a right can be litigated by paying a small fee, the litigant is entitled to avail himself of that privilege to his best advantage. But where litigants are permitted to avail themselves of the indulgence of the Court to convert what on the face of it appears to be a trivial and innocuous proceeding into a suit in which grave issues involving very substantial rights and large properties are adjudicated upon, it is the duty of the Court to use all its powers to prevent such an abuse.

To come to particulars. The present suit is based on a Kanom, but the matter decided has practically no bearing on that question. It is the right of rival Uralans, that of the plaintiff and of the 19th defendant, that has been considered in judgments of enormous length which necessitated the examination of numerous documents old and new. With what result? In second appeal we are called upon to pronounce our opinion on findings which in some instances we can treat as dealing with facts, and which in very many respects necessitate an enquiry into mixed questions of fact and law. If the respective rights of the plaintiff and of the 19th defendant were directly in issue, the suit would have been filed in a different Tribunal from which a first appeal would have been preferred to this Court. I cannot help feeling that the leniency with which such litigations are treated may enable a suitor to choose his own time and forum for prosecuting his rights. Fortunately the integrity of the subordinate judiciary in this country is so well established that there is not much fear of miscarriage of justice by such devices. But it is not difficult to imagine circumstances which may lend themselves to the unscrupulous handling of a clever suitor to the detriment of his opponent. I hold very strongly with Mr. Justice Wilkinson that Courts should, as far as possible, refuse to allow a plain plaint to be construed as containing hidden causes of action and to pronounce an opinion thereon. The parties suffer more severely than the Government revenue through such an indulgence. I feel no doubt that the use of all the powers conferred on Courts relating to the addition or deletion of parties, to the returning of plaints for amendment or for presentation to the proper Court with reference to the substantial questions in issue, would tend to advance justice and not to retard it. It may discourage,—what is now pursued as a fine art—the compelling of Courts to deal with questions which *ex facie* have no relevancy to the reliefs stated in the plaint.

Before I leave this subject, let me refer to another concrete instance taken from

this second appeal, which enforces in a marked degree the necessity for the above caution. For nearly half a century the plaintiff's Illom and the 19th defendant's Kovilagom have been playing a game of hide and seek. They dared not face each other. In suits for rent and for redemption, tenants were encouraged to set up the rights of the 19th defendant's Kovilagom. Documents were summoned from and produced by the rival claimant Some of them were characterised as impudent forgeries in the earlier litigation; but as time has rolled on, they have gained sanctity by age: they have now risen to the distinction of being reverentially handled lest they crumble to pieces and to the dignity of being regarded by the translator as undecipherable in places as to words, syllables and phrases. I am referring to Exhibit VII in particular; let us look at the result. On the present occasion, the Subordinate Judge, differing from the District Munsif and differing from a previous Subordinate Judge, has held that the document is genuine. In second appeal, we are perforce compelled to accept that finding. If in the earlier litigation, the Court had refused to raise any issue on the rival claimants' rights or to permit subpœnas to be taken out on those issues, the question would soon have been brought to a head and the parties would have directly raised the point earlier. I have made these prefatory remarks, as I feel that the laxity of the Courts helps dishonest litigants to resort to devices for stifling justice and for availing themselves of the processes of law to gain an undue advantage over honest litigants.

Now I shall deal with the case, bearing in mind the limitations which the law imposes on a Court sitting in second appeal. Mr. K. Srinivasa Aiyangar for the appellant and Mr. T. R. Ramachandrier for the respondent have placed before us all that can be said in favour of their respective clients. The main points for decision are:—

(*a*) Whether the Kovilagom of the 19th defendant has a subsisting Uraima right in the plaint Devaswom;

(*b*) Whether the plaintiff is only a Samudayi; if so, what are his functions and privileges,

A large number of subsidiary issues have to be considered in connection with these two questions. The history of the Uraimaship of the Devaswom is lost in antiquity. It is not disputed that three Nambudri Illoms were entitled originally to contribute each one Uralan to the temple. Two of them became extinct before 1841. The last Illom, which may for brevity's sake be called the Oravil Illom, had an undoubted claim to one Uralan. From Exhibit XV, it is clear that the last surviving member of the Oravil Illom assigned the Uraima right to the Padinhare Kovilagom, of which the 19th defendant is the present Thamburatti. From subsequent documents which it is not necessary to refer to at length, it appears that the transferor regarded himself as jointly entitled with the Padinhare Kovilagom to be the Uralan of the temple. It may be that the last member of the Oravil Illom acquired the rights of the two other Illoms by Attaladakkam right. It is unnecessary to pursue this enquiry. The Oravil Illom became extinct in 1843.

To my mind, it admits of no doubt that originally the plaintiff's predecessors regarded themselves only as agents of the Uralan. It is the subsequent development of their rights and the extinction or supersession of the rights of the 19th defendant's Kovilagom that have to be considered in this case. I may at once say that the pretension of the plaintiff to style himself as the Udama or the owner of the Devaswom has not a shred of evidence to support it. Mr. Srinivasa Aiyangar did not argue the case on that footing. His contention was that since 1860 the plaintiff's predecessors have been setting themselves up as the sole managers of the Devaswom and have thereby acquired an indefeasible right to manage its affairs, by whatever name they may be called. He also argued that the 19th defendant's Kovilagom lost the right, if they possessed it at any time, by the bar of limitation.

It is common ground that the transfer referred to in Exhibit XV was incapable of conferring a legal right to the Uraimaship. Mr. Ramachandrier contended that by exercising the rights of a Uralan since 1841, the 19th defendant's Kovilagom acquired a prescriptive title to be Uralans, that the management by the plaintiff was only in

his capacity as Samudayi, that the latter did not and could not acquire the Uraima right, and that, therefore, plaintiff has no right to recover possession of the demised properties.

These arguments of the learned Vakil necessitate an enquiry into the respective rights and duties of a Uralan and of a Samudayi. It has to be borne in mind, in this connection, that the plaintiff's Illom have been the hereditary Samudayis of the Devaswom long before 1841. Before referring to the cases which deal with the functions of the various dignitaries connected with a Devaswom, it may be useful to enquire into the history of their offices. In Malabar, as on the East Coast, temples, in most instances, owe their existence to the munificence of some ruling chief or nobleman. But it would be inaccurate to say that all of them have been so founded. In a small village, the villagers might establish a temple—not a few instances of this kind are to be found on the East Coast, and I do not suppose religious evolution has been working differently on the West Coast. Whenever an influential chief or Karnavan founded a Devaswom, he would in addition to being its founder be its Uralan also. Distance from the temple and other considerations might induce him to appoint others to manage the affairs of the Devaswom. The word Samudayam denotes an assembly of persons. That is its etymological meaning. The chief inhabitants of a village where the temple is founded would naturally be the persons to whom the management would be entrusted. They may among themselves select a person to be their agent, or it may be that the founder himself might ask one person among the villagers to be the manager. In course of time, the successive discharge of duties by the members of the same family would ensure to that family the privilege of giving the manager from its members. This is the process by which the principle of heredity has been evolved all over the world; and in a country like India, where reverence for established institutions and for long-continued practices is a sort of fetish, heredity gains recognition far more easily than elsewhere. In Malabar these conservative tendencies are at their highest. In my opinion, this process accounts for the existence of what are known as hereditary Samudayis. There are other hereditary offices connected with a Devaswom. I feel no doubt that at its inception the Samudayi was only the agent of the Uralan, if there was one, but the reasoning by which a hereditary Samudayi can be regarded as a perpetual agent is a conception of law which demands serious consideration. Further, it is not correct to assume that the Samudayi remained an agent, pure and simple, even after the extinction of the house which founded the Devaswom. The suggestion of Mr. Ramachandrier that, if the Tarwad or Kovilagom which founded the Devaswom became extinct, the right of the Uralan would escheat to Government requires more authority to support it than the learned Vakil has given us. After the policy declared in Act XX of 1863 it is open to argument that the Government divested themselves of their right to claim this particular kind of escheat, even if the proposition is unexceptionable that the right of trusteeship which vested in the owner of temporal properties would pass by reversion to the Crown by virtue of his private properties having escheated. It is more natural to suppose that the disappearance of the hereditary Uralan will be followed by the development of the Samudayam into the Uralan. In Moore's Malabar Law this process is hinted at as of constant occurrence. Mr. Justice Holloway seems to have set his face against this practice.

Before passing away from this subject, I may say that the main conditions regarding the respective functive functions of these officers of the temple are not to be gathered from *a priori* notions regarding their rights as understood in ancient times, but from the usages of the particular institutions concerned. There may be a temple in which the Uralan is the person in whom the property and the management vest and such a temple may have a Samudayi who will be the agent of Uralan. In such a case, the Samudayi will not be entitled to sue or defend actions in his own name. There may be institutions in which an absentee Uralan performs only the functions of a supervisor or controller, leaving the management and legal ownership of the Dewaswom properties in the Samudayi. The Uralan in such a case will have very

nearly the powers of a Temple Committee and the Samudayi those of a trustee. The right of suit will be in the Samudayi in these institutions. There may be a temple in regard to which the founder's family which exercised the Uraima right ceased to exist generations ago. In such a case, the Samudayi will be the real Uralan.

On the merits, the first point raised by Mr. Srinivasa Aiyangar was that the suit should be confined to the consideration of the question whether defendants Nos. 1 to 11 have any valid defence to surrendering property which they obtained under the demise of 1898 and that the rival claims of the plaintiff and of the 19th defendant should not be gone into in this case. He argued that the 19th defendant was impleaded, not because he claimed the Uraima right, but on the ground that he was the assignee of the other defendants. In view of the principles enunciated by me in the opening paragraph of this judgment, I would have been prepared to strike out all the averments on either side which do not relate to the question of surrender, had it not been for the fact that the plaintiff deliberately challenged the title of the 19th defendant and invited a decision upon the respective titles of the parties. Even this may be ignored, but for the fact that the questions involved in the suit have been elaborately gone into in the two Courts and it would result in sanctioning a waste of judicial time and energy, if, at this stage, the plaint is directed to be amended by striking out the contentions relating to the 19th defendant or is directed to be presented to the proper Court on the ground that the substantial relief claimed in the plaint should be properly valued. The plaintiff apparently felt emboldened by his successes against tenants behind the back of the 19th defendant and was prepared to meet him in the open field. The 9th defendant thought that this was her last chance and concentrated all her strength upon establishing her case. Much as I regret that the Courts below should have allowed this suit to be treated in the way it has been done, I am not prepared to wipe out all that has been put on the record by either side and to treat the suit as one for redemption, pure and simple. In this view, I do not consider it necessary to express any opinion on the interesting question of estoppel by tenant argued by the learned Vakil for the appellant.

The next contention was that the Kovilagom of the 19th defendant had no right to the Uraima right. Until the Judicial Committee ruled in *Rajah Vurmah Valia* v. *Ravi Vurmah Kunhi Kutty* (1) that an assignment of the trusteeship was opposed to public policy, it seems to have been the practice, not only on the West Coast, but also on the East Coast to transfer such rights. But the pronouncement of the Committee must be deemed to have declared the pre existing law. Therefore, the question is whether the Padinhare Kovilagom acquired a prescriptive title to be the Uralan of the Devaswom. The learned Vakil for the appellant, contended that beyond an acknowledgment by the plaintiff's Illom of their liability to render accounts, the Padinhare Kovilagom was not shown to have had any possession of the Devaswom properties either actually or constructively and that consequently no adverse possession was acquired. The documents to which the learned Vakil for the respondent drew our attention show that the 19th defendant's Kovilagom was in management of the properties through the plaintiff's Illom. Exhibits XXXIII, XIII, I, LXXXVII, I(*a*) and XII, among other documents, prove active participation in the affairs of the Devaswom. The Subordinate Judge has found that up to 1860 the Padinhare Kovilagom "took an active part in looking after the affairs of the plaint temple"; and I think there is ample evidence to support this finding. I, therefore, hold that the 19th defendant's Kovilagom would have acquired a prescriptive title to the Uraimaship by the year 1860 if the law permitted them to do so. As regards the suggestion that that acquisition must be restricted to the right of one of the Uralans alone and that the plaintiff must be deemed to have adversely enjoyed the other two Uraima rights, it is enough to say that there is no trace in any of

(1) 1 M. 235; 1 Ind. Jur. 134; 4 I. A. 76; 3 Sar. P. C. J. 687; 3 Suth. P. C. J. 382; 1 Ind. Dec. (N. S.) 156.

the numerous documents filed in the case that the plaintiff's Illom prescribed for the rights of the two Uralans of the two extinct Illoms.

The finding of the Subordinate Judge on this question is stated in these terms at the end of paragraph 18: "From 1886 onwards plaintiff's Mana was allowed to have its own way in all matters". Mr. Srinivasa Aiyangar contended that, as under the old Limitation Acts in force up to the year 1871, there was no provision for acquisitive prescription, even granting that the 19th defendant's Kovilagom had possession of the Devaswom properties through their agents, they were not entitled to be regarded as Uralans. I was at first inclined to agree with this contention, but the course of decisions in the other Presidencies to which Mr. T. R. Ramachandrier drew our attention shows that even under the old Limitation Acts and Regulations, title by prescription was held to have been acquired. The decision in *Gunga Gobind Mundul* v. *Collector of 24-Pergunnahs* (2) certainly lends support to this proposition. At first it looks as if the suit brought by the plaintiff in that case was dismissed as being barred by limitation, but the observations on page 362 suggest that even under the old Acts a prescriptive title could have been acquired. This was the interpretation of that decision adopted in *Brindabun Chunder Roy* v. *Tara Chand Banerjee* (3). The Calcutta High Court have taken that view consistently. See *Gossain Das Chunder* v. *Issur Chunder Nath* (4) and *Ram Chunder Ghosaul* v. *Juggutmonmohiney Dabee* (5). In *Jagamba Gosvamini* v. *Ram Chandra Goswami* (6) Justices Rampini and Pratt reviewed all the earlier decisions of their Court and said that notwithstanding the fact that there was no provision in the earlier Regulations and Acts of Limitation similar to section 29 of the Act of 1871, title by prescription could have been acquired under the old Act, see page 317. In *Jagrani Bibi* v. *Ganeshi* (7) the same view was enunciated, following *Gossain Das Chunder* v. *Issur Chunder Nath* (4) and the decision of the Judicial Committee in *Gunga Gobind Mundul* v. *Collector of 24-Pergunnahs* (2). In *Radhabai* v. *Anantrav Bhagvant Deshpande* (8) the Full Bench of the Bombay High Court accepted this view of the law. See the judgment of West, J., at pages 228 and 229. As against these decisions there is an old decision of this Court in *Kesava Pillai* v. *Pedu Reddi* (9), in which it was pointed out that under the Act of 1859 no prescriptive title could be acquired. I do not think that it is safe to follow this ruling in preference to the pronouncement of the Judicial Committee which has been accepted in all the other High Courts. It is to be borne in mind that under the English Law even before the Statutes contained any provision by way of prescription the English Courts held that continued long possession adversely to the owner would confer title to the property. I, therefore, am of opinion that the 19th defendant's Kovilagom must be deemed to have acquired a prescriptive right to the property before 1860.

The next contention of the learned Vakil for the appellant was that since 1860 the 19th defendant's Kovilagom ceased to manage the temple affairs and that the plaintiff's Illom acquired a prescriptive title thereto as Uralan. Mr. Ramachandrier's answer was two-fold. He relied on the principle that "once a Samudayi always a Samudayi", and contended that the plaintiff's Illom was incapable of acquiring a prescriptive title so long as it did not divest itself of the functions of a Samudayi, *secondly*, he contended that the course of conduct pursued by the plaintiff's Illom showed that they only prescribed for a Samudayi's right and for no more.

As regards the first contention the learned Vakil referred to section 109 of the Evi-

(2) 11 M. I. A. 345; 7 W. R. P. C. 21; 1 Suth. P. C. J. 676; 2 Sar. P. C. J. 284; 20 E. R. 131.
(3) 20 W. R. 114; 11 B. L. R. 237.
(4) 3 C. 224; 1 Ind. Dec. (N. S.) 731.
(5) 4 C. 283 at p. 297; 3 C. L. R. 336; 2 Shome L. R. 2; 2 Ind. Dec (N. S.) 180.
(6) 31 C. 314.
(7) 3 A. 435; A. W. N. (1881) 9; 5 Ind. Jur. 652; 2 Ind. Dec. (N. S.) 219.
(8) 9 B. 198; 5 Ind. Dec. (N. S.) 133.
(9) 1 M. H. C. R. 258.

dence Act. It is true that once a relationship like that of principal and agent is established, it would require very strong evidence to show that that relationship was abandoned and that a new right was asserted to the knowledge of the principal. But the position in the present case is not that of an agent appointed by the principal. As I stated before, it is a case of hereditary agents under hereditary principals. What I understand by the term hereditary agent or Samudayi is this: that ordinarily you will have to look to the family of the Samudayi for a person to manage the affairs of the Devaswom. On the death of the previous Samudayi and by the fact of a member of the Samudayi's family entering upon the duties of a Samudayi, it may be taken that he was impliedly appointed by the then Uralan to discharge the duties of an agent. It would not follow from this that the acts and declarations or omissions of the previous Samudayi who was a member of the same family would be binding upon the succeeding Samudayi. I do not say that there should be a *sannad* of appointment in the case of each successor, but I would require very strong authority to convince me that each succeeding agent, though he belonged to the same family, was bound by the acts or conduct of his predecessor-in-office. Therefore, granting for the sake of argument that by Exhibits VII and XLIV the Samudayi in office at the time recognised the right of the 19th defendant's Kovilagom, it does not follow that that acknowledgment would affect his successor. The Subordinate Judge has given the dates of succession of the various Samudayis from 1843. It is clear from that statement in paragraph 3 that the Samudayi who acknowledged the title of the 19th defendant's Kovilagom in 1843 was succeeded by one Parameswaran Nambudri who died in 1852, that this man was succeeded by Naryanan Somayajipad in 1872-1873 and that the plaintiff succeeded to the management in 1892 93. Now if there is evidence from 1892 onwards that the plaintiff repudiated, to the knowledge of the 19th defendant's Kovilagom, the title of that Kovilagom and asserted his right to be independent of that Kovilagom, I fail to see why the recognition by his ancestor in 1843 should be against his setting up a right in himself. In 1892-93 there was a very important proceeding to which sufficient attention has not been paid by the Subordinate Judge. In that year the Government contemplated instituting proceedings in escheat regarding the properties and rights possessed by the Oravil Illom. It is conceded that to this proceeding the plaintiff's Illom as well as the 19th defendant's Kovilagom were parties. Mr. Ramachandrier relied upon these proceedings on the ground that the Government dropped their intention of claiming the properties by escheat because the 19th defendant's Kovilagam established its right to them. It may be that that consideration operated on the Collector to give up his idea of claiming the properties of Oravil by escheat, but at the same time it is clear that the plaintiff's Illom set up its independent right to manage the Devaswom to the exclusion of the 19th defendant's Kovilagom. As the 19th defendant's Kovilagom was a party to these proceedings, her predecessors-in interest must have been aware of the adverse claim set up by the plaintiff's Illom.

Now the question is as to whether this assertion conferred a right on the plaintiff's Illom to manage the properties without the intervention of the 19th defendant's Kovilagom. I am not now concerned in saying that the assertion amounted to claiming Uraima right itself. It may be that the plaintiff did not until 1902 set up a right as Uralan, but if the plaintiff's predecessor Narayanan Somayajipad asserted that he was entitled to manage the properties of the Devaswom on the ground that there are no Uralans for the temple, will not that confer a right upon him to sue in his own name to recover property on behalf of the Devaswom? Mr. Ramachandrier strongly relied upon the decision in *Patinharipat Krishnan Unni Nambiar* v. *Chekur Manakkal Nilakandan Bhattathiripad* (10) for the proposition that a Samudayi can never sue to recover trust property. I have examined this case very carefully. I do not think that the present case is covered by that judgment. At the same time, I must express my respectful dissent from some of the very broad propositions enunciated by the learned Chief Justice. Mr. Justice Innes' judgment is not really in conflict with my view. It was apparently

(10) 4 M. 141; 1 Ind. Dec. (N. S.) 933.

found in that case that there was an Uralan in active management and that the hereditary Samudayi was appointed by that Uralan. The learned Judge points out that the religious institution was in the hands of trustees or Uralans. In that view of the facts the learned Judge was right in holding that the Samudayi could not maintain a suit in his own name. The learned Chief Justice states that the powers of the Samudayi are confined to the management of the temple and that when occasion requires, resort should be had to the course of applying to the Uralans to lend their names. If it was intended to lay down as a general proposition of law that under no circumstances could a Samudayi institute a suit in his own name, I would respectfully dissent from the proposition. But, as I said before, the facts of the case justify the conclusion arrived at in the judgment of the Court. The other case relied upon is *Kunjunneri Nambiar* v. *Nilakunden* (11). The judgment in that case is very short and from the statement of facts it is clear that the Samudayam was a hereditary one and that the Samudayi executed the Kanom deed as the agent of an existing Uralan. *Rama Varar* v. *Krishnen Nambudri* (12) was a case where the Samudayi managed the temple affairs under a written agreement executed to the Uralan. On the other hand, we have some unreported decisions in which it has been held that a Samudayi can maintain a suit in his own name. Second Appeal No. 61 of 1881, Second Appeal No. 1688 of 1888 and Second Appeal No. 2256 of 1914. The truth is, in a conservative country like Malabar, where the dead weight of pre-existing custom is found to be intolerable, recourse is being had constantly to circumvent that custom by circuitous methods. It may not be the province of the Court to encourage such devices, but where a long-standing practice has come into existence which is not in strict conformity with preconceived notions and which is not opposed to reason or justice, Courts will not be justified in falling back upon old usage and to refuse to pay attention to the course of development in recent years. It may be that a Samudayi was not originally intended to usurp the functions of a trustee, but it would be idle to deny that they have successfully usurped the duties of the trustee in recent years, have completely ignored the Uralans, and have placed themselves in possession of the Devaswom properties. I am not, therefore, prepared to accede to the contention of Mr. Ramachandrier that the moment a person is described as a Samudayi he must be confined to the exercise of the functions which in ancient times were considered to be his, and that he should not be permitted to acquire new rights and obligations. The cases quoted by him only show that there must be an open and notorious disavowal of agency before a new right is prescribed. *Williams* v. *Pott* (13), *Burdick* v. *Garrick* (14), *Attorney General* v. *Corporation of London* (15), *Corea* v. *Appuhamy* (16) and *Lyell* v. *Kennedy* (17) are all cases where the Courts required the strongest proof on the part of the agent who set up a title adverse to the principal. I do not take these decisions to lay down that under no circumstances can an agent prescribe for the rights of the principal. On the facts of the present case I am prepared to hold that there has been a distinct repudiation of agency by the plaintiff's Illom and the acquisition of an independent right to manage the Devaswom affairs without recourse to an Uralan. It is not necessary for me to say that the plaintiffs have become trustees. As was pointed out by the Judicial Committee in the case of *Jagadindra Nath Roy* v. *Hemanta Kumari Debi* (18), in order to enable a person to sue on behalf of a religious institution, all that is necessary is possession and management of its affairs. If both these are

(11) 2 M. 167; 5 Ind. Jur. 130; 1 Ind. Dec. (N. S.) 387.

(12) 3 M. 270; 4 Ind. Jur. 622; 1 Ind. Dec. (N. S.) 744.

(13) (1871) 12 Eq. 149 at p. 151; 40 L. J. Ch. 775.

(14) (1870) 5 Ch. 433; 39 L. J. Ch. 369; 18 W. R. 387.

(15) (1850) 2 Mac. & G. 247; 12 Beav. 171; 1 H. L. C. 440; 2 Ha. & Lw. 1; 19 L. J. Ch. 314; 14 Jur. 205; 42 E. R. 95; 86 R. R. 92.

(16) (1912) A. C. 230; 81 L. J. P. C. 151; 105 L. T. 836.

(17) (1889) 14 A. C. 437; 59 L. J. Q. B. 268; 62 L. T. 77; 38 W. R. 353.

(18) 34 C. 129; 31 I. A. 203; 8 C. W. N. 809; 6 Bom. L. R. 765; 1 A. L. J. 585; 8 Sar. P. C. J. 698.

found, it does not matter by what name the person is known. Moreover since 1892 the plaintiff's Illom had been granting demises in their own name and have been instituting suits to recover demised properties in their own name. The 19th defendant's Kovilagom never instituted any suit or granted any demise since at least 1860. Under these circumstances, I have come to the conclusion that the right to institute a suit on behalf of the Devaswom has become vested in the plaintiff's Illom and that it is not open to defendants Nos. 1 to 11 to refuse to surrender the properties which they obtained on demise from the plaintiff.

On the question of what would suffice as repudiation of agency, I may refer to *Dadoba* v. *Krishna* (19), *Nabab Mir Sayad Alamkhan* v. *Yasinkhan* (20) and *Sankaran* v. *Krishna* (21) quoted by Mr. Kutti Krishna Menon. It is true that in Travancore and Cochin, the Samudayi is regarded as being entitled to sue for rents but not to sue to recover possession. See *Nilakandaru* v. *Nilakandan* (22). These cases must be confined to Samudayis who have been appointed by the Uralans. In conclusion I must guard myself by saying that I do not decide that the 19th defendant has no rights in the temple. Whether she is still Uralan, and if she is, whether her rights are only those of supervision and control may have to be decided. It is enough for the disposal of the present litigation to say that the plaintiff has acquired a prescriptive right to manage the Devaswom properties by granting Kanoms and by instituting suits for redemption, etc., and is entitled to possession. I must, therefere, reverse the decree of the Court below and remand the appeal. There is issue No. 8 regarding improvements which have to be decided by the Court of Appeal. In the circumstances of this case, having regard to the extravagant rights set up by the plaintiff and to the fact that the 19th defendant is not altogether an interloper, I think it is proper that each party should be directed to bear its own costs hitherto incurred.

(19) 7 B. 34; 4 Ind. Dec. (N. S.) 22.
(20) 17 B 755; 9 Ind. Dec. (N. S.) 496.
(21) 16 M. 456; 5 Ind. Dec. (N. S.) 1024.
(22) 18 Travancore Law Reports 129.

NAPIER, J.—I agree and only wish to add that in my opinion the proposition that a hereditary Samudayi whose office entails the doing of many acts of management, is a mere agent of the Uralan and thus affected by the ordinary principles of agency, if that is what is intended to be laid down in the early cases, requires reconsideration.

SECOND APPEAL No. 925 OF 1916.

This second appeal follows the decision in Second Appeal No. 924 of 1916. The lower Appellate Court will have to decide issue No. 11 as well.

SECOND APPEAL No. 926 OF 1916.

Following the judgment in the principal case, the decree of the lower Appellate Court is reversed. The Subordinate Judge will now decide issues Nos. 2 and 6.

Appeals allowed;
Suits remanded.

M. C. P.

PATNA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 394 AND 395 OF 1917.

February 4, 1918.

Present:—Justice Sir Ali Imam, KT.

IN S. A. No. 394 OF 1917

SRIKISHUN LAL AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SHEOBALAK GOPE—DEFENDANT—RESPONDENT.

IN S. A. NOS. 395 OF 1917

SRIKISHUN LAL AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

AMRIT KUMHAR—DEFENDANT—RESPONDENT.

Registration Act (XVI of 1908), s. 17—Compromise containing lease, whether requires registration—Bengal Tenancy Act (VIII B. C. of 1885), s. 29—Compromise enhancing rent in contravention of section, legality of.

A compromise between landlord and tenant creating a lease and not incorporated in a decree of Court requires registration under section 17 (1)

SRIKISHUN LAL v. SHEOBALAK GOPE.

(*d*) of the Registration Act and is not admissible in evidence unless so registered. [p. 639, col. 2.]

An enhancement of rent of an occupancy holding in excess of that allowed by section 29 of the Bengal Tenancy Act agreed to by means of a compromise is illegal. [p. 639, col. 2; p. 640, col. 1.]

Appeals from decisions of the Additional District Judge, Gaya, dated the 11th January 1917.

Messrs. *K. P. Jayaswal* and *Lakshmi Kant Jha*, for the Appellants.

Mr. *B. Bose*, for the Respondents.

JUDGMENT.

S. A. No. 394 of 1917.

The plaintiffs-appellants instituted the suit for a declaration that the annual *jama* of the land in suit was Rs. 39-4-6, including road cess and public works cess, and that the orders of the survey authorities giving in the Record of Rights the *jama* at Rs. 20 with cesses may be cancelled. The defendant-repondent resists the suit and contends that the amount of the *jama* mentioned in the Record of Rights is the correct amount.

The plaintiffs-appellants base their claim to the higher *jama* on the ground that in a previous suit between the parties a compromise had been effected and that the petition of compromise filed in that case contains the clear agreement between the parties that the *jama* to be paid to the plaintiffs-appellants would be Rs. 39-4-6 with cesses per year. The Munsif who tried this case dismissed the suit. The learned Additional District Judge, who heard the appeal, has delivered a judgment confirming the decision given by the Munsif.

There are two grounds on which evidently the suit of the plaintiffs-appellants failed before both the Courts below.

The *first* ground is whether the petition of compromise filed in a previous litigation does not amount to a lease and as such was it not a document that should have been registered under section 17, clause (*d*) of the Registration Act.

The *second* ground taken is that the agreement would be invalid, inasmuch as it was to secure an enhancement of rent contrary to the provisions of section 29 of the Bengal Tenancy Act.

As regards the first point Mr. Jayaswal appearing on behalf of the plaintiff-appellants has contended that the petition of compromise was not a lease and that it amounted to no more than a mere agreement. He has relied for this contention on *Panchanan Basu* v. *Chandi Charan Misra* (1). The facts of that case are different from those of the present one. In that case the compromise petition did not amount to a lease within the meaning of clause (*d*) of section 17 of the Registration Act, because it was no more than a mere agreement to create a lease at a future date. This distinction was kept in view when that case was finally decided. In order to understand the compromise petition on which the contention of the plaintiffs-appellants is based, I have had the original read out to me and it seems to me that a proper construction of the intent, the meaning and purpose of that petition can leave no doubt in one's mind that it was a lease and not an agreement to create a lease in future. In this connection it may also be mentioned that the terms of this petition of compromise were not embodied in the decree that was drawn up in that suit. Therefore, the defect regarding non-registration of this petition of compromise remains insurmountable. In the circumstances it was rightly rejected as any evidence in this case.

With reference to the second ground, learned Counsel contends there is nothing to show that any enhancement within the meaning of section 29 of the Bengal Tenancy Act has taken place. In this connection the presumptive evidence of the correctness of the Record of Rights must be taken against the plaintiffs-appellants. The lower Appellate Court points out that there was no evidence to rebut the presumption. In the absence of such evidence it is not open to me to hold that the rent of this holding was not that which is contained in the Record of Rights. That being so, the question then is whether there has been an enhancement and whether that enhancement is contrary to the provisions of the Bengal Tenancy Act. Evidently it is far in excess of that which is permitted by the section. The Record of Rights shows that the holding in question is in the occupancy right of the defendant and there is nothing to show that the defendant is not an occupancy *raiyat*. The enhancement

(1) 6 Ind. Cas. 443; 37 C. 808; 14 C. W. N. 874.

therefore, is illegal. I, therefore, hold that the view taken by the two lower Courts of the two points of law raised before me by the learned Counsel on behalf of the plaintiffs-appellants was the correct view. The appeal is dismissed with costs.

The learned Counsel appearing on behalf of the plaintiffs-appellants has asked me to give him at least a modified decree in respect of the rent of the years in suit. His contention is that even if it be held against him, as I have already held, that the rent was Rs. 20 including cesses, he ought to get relief in respect of that. I am wholly unable to consider this question at the present stage of the hearing of this case. I also notice that no such claim was advanced as a ground in the memorandum of appeal filed in this Court.

S. A. No. 395 of 1917.

The plaintiffs-appellants in this case instituted this suit basing their claim to the reliefs contained in the plaint on a *kabuliyat* alleged to have been executed by the defendant-respondent. The whole basis of the plaintiffs' case is this document. The lower Appellate Court has declined to place any reliance on this *kabuliyat*, which is unregistered. The finding of fact, therefore, with regard to the genuineness of the *kabuliyat* is against the plaintiffs-appellants. One of the grounds taken by the learned Judge in refusing to accept this document as a genuine one is that although there was a previous suit between the parties the plaintiffs had not dared to use this document in evidence, though they have relied on it in this case as the very basis of their suit. As a finding of fact the trying Court also came to the same conclusion and alluded to the fact that this *kabuliyat* had never been in the previous proceeding between the parties put forward and that for the first time it saw the light of day was in the trial of the present suit.

The learned Counsel appearing on behalf of the plaintiffs-appellants has invited me to examine the document in question and drawn my attention to two seals—one of them purports to be of 1912 and the other of 1914. The present suit was instituted in 1915. Evidently, therefore, if these two seals are authentic, the impressions contained therein were impressions that were made before the institution of this suit. It is contended that these two seals represent the seals of Courts that decided the previous proceedings between the parties and that the impressions ought to be sufficient in themselves to establish the error into which on this point both the lower Courts have fallen. I have looked at these two seals with some care but even accepting that these two are genuine impressions there is nothing before me to satisfy me that these two seals were put down, firstly, by the authorities of the Courts they purport to be seals of, secondly, that they were made at or about the time when they purport to have been made, and thirdly, that they are seals of Courts that tried the previous proceedings between the parties. In the circumstances I am unable to get any help from an examination of the seal impressions that might support the contention of the learned Counsel appearing on behalf of the plaintiffs-appellants. In the course of the address on this point I was invited to look into a certified copy of some deposition that was taken in some of these previous proceedings. It was suggested that if I looked into these copies it would have appeared that the *kabuliyat* in question had as a matter of fact been used in the trial of proceedings between the parties on previous occasions. I declined to look into this deposition inasmuch as it was not brought on the record in the trial of this case, nor did I feel disposed to allow this deposition to be put in at this stage of the case without the other side having an opportunity of meeting any conclusion that might be deducible from an examination of this document.

In the circumstances and in the absence of any other point of law disclosed in the hearing of this second appeal, I have no option but to dismiss it with costs.

The learned Counsel appearing on behalf of the plaintiffs-appellants has asked me to give him at least a modified decree in respect of the rent of the years in suit. His contention is that even if it be held against him as I have already held that the rent was Rs. 20 including cesses, he ought to get relief in respect of that For the same reasons as given in Second Appeal No. 394 of 1917 I am unable to allow the plaintiffs-appellants any relief for the admitted rent of the years in suit.

Appeals dismissed.

PRAYAGA DOSS JEE VARU *v.* VENKAMA NAIDU.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1126 AND 1437 TO 1439 OF 1914.

October 16, 1917.

Present:—Mr. Justice Sadasiva Aiyar, Mr. Justice Spencer and Mr. Justice Bakewell.

Sri Mahant PRAYAGA DOSS JEE VARU —APPELLANT

versus

VENKAMA NAIDU—DEFENDANT—RESPONDENT IN S. A. No. 1126 OF 1914

P. GURAPPA NAIDU—PLAINTIFF—RESPONDENT IN S. A. No. 1437 OF 1914

MUNIAPPA NAIDU—PLAINTIFF—RESPONDENT IN S. A. No. 1438 OF 1914

A. RANGAPPA NAIDU—PLAINTIFF—RESPONDENT IN S. A. No. 1439 OF 1914.

Madras Estates Land Act (I Mad. of 1908), *ss.* 3 (4), 13 (3)—*Landlord and tenant—Tenancy, incidents of—Improvements, what are*—Mathiri kasavu *and* sadalwar *cesses, legality of - Irrigation with well water—Garden rates, levy of, legality of—Contract and usage, suit based on—Presumption—Pleadings, construction of—Court, duty of.*

Mathiri kasavu (straw rent) and *sadalwar* are charges incidental to a *ryot's* holding and are payable with the rent. [p. 642, col. 1.]

Venkata Perumal v. *Ramudu*, 27 Ind. Cas. 688; 39 M. 84; 28 M. L. J. 81; (1915) M. W. N. 132; 17 M. L. T. 129, followed.

A landlord is entitled to charge garden rates for crops grown with the aid of water from wells sunk by a *ryot* if they are based on any contract, express or implied, with the *ryot* or any local usage. [p. 643, col. 1; p. 644, col. 1.]

Section 13 (3) of Madras Act I of 1908 does not preserve the distinction between local usage and contracts for rents, express or implied, contained in section 11 of Act VIII of 1865. [p. 643, col 1.]

Where, therefore, a claim for enhanced rent is not based expressly in the plaint on a contract with the *ryot*, express or implied, but on custom, it is competent for the Court to go into the question whether the usage is the result of a valid contract. [p 643, col. 1.]

Arunachelum Chetty v. *Syyad Ahamed Ambalam*, 31 Ind. Cas. 539; (1916) I M W. N. 247; 2 L. W. 1117; 19 M. L T. 138, dissented from.

Pleadings in the Mufussil Courts, which are loosely drawn up and do not contain exhaustive statements as to the basis of claims and defences, describing in accurate legal language the alternative and distinctive ways of founding and describing the rights put forward therein, should not be taken too literally and the substance of the averments should be looked into. [p 643, col. 1.]

Where enhanced rent has been paid by tenants for a long period of time, not only can the existence of an agreement to pay rent at such rate be presumed but the consideration for the same can also be presumed. Both presumptions are presumptions of fact. [p. 642, col. 2.]

Section 13 (3) of the Madras Estates Land Act would not affect the liability of *ryots* to pay enhanced rents, if the improvements were made before the Act and if there had been a contract between the landlord and the tenant entered into before the passing of the Act to pay rent at such rates. [p 642, col. 1.]

Where wells are sunk by a *ryot* in estate *porambоke*, the mere abstention of the landholder from charging rent on the sites occupied by the wells might amount in law to a consideration for a contract to pay enhanced rates. [p. 642, col. 1.]

An improvement made by a *ryot* which prejudicially affects another land of the landholder, if made without his consent in writing, would not be an improvement of which the *ryot* could claim the advantage provided by section 13 (3) of the Act. [p. 642, col. 1.]

Second appeals against the decrees of the District Court, North Arcot, in Appeal Suits Nos. 792, 670, 718 and 719 of 1913, preferred against the decrees of the Court of the Revenue Divisional Officer, Chandragiri Division, in Summary Suits Nos. 434, 1316, 1317 and 1318 of 1912.

The Hon'ble Mr. *S. Srinivasa Iyengar*, Advocate-General (with him Messrs. *S. Gopalasami Iyengar* and *K. Srinivasa Iyengar*), for the Appellants.

These second appeals along with Second Appeals Nos. 1440 to 1447 of 1914 coming on for hearing on the 15th and 19th February 1917 and having stood over for consideration till the 28th February 1917, the Court (Sadasiva Aiyar and Spencer, JJ.) delivered the following

JUDGMENT.—In all these second appeals the appellant is the Mahant of Tirupati and the respondents are the *ryots* of Karvetnagar Estate. In all of them the question arises whether the landholder was entitled to charge garden rates for crops grown with the aid of well water. In Second Appeals Nos. 1437 to 1439 and 1440 to 1447 there is a question whether the landholder was entitled to charge for a second crop cultivated on dry land with the aid of well water. In Second Appeals Nos. 1440 to 1447 there is a further question whether the District Judge was right in disallowing the charge for *mathiri kasuvu* (straw rent), and in Second Appeals Nos. 1437 to 1439 whether he was right in disallowing the charge for *sadalwar* (stationery) which he allowed in the former batch.

In *Venkata Perumal* v. *Ramudu* (1)

(1) 27 Ind. Cas. 688; 39 M. 84; 28 M. L. J. 81; (1915) M. W. N. 132; 17 M. L. T. 129.

mathiri kasuvu and *sadalwar* were treated as charges incidental to the tenure of the land and payable with the rent. Following that decision we allow the appeals in this respect.

On the question common to all these appeals, the lower Courts are unanimous in finding that the wells were sunk at the cost of the *ryots* without any assistance from the landholder, but they have not decided whether they were sunk before or after the introduction of the Madras Estates Land Act, nor has the District Judge recorded any finding as to the length of time that these garden rates have been in force, although the Sub-Collector stated in his judgment that it was admitted that these rates had been accepted in all *faslies* from 1243 onwards. There is evidence that a number of wells are outside the holdings which they irrigate and are either in *poramboke* or in the *patta* land of other *ryots*. The District Judge was of opinion that it was immaterial whether the well was actually situated in the plaint lands or not. We cannot accept this view. In certain conditions it would be very material. An improvement which prejudicially affected another land of the landholder, if made without his consent in writing, would not be an improvement of which the *ryot* could claim the advantage provided by section 13 (3) of the Act *vide* the definition of improvement in section 3 (4).

In a similar case, coming from the same district, this Court in *Govind Doss* v *Gurram Chinnappa Naidu* (2), dealing with the case of wells sunk in estate *poramboke*, held that the mere abstention of the landholder to charge rent on the sites occupied by the wells might amount in law to a consideration for a contract to pay enhanced rates.

In *Govind Doss* v. *Gurram Chinnappa Naidu* (2) and *Venkata Perumal* v. *Ramudu* (1) it was decided that section 13 (3) would not affect the liability of *ryots* to pay enhanced rents if the improvements were made before the Act and if there had been a contract between the landlord and the tenant entered into before the passing of the Act to pay at such rates.

(2) 27 Ind. Cas. 869; 28 M. L. J. 136; 2 L. W. 142.

It was, moreover, held in *Govind Doss* v. *Gurram Chinnappa Naidu* (2) and in *Arumugam Chetti* v. *Raja Jagaveera Rama Venkateswara Ettappa* (3) that an implied contract to pay increased rent might be presumed from a continued payment for a number of years at such rates.

We do not follow the learned Judges who decided *Arunachelum Chetty* v. *Syyad Ahamed Ambalam* (4) that only the existence of agreements can be presumed by such payments spread over a long period of time but that consideration for such agreements cannot be presumed. Both presumptions are presumptions of fact. There is no principle by which Courts are to be enabled to make the one presumption and disabled from making the other. In *Armugam Chetty* v. *Jagaveera Rama Venkateswara* (5) this is recognised by one of the learned Judges who decided *Arunachelum Chetty* v. *Syyad Ahamed Ambalam* (4). For he says there—"Of course the consideration may be of the same *implied* nature as the covenant to pay."

In *Arumugam Chetti* v. *Raja Jagaveera Rama Venkateswara Ettappa* (5) Subramania Aiyar, J., declared that a presumption of consideration might be justified on the lost grant principle, on the ground that after a great many years it would be unfair to compel the landholder to prove consideration; but he declined to presume consideration on the facts of tha case, for the reason that there would be no difficulty in the landholder proving what the consideration was if payments had been made at a higher rate for short periods ranging only from one to 18 years. It was contended that as the plaintiff did not claim the enhanced rate on the basis of a contract supported by the consideration proceeding from him in the shape of an undertaking not to charge rent for the well—*poramboke* sites on which the tenants had sunk wells, and as he did not even set up an implied contract to be presumed from very long continued payments of higher rents, this Court could not in second appeal allow him to raise for the first time the ques-

(3) 28 M. 444; 15 M. L. J. 292.
(4) 31 Ind Cas. 539; (1916) 1 M. W. N. 237; 2 L. W. 1117; 19 M. L. T. 138.
(5) 8 Ind. Cas. 330; 35 M. 134 at p. 136; 9 M. L. T 76.

tion of the right of enhancement based on contract. Reliance is placed for this contention on the decision in *Arunachelum Chetti* v. *Syyad Ahamed Ambalam* (4), already quoted. But the distinction between contract rates and customary rates is a very subtle one as between landlords and tenants. No doubt section 11 of Act VIII of 1865 makes some distinctions between local usage and contracts for rents, express or implied, but section 13 (3) of Madras Act I of 1908 does not preserve this distinction. It is impossible to expect to find in the pleadings in Mofussil Courts exhaustive statements as to basis of claims and defences, expressing in accurate legal language the alternative and distinctive ways of founding and describing the rights put forward in the pleadings. The facts and the evidence to prove a contract, where the contract is a very old one, are almost the same as those on which a custom to pay enhanced rents has to be proved if such a custom is valid. In the cases of *Govind Doss* v. *Gurram Chinnappa Naidu* (2) and *Venkata Perumal* v. *Ramudu* (1) the claim put forward to enhanced rent was based on usage and the question whether the usage might have been the result of a valid contract was gone into by this Court without objection. As the learned Judges in the case reported as *Arunachelum Chetty* v. *Syyad Ahamed Ambalam* (4) refused to allow the claim to enhancement to be based on a contract owing to their construction of the language of Sir Subramania Aiyar's judgment in *Arumugam Chetti* v. *Raja Jagaveera Rama Venkateswara Ettappa* (3) (as regards whether consideration can be presumed from the evidence of long usage to pay higher rent) and as we differ from that construction, we do not feel ourselves bound by that decision to decline to make a remand so as to have a finding from the lower Appellate Court on the question of express or implied contract.

We must, therefore call for fresh findings from the District Judge on the following questions :—

(1) In which of these appeals are the wells which irrigate the *ryot's* holding situated in land for the occupation of which the landlord might legally but has not in fact, charged any additional rent?

(2) In each of these cases were the wells constructed before or after the passing of Madras Act I of 1908 ?

(3) For how many years in each case have the *ryots* been paying these increased garden rates without protest ?

The findings should be returned within two months from this date. Fresh evidence may be adduced Ten days are allowed for filing objections.

In compliance with the order contained in the above judgment the District Judge of North Arcot submitted the following

FINDINGS.

I am directed to submit findings on three new issues as specified in the judgment of the High Court.

2. In Appeal Suits Nos. 364 to 371 of 1913 corresponding to second Appeals Nos. 1440 to 1447 of 1914 on the file of the High Court, the parties have entered into a compromise that the rates of rent claimed in *Fasli* 1319 are to be considered as the proper rates payable by the *ryots* and that the suits should be dismissed accordingly, each party bearing his own costs throughout. Findings are, therefore, unnecessary in these suits.

3. As regards the other four suits the defendant in Appeal Suit No. 792 of 1913 and the plaintiffs in Appeal Suits Nos. 670, 718 and 719 of 1913 are *ex parte*. The appellant called the Village Monegar who is also a *ryot* owning lands there. He says he knows the lands of the plaintiffs in Appeal Suits Nos. 670, 7 8 and 719 of 1913 (Second Appeals Nos. 1437, 1438 and 1439 of 1914), but he does not know the defendant in Appeal Suit No. 792 of 1913 (Second Appeal No. 1126 of 1914). No new wells have been dug in the last 10 or 12 years, and all wells have been in existence as long as he can remember (he is now aged 30). When crop-*war* rent is charged the sites of the wells are allowed free of rent. No rents other than crop *war* have ever been paid. The plaintiff in Appeal Suit No. 718 of 1913 was examined as P. W. No. 1 in the lower Court, and he then alleged that he had dug a well three years previously and bought another one, and he had never previously raised wet crops. He, however, accepted a *patta* in the usual general terms. On the other hand P. W.

No. 4, plaintiff in one of the compromised suits, stated that the rates now entered in the *pattas* had been entered in *pattas* as long as he could remember, that is for more than 50 years, and that such rates had been collected. P. W. No. 3, plaintiff in Appeal Suit No. 719 of 1913, stated in the original trial that he irrigated his crops with water from wells dug by him, but he has not now appeared to say when he dug his wells.

4. As regards Appeal Suit No. 792 of 1913 (Summary Suit No. 434 of 1912) the *karnam* stated in the original trial that no well had been sunk during his time, but he does not seem to have had knowledge of the village prior to *Fasli* 1319. The *ryot's* witness stated that wells had been sunk 10 years previously and he admitted that the rates of rent claimed had been in force to his knowledge for 20 or 25 years.

5. As regards the issues now remanded by the High Court I must find that :—

(1) in no case has the landlord charged rent for the sites of wells though he might legally have done so;

(2) the wells concerned in these suits were constructed before the passing of Madras Act I of 1908 and

(3) the *ryots* have been paying these rates without protest from time immemorial.

6. With reference to the new third issue, I might perhaps remark that these suits relate to lands in the Karvetnagar Zamindari, in which it has been the immemorial custom to issue *pattas* based upon the original crop sharing principle. These *pattas* provided rates for all crops and if a *ryot* grew an inferior crop he paid less rent, but if he grew a superior crop he paid more rent irrespective of the source of irrigation The contract is the original and ancient one, though clauses or rates relating to superior wet crops may not come into operation, unless or until water is available for irrigation. One consideration for paying higher rates when superior crops are raised is the understanding that lower rates or no rent at all shall be paid when inferior crops are raised or the lands lie waste from unavoidable circumstances. The system is, in accordance with the custom of the country to adjust the demand in accordance with the ability of the individual to pay.

These second appeals coming on for final hearing this day after the return of the findings of the lower Appellate Court upon the issues referred by this Court for trial, the Court delivered the following

JUDGMENT.

SECOND APPEAL No. 1126 OF 1914.

The findings are accepted.

The result is that the second appeal is allowed and the decree of the lower Appellate Court is varied accordingly with costs in this Court to be paid to the appellant by the respondent.

SECOND APPEALS NOS. 1437 TO 1439 OF 1914.

The findings are accepted and the suits are dismissed with costs throughout of the appellant. Vakil's fee in each case is Rs. 12.

(Second Appeals Nos. 1440 to 1447 of 1914 were adjourned for one week to enable the parties to file properly stamped petitions of compromise).

Appeals allowed.

M. C. P.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

PETITION NO. 141 OF 1916-17 OF PARTABGARH DISTRICT.

February 16, 1917.

Present:—Mr. Campbell, S. M., and Mr. Ferard, J. M.

RAM KUMAR—PLAINTIFF—APPELLANT

versus

Raja PARTAB BAHADUR SINGH—DEFENDANT—RESPONDENT.

Oudh Rent Act (XXII of 1886), ss. 53, 107B, Ch. VII A—Tenant holding at favourable rent—Ejectment—Procedure—Resumption.

Section 107B of the Oudh Rent Act supersedes, in the case of tenants holding at a favourable rate of rent, section 53 of the Act. [p. 645, col. 1.]

Where there is a special provision governing a special class of cases the latter should be dealt with under it, and not under the general provision governing general cases. [p. 645, col. 1.]

A tenant holding at a deliberately, and not accidentally, favourable rate of rent comes under section 107B of the Oudh Rent Act, and is subject to resumption proceedings under Chapter VII A of the Act and cannot be ejected by notice as an ordinary tenant. [p. 645, col. 1.]

Appeal from the decree of the Commissioner, Fyzabad, dated the 24th October 1916.

JUDGMENT.

FERARD, J. M.—The plaintiff-appellant, Ram Kumar, contested ejectment notice on the ground that he was a permanent lessee at a favourable rate of rent, and that this had been decided in a previous suit of 1903. The Assistant Collector accepted this plea and granted decree on the ground of *res judicata*. The Commissioner in appeal has examined the record of the 1903 suit and found that the lease to the original lessee, predecessor of plaintiff-appellant, was not heritable—it ceased to be 'permanent' when the original lessee died. I have also examined the 1903 record ending with the Board's (Mr. J. B. Thomson) order of 18th July 1904, and I find that so far the Commissioner's view is correct. The original lessee could not be ejected during his lifetime, but this immunity did not pass to his successor, plaintiff-appellant. The only point that his Counsel now presses before me is that the rent was and is favourable. Of this there is no doubt. The Commissioner's judgment of 1903 shows it, and it was clearly deliberately favourable. Plaintiff-appellant is now a tenant at a favourable rate of rent, but with no right to hold on at it. The only question that presents itself to me is whether respondent was right in proceeding against him by notice instead of under the resumption Chapter VII A. The Commissioner is right in his statement that there is nothing in the nature of a "grant" about a permanent lease but appellant is certainly holding, or holding over, to use the Commissioner's expression, land at a favourable rate of rent, and such land comes under section 107B, Oudh Rent Act. *Hanuman Datt* v. *Thakurain Sri Ram Kuar* (1) bears on this point. I do not agree with it. When there is a special provision governing a special class of cases the latter should be dealt with under it, and not under the general provision governing general cases. Section 107B supersedes section 53, Oudh Rent Act, in the case of tenants holding at a favourable rate of rent.

The notice of ejectment was, therefore, bad and I would allow the appeal and restore the finding of the first Court Costs to appellant. I may note further that if Commissioner's appellate order was to stand, a remand for decision of original issue No. 3, on the question of compensation, would be necessary, as the lower Courts have left it without decision.

CAMPBELL, S. M.—The rent in this case was deliberately, and not accidentally, favourable. The Board have repeatedly held that in such circumstances ejectment was inadmissible and that *Hamuman Datt* v. *Thakurain Sri Ram Kuar* (1) was inapplicable. I agree in the proposed order.

Appeal allowed.

(1) Selected Decision No. 5 of 1909.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 90 OF 1915.

September 18, 1917.

Present:—Mr. Stuart, A. J. C., and Pandit Kanhaiya Lal, A. J. C.

Chaudhri GANGA BAKHSH SINGH —PLAINTIFF —APPELLANT

versus

The Hon'ble Rai Bahadur Munshi GOKUL PRASAD, PRESIDENT, KAYASTH SCHOLARSHIP TRUST, ALLAHABAD—DEFENDANT—RESPONDENT.

Construction of document—Will, interpretation of—Widow, estate taken by—Endowment, deed of, validity of—Pardanashin *lady, deed executed by—Evidence, nature of—Burden of proof.*

Where the language in which a deed is written is not the language of a trained draftsman or a skilled conveyancer but the draft is prepared by an amateur or a layman, all that is necessary to interpret such a deed is to give the plain meaning to the words used, neglecting grammatical errors and remembering the limitations and deficiencies of the draftsman. [p. 651, col. 1.]

Where a Will executed by a Hindu gentleman in favour of his wife declared that he left his property to her absolutely and entirely, that he liked her to retain certain old servants in her employment so long as they behaved themselves, and that if she wished to utilise the powers she possessed in order to make an endowment of a religious or a charitable nature, such an object would meet with his approval, though if she did this he would be opposed to her giving the manager of the endowment too free a hand:

Held, that under the above Will the testator devised a full and complete estate, and not merely a life estate, to his wife. [p. 652, col. 2.]

GANGA BAKHSH SINGH *v.* GOKUL PRASAD.

Where the execution of a deed of endowment by a *pardanashin* lady was questioned, and the evidence showed affirmatively and conclusively that the deed was explained to her, and she thoroughly understood it and signed it after execution not under duress or undue influence but from her free and independent will, that the disposition of the property was a most natural disposition and that besides her strength of will and business capacity, she had independent outside advice coming from members of her own family, who were interested in the promotion of the objects she had at heart:

Held, that the deed of endowment was a valid and legal disposition. [p 654, col. 1.]

Appeal from the decree of the First Subordinate Judge, Sitapur, dated 23rd August 1915.

Messrs. *W. Wallach*, *S. N. Sen*, *Shahanshah Husain*, *Gulab Chand Srimal*, *Bahadur Lal*, and *Kalindri Prasad*, for the Appellant.

The Hon'ble Rai *Gokal Prasad* Bahadur and Messrs. *Ram Chandra* and *Chhail Behari Lal*, for the Respondent.

JUDGMENT.—Bisheshar Bakhsh Singh Kayesth was a member of the family of Kanungos of Rampur Kalan in the Sitapur district. Daryao Singh was the head of the family at the time of annexation. He had three sons Anant Singh, Balwant Singh and Hardeo Bakhsh Singh. There was a dispute as to the status of the family and the rule of succession, which was eventually decided by their Lordships of the Privy Council in *Shankar Baksh* v. *Hardeo Baksh* (1). Bisheshar Bakhsh Singh was the son of Hardeo Bakhsh Singh. On the death of his father he succeeded to certain rights in certain villages and he was entitled to make a Will by which he could devise has property after his death to whomsoever he pleased. He was married about 1888 and he signed a document, which he called a Will, on the 6th August 1892. He died on the 27th June 1898. He had no children. His widow Ram Kali succeeded to the whole of his property. She executed a deed of endowment on the 8th August 1904. She died on the 23rd August 1913.

Ganga Bakhsh Singh, the son of Balwant Singh, instituted the suit out of which this appeal arises in the Court of the Subordinate Judge of Sitapur. He claimed the estate of Bisheshar Bakhsh Singh as reversionary heir. He stated that Shankar Bakhsh Singh, the son of Anant Singh, was alive at the time of Ram Kali's death (he is alive still) but asserted that, although Shankar Bakhsh Singh would, if not disqualified, have been entitled to a reversionary interest equivalent to that of the plaintiff. Shankar Bakhsh Singh was disqualified from inheritance by reason of insanity. He, therefore, claimed the whole estate as reversioner.

He instituted the suit against the president of the trust formed under the deed of the 8th August 1904. The reply was that Bisheshar Bakhsh Singh had authority to devise his estate as he wished after his death, that he exercised that authority and executed the Will, to which reference has been made, on the 6th August 1892, and devised a full estate to his widow Ram Kali, to which she succeeded on the death of the testator, that Ram Kali made the whole estate the subject of an endowment, and that the plaintiff had no right of any kind. It was further stated that Shankar Bakhsh Singh was not insane. To this plaintiff replied, that Bisheshar Baksh Singh had the right to devise his property by Will, but that he had impaired his mind by excessive drinking to such an extent that he was incapable of making an intelligent and valid disposition on the 6th August 1892, and that further at the time that he affixed his signature to the alleged Will he was completely intoxicated, and did not know what he was doing. The plaintiff's first point thus was, that he contested the execution of the Will. He was not satisfied with that. He continued that, even if the execution of the Will was established, on its interpretation it transferred nothing more than a qualified life-estate to Ram Kali. There, as we understand it, he left the case. He did not set up any argument based on the provisions of Act I of 1869. At original page 244 it is clearly stated, that the suit would be determined under the provisions of the Mitakshara Law. It is further clear that he set up no title as the heir of Ram Kali. He claimed as the reversioner of Bisheshar Bakhsh Singh.

The learned Subordinate Judge decided that Shankar Bakhsh Singh was not insane, that Bisheshar Singh was not disqualified by

(1) 16 C. 397; 16 I. A. 71; 13 Ind Jur. 98; 5 Sar. P. C. J. 299 Rafique and Jackson's P. C. No. 108; 8 Ind. Dec. (N. S.) 261.

intemperate habits from making a valid Will, that he was not intoxicated at the time that he made the Will, that the Will effected a valid disposition, and that on its interpretation it transferred a complete estate to Ram Kali. He dismissed the suit accordingly. The present appeal is filed by the plaintiff.

The position taken up in appeal is different to the position taken up in the lower Court. The learned Counsel for the appellant has not argued on the question of the insanity of Shankar Bakhsh Singh. He has devoted practically no argument to the allegation that Bisheshar Bakhsh Singh's power of making an intelligent disposition was weakened by a general habit of intemperance. He has argued very faintly in support of the suggestion that Bisheshar Bakhsh Singh was intoxicated at the time that he made the Will. He has based the greater part of his argument on the question of the interpretation of the Will, but he has added a plea which is not only a new plea but which is in direct opposition to the case advanced for the plaintiff in the lower Court. He now puts forward the argument that on the showing of the defendant Ram Kali's estate derived from her husband was *stridhan*, and that as *stridhan* it would devolve in such a family as this on the heirs of her husband, that is on Shankar Bakhsh and himself, and as heir to the *stridhan* he challenges the validity of the deed of endowment. We have already stated that the plaintiff clearly and distinctly based his claim to succeed on the plea that he is the reversionary heir of Bisheshar Bakhsh Singh and not that he is heir of the lady It is true that in the twelfth paragraph of the plaint he suggested that in any circumstances he was the sole heir. But the decision on the 19th issue shows his position. The learned Subordinate Judge writes:—"The plaintiff does not claim the property in suit as the representative of Th kurain Ram Kali so as to be bound by the deed executed by her. He claims the property as the reversionary heir of the lady's husband under the Hindu Law." By taking this attitude in the lower Court he avoided a discussion on the question of limitation. Having had the point of limitation decided in his favour he has now adopted an absolutely inconsistent position and placed the defendant-respondent at a disadvantage. We shall refer to the admissibility of this plea later.

We now proceed to decide the various points one by one.

The first point is as to the insanity of Shankar Bakhsh Singh. The learned Subordinate Judge after considering the evidence arrived at the conclusion that Shankar Bakhsh Singh is not insane. The learned Counsel for the appellant has not argued on the point. He has not withdrawn the plea but has not supported it. We have examined the evidence, and we find that the learned Subordinate Judge's conclusion is perfectly correct, and that Shankar Bakhsh Singh is not insane. Thus in any circumstances the appellant can only succeed in respect of half of his claim.

We next take up the allegation that Bisheshar Bakhsh Singh was so addicted to the use (or rather to the abuse) of alcohol that he was incapable of making a Will or in fact of any intelligent act. Bisheshar Bakhsh Singh was a Kayesth, and as a Kayesth had no religious objection to the use of alcohol. Amongst the large majority of Kayesths it is not considered discreditable to take alcohol in moderation, and the circumstance that Bisheshar Bakhsh Singh was not an abstainer from alcohol reflects nothing upon his intelligence or his character. The evidence on the point leads us to the conclusion that Bisheshar Bakhsh Singh was a regular drinker, and that he was not invariably moderate. To use a colloquial expression, he was a fairly hard drinker, and in the course of his life was intoxicated on several occasions. But it is impossible to arrive at a conclusion that he was a drunkard, and the suggestion that he was so saturated with alcohol as to be incapable of making an intelligent disposition of his property or doing any other act which the law permitted him to do, is extravagant and unsupported by the right view of the evidence on the record. The plaintiff has recklessly put in a mass of false evidence to support his suggestion that his cousin was a besotted drunkard. By his own recklessness he has afforded a strong answer to his argument. Wit-

ness after witness has given suborned and perjured evidence to show that the deceased was practically a dipsomaniac, that he drank three or four quarts of spirit every day, that he was never sober and that he was incapable of any sort of intelligent action. The story so told is a tissue of absurdities. If Bisheshar Bakhsh Singh had been as he is thus represented to be, if he had become a dipsomaniac at an early age, he would not have lived as long as he did. While the falsity of this evidence is exposed by its extravagance, and its intrinsic worthlessness is palpable on examination, the evidence given on the other side with regard to the habits of the deceased is moderate, reliable, and candid. Respectable Kayesth gentlemen have deposed that they knew Bisheshar Bakhsh Singh well, that he indulged in liquor, that he may have been occasionally intoxicated, but that there can be no suggestion that he was a hopeless drunkard or a dipsomaniac. There we may leave the point, noting that, inspite of the fact that the learned Counsel for the appellant has shown a wise discretion in not pressing this portion of the case, we have nevertheless examined critically the evidence upon the subject and that we are in complete accord with the conclusions of the learned Subordinate Judge to the effect that, before the execution of the Will, Bisheshar Bakhsh Singh was addicted to drink and at times used to drink to an excess, but that his mental capacity was not impaired by this act.

The next suggestion is that Bisheshar Bakhsh Singh was dead drunk at the time that he executed the Will. This Will was registered at the residence of Bisheshar Bakhsh Singh. Kazi Hadi Hasan, the Sub-Registrar who registered the document, was called as defendant's witness No. 2. If his evidence is believed, there can be no doubt as to the fact that Bisheshar Bakhsh Singh was in no way under the influence of liquor when he executed the Will, that he thoroughly understood its contents and that the Will expresses the deliberate intention of a man who was legally competent to make the disposition which it effected. The case in favour of the non-intelligent execution of the Will is as follows. A certain Raghubar, P. W. No. 22, who was formerly a table servant of Bisheshar Bakhsh Singh, has deposed that on the day of the execution of the Will Bisheshar Bakhsh Singh was lying dead drunk in his house and that while the witness was rubbing oil on his head for a purpose which he did not disclose, the Sub-Registrar and a certain Sheo Dayal, now deceased, who was the manager of the estate, entered the room with the Will and induced Bisheshar Bakhsh Singh to sign the Will without reading it. If this witness's evidence is believed, the Sub-Registrar was party to a disgraceful conspiracy and performed an act which rendered him liable to dismissal and prosecution. This witness was in receipt of Rs. 2 a month and his food and clothes from Bisheshar Bakhsh Singh. After the death of the latter he obtained employment on slightly better wages from another master, and at the time he gave his evidence was out of work. His evidence is on the face of it untrue. Another witness Lalta Prasad, P. W. No. 36, who was formerly a servant of Bisheshar Bakhsh Singh, has deposed that the deceased Sheo Dayal had discussed the continual drunkenness of Bisheshar Bakhsh Singh with a certain Ram Charan, now deceased, in presence of the witness, that these two persons had argued that, as Bisheshar Bakhsh Singh might become insane at any time, it would be advisable to cause him to execute a Will, the contents of which he would not understand, by which he should leave the whole of his property to his wife, putting in clauses by which Sheo Dayal and Ram Charan and others should be retained in their employment and that the conspiracy resulted in the execution of the document, under which he (Lalta Prasad) was to be given something. He was then servant of Bisheshar Bakhsh Singh. Lalta Prasad has stated that it so happened that he was not present at the time that the Will was executed. The learned Counsel for the appellant has been unable to show us what the conspirators stood to gain by such a proceeding. It is to be noted that, if Bisheshar Bakhsh Singh had died without making a

Will, his widow would have succeeded to his estate during her lifetime as a Hindu widow with limited powers of alienation. As these persons, according to the witness, were only intent on keeping on good terms with the lady and securing their own interests, and as they were apparently on good terms with her already, all that was necessary was that she should succeed to the estate. They were not likely to survive her and as the evidence shows did not survive her. Under the terms of the Will (as it will be seen) the lady had authority to dismiss them. This story appears to us to be a very foolish story and singularly unconvincing. Now it is to be remarked that this man Lalta Prasad since the death of Ram Kali has gone into the employment of the plaintiff. He is the plaintiff's man, and has every reason to desire the success of the plaintiff's claim. His evidence we regard as absolutely false. We now come to the evidence of a certain Matadin, P W. No. 3. Matadin has stated that the Will was executed intelligently, that Bisheshar Bakhsh Singh was perfectly sober at the time of its execution, that he thoroughly understood its contents, and that it contained his wishes. It is clear that the appellant cannot utilise anything which Matadin has said to support his case. But his position is that Matadin became his own servant, that Matadin had advised him to institute the suit, that Matadin had offered to give evidence in support of his claim, and that finally Matadin had turned on him and given evidence against him. It is true that Matadin had taken service with the plaintiff, that he assisted in the preparation of the plaint, and that after doing this he has given evidence in support of the authenticity of the Will. We find that Matadin is an absolutely untrustworthy witness, except with regard to that portion of his evidence in which he deposed to having attested the Will. He did attest the Will. It is sufficiently established that he at first took the side of the plaintiff, and has subsequently come up to give evidence for the defendant. But this circumstance does not help the plaintiff It shows that Matadin is a very untrustworthy person, and that his evidence as to the habits of Bisheshar Bakhsh Singh and the manner in which the Will came to be executed is unreliable.

The next point taken for the plaintiff is that the scribe of the Will Baz Bahadur, who is still alive, was not called as a witness. Baz Bahadur was like Lalta Prasad a servant of Bisheshar Bakhsh Singh. We do not know why the plaintiff has not chosen to produce him. But the fact of his non-production does not help the appellant's case. So far the case stands, that one apparently respectable and independent witness Kazi Hadi Hasan has given evidence which, if believed, shows that the Will is a valid Will. One witness Matadin has proved that he attested the Will, as he certainly did, and given other evidence. We place no reliance on the remainder of his evidence. Two witnesses Raghubar and Lalta Prasad have given evidence against the Will which is palpably false. The learned Counsel for the appellant has criticised the evidence of Kazi Hadi Hasan on one point. He has pointed out to us that Bisheshar Bakhsh Singh, while leaving the property to his wife, did not mention her name and told the Sub-Registrar that he did not know his wife's name. From this he would have us infer that Bisheshar Bakhsh Singh must have been drunk at the time. We do not find the inference established. Among Hindu gentlemen of the class of Bisheshar Bakhsh Singh it is not uncommon to find some who do not know their wives' names. Another point, which was taken in the Court below but was not taken in appeal, was that the Will was registered in an upper room. The significance here was that, if the executant had not been drunk, he would have executed it in a lower room. The learned Counsel for the appellant has laid no stress upon this point. Before we leave the evidence as to the intelligent execution of the Will we should refer to the depositions of three gentlemen, Babu Mahadeo Prasad, D. W. No. 6, a Deputy Collector in the United Provinces, Thakur Sripal Singh, D. W. No. 16, a member of a family of Talukdars in the Sitapur district, and a certain Radha Kishen, D. W. No. 18, who is a member of this family of Kayesths. All

these three gentlemen have deposed that Bisheshar Bakhsh Singh told them of the contents of the Will after he had executed it. The evidence of these gentlemen is absolutely reliable. On the question of intelligent execution we arrive at exactly the same conclusion as the learned Subordinate Judge. We find that Bisheshar Bakhsh Singh executed the Will while in full possession of his senses and his intelligence, and understanding exactly what he was doing.

We now come to the interpretation of the Will. The language in which it is written is not the language of a trained draftsman or a skilled conveyancer. The draft was prepared by an amateur or a layman, and the Will must be interpreted remembering the conditions under which it was prepared. As there has been some dispute with regard to the exact meaning of the words employed we have considered it advisable to translate this Will ourselves. The translation that we have made has been carefully explained to the Counsel who have had opportunities of the rendering of the Hindustani words into English. This is the final translation at which we have arrived:—

"Will executed by Thakur Bisheshar Bakhsh Singh, Taluqdar of Rampur Kalan and Biswan.

"1. I, Thakur Bisheshar Bakhsh Singh, son of Thakur Hardeo Bakhsh Singh, by caste Kayesth, resident of Kasba Biswan Khas, am a Talukdar of Rampur Kalan, Biswan, Paprawan, etc., situate in the Tahsils of Sidhauli, Biswan, Misrikh and Sitapur in the district of Sitapur.

"2. Whereas no reliance can be placed in any wise on this inconstant life, and whereas up till now I have no male issue from my loins, and besides this it is incumbent and necessary that I should nominate my heir and future representative in my lifetime, and at the same time should, by setting out those modes which are considered better and proper for the protection and good management of the estate and the rights attached to the *taluka* owned and possessed by me, declare my inmost intentions, therefore, while I am in a state of sound mind and right understanding and in keeping with all the rights, Shastric and legal, (I undertake) to put down those necessary points in the manner following, which will be acted upon after my demise.

"3. *Firstly*, that it is necessary to state this fact that the executant's father Hardeo Bakhsh Singh, having acquired the villages pertaining to the estate possessed by me as against other co-sharers of the family in the *taluka* with reference to specification and division in the *khewat* by virtue of a decree of the Civil Courts of the Province of Oudh and the Privy Council, got (his share) partitioned from other co sharers by the Civil and Revenue Courts, under which some entire villages, some *pattidari* villages and some entire *mohals* (partitioned) had been received by him; and after the death of Thakur Hardeo Bakhsh Singh, executant's father, 5-annas share of this estate out of the 16 annas in the entire *taluka* has come into my proprietary possession exclusively by way of succession, without being shared or claimed by anyone as ancestral, divided and separate property and that there is no other sharer or claimant to the property owned and possessed by the executant nor can there be any; and the executant is in every way entitled to dispose of the property and to nominate a legatee.

"4. *Secondly*, that I make this devise in favour of my wife to the effect that after my death my wife, daughter of Chaudhri Rudra Prasad Saheb, Talukdar of Nanpur Koili, will remain owner with all the powers and (*sic*) transfers of a proprietor, and in possession and in enjoyment of the profits, and the ruler of the estate, and my wife as my successor shall possess all the powers and (*sic*) transfers in their entirety which I have in this property and estate.

"5. *Thirdly*, that by reason of the observance of the custom of *pardanashini* my wife is unable to exercise herself (*i.e.*, personal) supervision and management over the estate, therefore, it is to be specially borne in mind that whatever agents and old servants, in whom I repose confidence and reliance up to the time of the execution of this (Will) and whose names are written hereafter in this paragraph, will remain managers of the estate and also of the domestic arrangements, etc, subject to the orders of and in obedience to my wife:—

"Munshi Sheo Dayal, Lalta Prasad Karinda, Baz Bahadur, Ram Charan Dube, Lalta Muqaddam, and Bhajju Khidmatgar,

"6. *Fourthly*, that the maintenance of the employees mentioned above will be made, on condition that they remain honest and efficient, and discharge their duties satisfactorily, from the collection of the profits of the estate, but should at any time the aforesaid servants be guilty of faults of dishonesty and causing injury to the estate, the legatee will have power to dismiss and discharge the above-mentioned agents, and this is also put down that Ram Charan will remain manager throughout his lifetime and after his death his brother Sitaram will be manager.

"7. *Fifthly*, that in default of my having male issue, I authorize my wife to construct a *shivala* and *thakurdwara* and along with the expenses of the *shivala* and temple to establish a charitable allowance, in order to give help to travellers, the needy, orphans, and helpless widows, and from the collection of the profits of the estate which will be utilised in this work to entrust and transfer the profits by way of endowment in the name of the manager and administrator without power of sale or mortgage or transfer. Therefore, the deed of Will has been executed, that it may serve as an authority and be of use when needed."

Many reported decisions have been quoted to us which, it is suggested, provide the canons of the interpretation to be adopted in arriving at the meaning of a document like the present. But it is not necessary for us to refer to authority upon a point as simple as the interpretation of this Will. All that is necessary to interpret a Will like the present is to give the plain meaning to the words used, neglecting grammatical errors, and remembering the limitations and deficiencies of the draftsman. Upon the reading of this document the impression left on our minds is that the testator gave the draftsman the following direction:—

He told him that he wished to leave his property to his wife absolutely and entirely, that he would like her to retain certain old servants in her employment as long as they behaved themselves, and that if she wished to utilise the powers which she possessed in order to make an endowment of a religious or a charitable nature, such an object would meet with his approval, though if she did this he would be opposed to her giving the manager of the endowment too free a hand.

These instructions appear to us to have been carried out perfectly correctly and clearly by the draftsman, although in his use of language he has not been skilful, and has not always been grammatical. The learned Counsel for the appellant has in argument treated the document as though it was drafted by a lawyer, and has endeavoured to find an exact connection between every paragraph. Such a form of construction is impossible. Words are used loosely. Intentions are expressed that are not always fulfilled. There is much overlapping and there is considerable surplusage.

But even if the method of interpretation which he would have us employ, were adopted, the result would not be essentially different. Great stress has been laid on the fact that, if the testator's main desire was to provide for the integrity and prosperity of his estate, that object would not be attained by his giving to his wife, a *pardanashin* lady aged at the time that the Will was made about 18 years, a free hand to dispose of the property as she wished. This argument begs the question. The testator is proved to have been greatly attached to his wife. His devotion to her was considered remarkable by his friends. The lady is proved to have possessed some education, and to have possessed—which is more important—a character and capacity for business affairs which are unusual amongst *pardanashin* ladies of her class. Upon the evidence we would be disposed to think that she was the stronger character of the two. There is no reason to suppose that the testator would not have been justified in an opinion that for the benefit of the estate itself it would be better that it should be absolutely under the control of his wife, that she should have an unfettered discretion to provide for the succession in any manner in which she pleased and that she could be trusted with complete powers of alienation. The wording of the fourth paragraph can leave no doubt as to the nature of the estate conferred. In the plainest words that an unskilled man could use, the draftsman has devised a complete estate to the lady. It is impossible upon the wording of the fourth clause to arrive at a conclusion that the estate awarded was merely the estate to which the

lady would have been entitled, if Bisheshar Bakhsh Singh had died intestate. The learned Counsel for the appellant goes further. According to his view the testator's object was to give the lady an estate even less than that of a Hindu widow. If that were his object, he could not possibly have assented to the terms of the fourth paragraph. Not only does he describe the lady as "owner:" he describes her as "owner with all the powers and transfers," by which is clearly meant "all the powers of transfer," "of a proprietor and in possession." He adds the rather meaningless expression "and in enjoyment of the profits." But he continues "and the ruler of the estate." The learned Counsel for the appellant would have us translate the words here as meaning the owner of the profits, with all the powers of transfer as proprietor with regard to the profits, and in possession of the profits, and in the enjoyment of the profits. Such a translation is opposed to the clear meaning of the words and would still leave the important words "and the ruler of the estate" untouched. Further he continues "and my wife as my successor shall possess all the powers and transfers (*i. e.*, the powers of transfer) in their entirety which I have in this property and estate." Even if the remainder of the Will contained statements repugnant to this clause, it would be difficult to arrive at a conclusion that a limited estate was devised to the lady. There is, however, no repugnance in any of the remaining clauses. It is true, that he continues by directing his wife to retain certain old servants in her employment subject to her orders and subject to the qualification that they should remain obedient to her, and continues that such servants are to be supported from the profits of the property, so long as their work is satisfactory and honest. This provision is nothing more than an attempt to restrain his wife from dismissing these servants arbitrarily and unjustly. How far the servants could have pleaded this clause against an arbitrary and unjust dismissal, it is not necessary for us to discuss. Upon the facts the lady showed no indication to treat any of them unfairly. It is sufficient for our purpose to examine this clause on the allegation that it is a restriction of the powers of the owner of a full estate. We do not consider that there is anything in this clause which detracts from the lady's full power to dispose of the property as she pleased.

We now come to the last portion with regard to the power of the lady to make an endowment for religious or charitable purposes. This portion is obvious surplusage, as the lady had the full power to do what she wished to the property. She could make any endowment that she pleased. There is no direction here to the lady to make an endowment. All that the testator says is that such an endowment would not be displeasing to him—a pious expression of opinion which has no effect in detracting from her full powers to dispose of the property. On the question of interpretation we note that, after a careful consideration, we find that the restriction of the power of transfer is a suggestion that if such an endowment should be made, it would be advisable that the manager of the endowment should have no power of transfer of any kind. We are thus satisfied that under the Will the lady had a complete estate.

We now come to the endowment made by the lady. We are in some doubt as to whether we should have permitted the appellant to argue on this point at all. In the lower Court he had clearly not claimed through the lady, but, inasmuch as the lower Court had taken a large mass of evidence as to the validity of the endowment, we with some diffidence permitted argument upon the point for the purpose of arriving at a short conclusion on the merits. Ram Kali belonged to a Kayesth family, many of the male members of which were connected with the legal profession. In this family the subject of the education of their caste-fellows and the improvement of the position of Kayesths by affording them facilities for instruction was clearly of absorbing interest. The lady's brother Chaudhri Mahadeo Prasad, who was examined at unnecessary length as a witness in the case, is a wealthy gentleman of high position who has practically made the improvement of education amongst the Kayesths his life-work. He has himself given half a lac of rupees to the educational institution at Allahabad known as the Kayestha Pathshala and has created a trust in respect of his own

property, by which half the profits will go towards the foundation of scholarships for Kayesth students. Ram Kali, as has been already stated, was a lady of exceptional intelligence and some education. After her husband's death she appears to have applied her mind to the best use that she could make of her fortune towards the increase of religious merit for her husband and the improvement of the position of the members of her own community. After careful deliberation and close examination of various projects, after rejection of many proposals made to her, she finally selected a certain scheme to which the property left by her husband should be devoted. That scheme is embodied in the deed of endowment. There is a mass of evidence to show that she took advice from various persons—advice not the less valuable because some of her advisers were members of her own family and because all of them were philanthropic gentlemen intensely interested in the improvement of the Kayesth community. She did not always accept the advice proffered and after mature deliberation she settled on a scheme, reasonable and intelligent, which combined the perpetuation of her husband's memory and the acquisition of religious merit by him, the advancement of the religious principles which she had at heart, and the improvement of the condition of the poorer members of her own community. A mass of evidence has been called upon this point and the endowment has been made the subject of much criticism in this Court which, in spite of its ingenuity, can only be described as infructuous. It was considered advisable in the interests of all parties to register the deed, not in Sitapur where the property was situated, but in Allahabad where the lady happened to be residing, and, to enable the deed to be registered in Allahabad, Chaudhri Mahadeo Prasad presented the lady with a little piece of land of no great value in Allahabad. She added this land to the other property endowed and thus enabled herself to register the deed in Allahabad. There was a decision of the Allahabad High Court in *Sheo Dayal Mal* v. *Hari Ram* (2), which stated that such a registration is bad in law. That decision was, however, dissented from in *Gulzari Lal* v. *Daya Ram* (3) and was overruled by their Lordships of the Privy Council in *Hari Ram* v. *Sheodayal Mal* (4). There can be no doubt as to the fact that the registration was good in law. The learned Counsel for the appellant, when the decision of their Lordships of the Privy Council was brought to his notice, frankly withdrew his argument upon this point. But he continued to urge that the evidence on the record, if properly considered, must lead to the conclusion that the deed of endowment was bad, that the execution had not been established, and that the evidence showed that the deed had been executed under undue influence. There are many decisions as to the safeguards that must surround a *pardanashin* lady in executing a deed. It is unnecessary to refer to more than one in which their Lordships of the Privy Council have summed up the law on the subject in a comparatively recent case. That decision will be found in *Kali Bakhsh Singh* v. *Ram Gopal Singh* (5). At page 89* their Lordships say:—"In the first place the lady was a *pardanashin* lady, and the law throws around her a special cloak of protection. It demands that the burden of proof shall in such a case rest, not with those who attack, but with those who found upon the deed, and the proof must go so far as to show affirmatively and conclusively that the deed was not only executed by, but was explained to, and was really understood by, the grantor. In such cases it must also, of course, be established that the deed was not signed under duress, but arose from free and independent will of the grantor. The law as just stated is too well settled to be doubted or upset. It was expressly re-affirmed by this Board in the case of *Sajjad Husain* v. *Wazir Ali Khan* (6),

(2) 7 A. 590; A. W. N. (1885) 146; 4 Ind. Dec. (N. S.) 527.

(3) 9 A. 46; A. W. N. (1886) 287; 5 Ind. Dec. (N. S.) 461.

(4) 16 I. A. 12; 11 I. A. 136; 5 Sar. P. C. J. 281; 6 Ind. Dec. (N. S.) 515.

(5) 21 Ind. Cas. 985; 36 A. 81; 16 O. C. 378; 1 O. L. J. 67; 18 C. W. N. 282; (1914) M. W. N. 112; 15 M. L. T. 30; 26 M. L. J. 121; 12 A. L. J. 115; 19 C. L. J. 172; 16 Bom. L. R. 147 (P. C.).

(6) 16 Ind. Cas. 197; 34 A. 455; 12 M. L. T. 361; 16 C. W. N. 889; 23 M. L. J. 210; (1912) M. W. N. 976; 16 C. L. J. 613; 15 O. C. 271; 39 I. A. 158; 14 Bom. L. R. 1055; 10 A. L. J. 364 (P. C.)

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and nothing that is now said can, or is intended to, disturb it." At page 92* it is added:—"Their Lordships, as already mentioned, have fully in view the fact that the lady was a *pardanashin* lady, but the evidence as to her strength of will and business capacity, and the fact that the deed as granted is not in the circumstances of her life in any way an unnatural disposition of part of her property, go far, taken together with the evidence in this case, to convince them that the deed was granted by her as the expression of her deliberate mind and apart from any undue influence exerted upon it. In short, their view is that if independent outside advice, which is an essentially different thing from independent outside control, had been obtained, the lady would have acted just as she did. Much as their Lordships support and approve of the protection given by law to a *pardanashin* lady, they cannot transmute such a legal protection into a legal disability."

We have been taken through, but we need not refer to, the mass of the evidence called. It has been thoroughly discussed by the learned Subordinate Judge with whose conclusions we are in complete accord. Here the case in favour of the validity of the deed is even stronger than in the case just quoted. The burden of proof has been put upon those who founded upon the deed. The evidence shows affirmatively and conclusively that the deed was explained to and thoroughly understood by the lady. It was executed by the lady. It was not signed under duress. It arose from the free and independent will of the grantor. There was no undue influence. The disposition of the property was a most natural disposition. The lady had strength of will and business capacity. In addition she had outside advice. In many cases that outside advice came from members of her own family, and in all cases it came from gentlemen who were interested in the promotion of the objects which she had at heart. But the advice was independent. Upon the evidence as it stands there can be no possible doubt as to the fact that the deed of endowment is a valid and legal disposition.

The learned Counsel for the appellant has added one small point. He objected to the refusal of the learned Subordinate Judge to call certain witnesses at the close of the case—a point which he states is referred to at original pages 27 and 28 of the learned Subordinate Judge's judgment. We have only to say upon this point that we approve the action of the learned Subordinate Judge. The plaintiff's evidence was closed on the 2nd June 1915. The defendant's evidence was closed on the 7th July 1915. The plaintiff's rebutting evidence was called from the 7th July 1915 onwards. It was the business of the plaintiff to have applied for the examination of the five witnesses in question before the 7th July 1915. He did not do so until the 26th July 1915 and the learned Subordinate Judge rightly refused his application.

There are many other points taken in the grounds of appeal, but we need not refer to any of them, as with the exception of the points that we have already decided the remainder were withdrawn in argument.

We conclude that Bisheshar Baksh Singh executed a valid and effective Will by which he devised a full proprietary estate to Ram Kali and that Ram Kali made a valid and effective endowment which leaves the appellant no interest of any kind in the property in dispute. We, therefore, dismiss this appeal. The appellant will pay his own costs and those of the respondent.

Appeal dismissed.

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PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 151 OF 1917.

February 22, 1918.

Present:—Mr. Justice Roe and Justice Sir Ali Imam, KT.

JADUBANS PANDAY—JUDGMENT-DEBTOR—APPELLANT

versus

EKRAM RAI AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Res judicata -*Execution proceedings—Objection disposed of at one stage, whether can be raised at subsequent stage.*

JADUBANS PANDAY *v.* EKRAM RAI.

Where in execution an objection is raised and gone into, the same objection cannot be considered on any subsequent application in execution. If it is decided against the judgment-debtor it is decided for good and all against him, and if decided in his favour is equally binding [p. 656, col. 2.]

Where a decision of the execution Court is that no property of a judgment-debtor can be attached, that decision is final. [p. 657, col. 1.]

Appeal against the order of the District Judge, Shahabad, in Miscellaneous Appeal No. 50 of 1917, dated the 2nd April 1917, affirming that of the Sub-Judge, Shahabad, Arrah, in Suit No. 9 of 1917, dated the 17th March 1917.

FACTS.—The decree-holders-respondents obtained a decree under Order XXXIV, rule 6, of the Civil Procedure Code against Ambica Panday, Jamadar Panday and their sons and grandsons. Subsequent to the decree Ambica Panday and Jamadar Panday made an application to be declared insolvents and were so declared on 5th May 1913. On 13th December 1913 the decree-holders made an application for execution of their decree against the entire body of the judgment-debtors, *viz.*, Ambica, Jamadar and their sons and grandsons. An objection was filed on behalf of the judgment-debtors that their property was not liable to be sold as they had been declared insolvents The Court allowed the objection and held that the entire joint family consisting of Ambica, Jamadar and their sons and grandsons had been declared insolvent and that the property had become vested in the Receiver and that, therefore, the execution could not issue against them. Subsequently on 22nd December 1916 the decree-holders made a second application for execution of their decree against the sons and grandsons of Ambica and Jamadar and prayed for attachment and sale of their shares in two houses. An objection was taken on the ground that the judgment-debtors having been declared insolvents, the decree-holders were not entitled to proceed with the execution of the second application for execution of their decree. Both the Courts below found that the insolvency proceeding was against Ambica and Jamadar only and not against their sons and grandsons and that notwithstanding Ambica and Jamadar's having been declared insolvents the decree-holders could proceed against their sons and grandsons, who were no parties to the insolvency proceeding and against whom no declaration or order had been made in that proceeding. A second appeal was preferred to the High Court against the order of the Courts below.

Mr. *Parmeshwar Dayal*, for the Appellant, contended that the Court below had no jurisdiction in the second execution proceeding to decide whether the appellant was or was not a party to the insolvency proceeding. In the previous execution proceeding it was decided that the insolvency proceeding was against the entire joint family consisting of Ambica, Jamadar and their sons and grandsons. No appeal was filed against that order and, therefore, that order became final. The present application is barred by the principle of *res judicata*. When once a point is decided in an execution proceeding and is allowed to become final, the same point cannot be raised and decided in a subsequent execution proceeding. He relied on *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (1), *Khosal Chandra* v. *Ukiladdi* (2), *Mazzem Hossein Mondal* v. *Sarat Kumari Debi* (3), *Ram Kirpal* v. *Rup Kuari* (4), *Beni Ram* v. *Nanhu Mal* (5), *Manjunath Badrabhat* v. *Venkatesh Govind Shanbhog* (6) and *Bisheswar Dayal* v. *Rup Kishore Lal* (7).

Mr. *Panchanan Banerjee*, for the Respondents.—The fact that the sons and grandsons of Ambica and Jamadar are in possession of the properties sought to be attached and sold in the present execution proceeding, shows that the properties in dispute had not vested in the Receiver. Unless the property is vested in the Receiver appointed in the insolvency proceeding the judgment-debtors are not entitled to any benefit on account of the insolvency proceeding.

(1) 8 C. 51; 11 C. L. R. 113; 8 I. A. 123; 4 Sar. P. C. J. 249; 4 Ind. Dec. (N S.) 32 P. C.).
(2) 3 Ind Cas. 47; 14 C. W. N. 114.
(3) 5 Ind. Cas. 89; 14 C. W. N. 433; 11 C. L. J. 357.
(4) 6 A. 269; 11 I. A. 37; 4 Sar. P. C. J. 489; 3 Ind. Dec. (N S) 718.
(5) 7 A. 102; 11 I. A. 181; 4 Sar. P. C. J. 564; 4 Ind Dec. (N. S) 138.
(6) 6 B. 54; 3 Ind. Dec. (N. S.) 493.
(7) 41 Ind. Cas. 675; 3 P. L. W. 13.

Ambica and Jamadar were the only persons who were parties to the insolvency proceeding, their sons and grandsons had nothing to do with it. The order in the insolvency proceeding was quite clear that the proceeding was against Ambica and Jamadar personally. The construction placed upon the order by the execution Court in the previous execution proceeding was a wrong construction. A wrong construction placed upon a document by a Court cannot operate as *res judicata*.

JUDGMENT.—The facts of this case are that the appellants before us were members of a joint family of which the *kartas* were Ambica and Jamadar. Ambica and Jamadar were declared insolvents and their property vested in a Receiver. On the 12th January 1917 the present opposite party made an application to execute a decree obtained against the joint family by the attachment and sale of the family dwelling house. Various objections to his execution were taken by the appellants and the following judgment thereon was written:—

"The decree-holder wants to execute his decree against two houses belonging to the judgment-debtors Ragho Bans, Jadu Bans and others. They object on the ground that the managing members of the joint family named Ambica and Jamadar were declared insolvents and so the property belonging to the joint family cannot be seized in execution of the decree. On reference to the insolvency proceedings it is clear that Ambica and Jamadar were declared as insolvents in their personal capacity, so the objection cannot stand. It is also clear that the houses sought to be proceeded against did not vest in the Receiver, but were released on the ground that they had been purchased by one Deo Narain so the objections have no legs to stand upon. The insolvency proceedings came to an end on 15th July 1916. The present application for execution was put in on 13th January 1917. It is further contended that the present application for execution is barred. On reference to the copy of the order-sheet it appears that the previous proceeding came to an end on 2nd March 1914. So no bar of limitation applies. The previous objection was decided on 17th August 1912 against Malicka, to which the present judgment-debtors were not parties. The objections are disallowed and execution is to proceed."

In this Court it is contended that this judgment must be set aside, on the ground that the point in issue had already been decided by a judgment written on the 2nd March 1914 upon an application made to sell the houses of two other members of the joint family. It is conceded in argument that in these proceedings the whole joint family, including all the sons and grandsons of Ambica and Jamadar, were on the record. The existence of this judgment was apparently not brought to the notice of either of the Courts below. We have, therefore, to consider whether the judgment of the 17th March 1917 decides issues which had already been decided. For it is settled law that where in execution an objection is raised and gone into, the same objection cannot be considered on any subsequent application in execution. If it was decided against the judgment-debtors it was decided for good and all against them, and if decided in their favour it is equally binding. The learned District Judge at the hearing of the appeal before him substantially adopts the Subordinate Judge's decision. He advances practically no new arguments of his own but merely elaborates the arguments of the first Court. We propose, therefore, to take the judgment of the first Court and compare it with the judgment which is said to be a bar to the execution.

The first half of the judgment deals with the question whether Ambica and Jamadar were declared insolvents in their personal capacity or by the insolvency the whole joint family had become insolvent. This fact was substantially in issue on the first application for execution. It was specifically found in the Court deciding the objection on 2nd March 1914 that the father as managing member of the joint undivided Hindu family represents the entire estate and in the Insolvency Court represents the entire family. The issue, therefore, that the learned Judge set himself to decide in the first part of the case, that is to say, that part of the case which dealt with the effect of the insolvency of Ambica and Jamadar, had already been specifically decided in the previous proceedings. On the second part of

the case the question was whether the particular property now pursued had been released by the Receiver to Indra Narain. This question did not, in our view, arise. The release of the property to a third party by the Receiver would not render it liable to pursuit. It is urged before us that the houses now under attachment and sale were not the same houses as were previously pursued. Whether this is so or not, there is not sufficient material before us to show; but we hold that where a decision of the execution Court is that no property of a judgment-debtor can be attached that decision is final. It could not for instance be asserted that if on a decree made against *A*, *B* and *C*, *C's* cattle were attached, and on his plea that he could not be proceeded against under the decree the cattle be released, the decree-holder is entitled on the following day to seek to attach his ploughs and re-open the whole question of liability. Being of opinion that the order passed is *res judicata*, we must set aside the orders of the Courts below and direct that there be no further attempt to execute the decree by attachment and sale of the property of this joint family by this decree-holder. In view of the fact that the document upon which we have decided this case was not brought to the notice of the Courts below we make no order as to costs at any stage of this case.

Order set aside.

CALCUTTA HIGH COURT.
CIVIL RULE No. 756 OF 1917.
December 21, 1917.
Present:—Mr. Justice Teunon and Mr. Justice Newbould.
GOUR MONI DASSI AND OTHERS—PETITIONERS
versus
BORADA KANTA JANA—OPPOSITE PARTY.

Probate and Administration Act (V of 1881), s. 34—Administrator pendente lite, *position of—Probate Court, power of, to direct Administrator* pendente lite *to advance to widow contesting Will money for maintenance and conduct of case.*

The position of an Administrator *pendente lite* in Probate proceedings is closely analogous to that of a Receiver in a partition suit and section 34 of the Probate and Administration Act gives ample power to the Court to direct the Administrator *pendente lite* to do such acts as may be necessary in the interests of the several parties to the proceedings. [p. 658, col. 1.]

A testator left immoveable property, the annual income of which was ten thousand rupees, and also cash and money lent out at interest. By a Will purporting to have been made by him, the widow was allowed Rs. 20 a month and her minor sons were given shares in the estate much less than what they would get by the law of inheritance. During the Probate proceedings the widow, who contested the Will, claimed on behalf of herself and her minor sons sums reasonably sufficient for their maintenance and also sufficient to enable her to contest the Will and to put her case adequately before the Court:

Held, that the Administrator *pendente lite* should be directed by the Court to advance to the widow one thousand rupees and thereafter under the orders of the Court such sums as might be found to be reasonably necessary for the maintenance of the widow and her minor sons and for the proper conduct of their defence in the Probate proceedings. [p. 658, cols 1 & 2.]

Rule against the order of the District Judge, 24-Pergannas, in Original Suit No. 28 of 1917.

FACTS appear from the judgment.

Babu *Sarat Chandra Roy Chowdhury* (with him Babu *Satya Charan Sinha*), for the Petitioners.—The District Judge was wrong in holding that he could not direct the administrator *pendente lite* to pay to the widow her necessary costs for conducting her and her minor sons' defence in the Probate proceedings Even where the defendants are minors the Court has authority to make order for the payment by the plaintiff to the guardian *ad litem* the costs of conducting the defence. The position of an Administrator *pendente lite* is analogous to that of a Receiver in a partition suit, and section 34 of the Probate and Administration Act gives ample power to Court to direct the Administrator to do such acts as may be necessary for the protection of the interests of the parties to the proceedings. If the order of the District Judge be allowed to stand, the widow and her minor sons will be prevented from contesting the genuineness of the Will.

Babu *Mohendra Nath Roy* (with him Babu *Manmatha Nath Roy*), for the Opposite Party.—The Court has no jurisdiction to direct a party to a proceeding to pay to the other party the costs of conducting the litigation. The

learned District Judge was perfectly justified in holding that in the absence of any express provision in Act V of 1908 or in Act V of 1881 he could not make any such order. The widow is not entitled to ask the Court to be paid by the Administrator *pendente lite* to enable her to contest the validity of the Will.

JUDGMENT.—This Rule is directed against an order of the District Judge of the 24-Pergannas, by which he has declined in certain Probate proceedings to make an order upon the Administrator *pendente lite* to advance to the widow of the deceased (who was contesting the Will that has been propounded partly on her own behalf and partly on behalf of her two minor sons) sums reasonably sufficient for their maintenance and also sufficient to enable the widow to contest the Will and put her defence adequately before the Court. The learned District Judge appears to be of opinion that there is nothing in the law which enables him to make such an order. But here it appears to us that he has fallen into error. The position of an Administrator *pendente lite* in a Probate proceeding is closely analogous to that of a Receiver appointed for instance in a partition suit, and section 34 of the Probate and Administration Act gives ample power to the Court to direct the Administrator *pendente lite* to do such acts as may be necessary in the interests of the several parties to the proceedings. In this case it appears that the annual income from the immoveable property alone exceeds or at least amounts to ten thousand rupees. It also appears that there is cash money in hand and also money lent out at interest. By the Will that has been propounded the widow, we are informed, has been allowed maintenance only at the rate of Rs. 20 a month and the share in the estate that would fall under the ordinary law of inheritance to her two sons has been reduced from, say, seven annas to five. It is obviously essential that in the interest of the widow and her two minor sons the person who propounds the Will should be required to prove that it was in fact duly executed by the testator and that every opportunity should be given to the widow on her own behalf and on behalf of her two minor sons to contest that position.

We, therefore, direct that at the moment one thousand rupees be advanced to the widow, the payment to be made within this day fortnight, and that thereafter under the orders of the Court such sums as may be found to be reasonably necessary for the maintenance of the widow and her children and for the proper conduct of their defence be advanced to them from time to time. The Rule is accordingly made absolute with costs, three gold *mohurs*. Let the record be sent down at once.

Rule made absolute.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 584 OF 1916.

April 26, 1917.

Present:—Mr. Justice Sharfuddin and Mr. Justice Roe.

MOSUDAN POTDAR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SATIS CHANDRA ROY—DEFENDANT—RESPONDENT.

Landlord and tenant—Mokurrari *tenure—Dispossession of tenure-holder from portion of holding—Tenure-holder, whether can withhold rent.*

Where a lessor is directly or indirectly concerned in the dispossession of a tenure-holder from a *mokurrari*, the tenure-holder is entitled to withhold payment of the entire rent to the superior landlord. [p. 659, col. 1.]

Second appeal from a decision of the District Judge, Bhagalpur, dated the 2nd February 1916, confirming that of the Subordinate Judge, Bhagalpur, dated the 28th May 1915.

FACTS.—The plaintiffs brought a suit in the Court of the Subordinate Judge, Bhagalpur, claiming arrears of rent from the defendant in respect of a *mokurrari* tenure of 204 *bighas* comprised in 4 separate plots on a yearly *jama* of Rs. 484-8-0 besides cesses at a rate of Rs. 2-6-0 per *bigha*. The suit was contested by the defendant, on the ground that the plaintiffs shortly after making the settlement with him as aforesaid settled an area of 94 *bighas*, one of the said 4 plots, with certain other persons, which prevented the defendant from obtaining actual possession of the said 94 *bighas* and that therefore the entire rent for the *mokurrari* tenure should be suspend-

ed. The Subordinate Judge held that the conduct of the plaintiffs amounted to an active participation in keeping the defendant out of possession of the aforesaid area of 94 *bighas* and he, therefore, dismissed the suit. An appeal against his decision before the District Judge of Bhagalpur was also dismissed. Hence the second appeal.

Mr. *Pugh* (with him Mr. *Lal Mohan Ganguli*), for the Appellants.

Messrs. *P. C. Manuk* and *Sultan Ahmad* (with them Messrs. *Naresh Chandra Singh* and *Surendra Mohan Das*), for the Respondent.

JUDGMENT.

SHARFUDDIN, J.—The plaintiffs who are the appellants gave a *mokurrari* to the defendant of about 204 *bighas* of land. One of the plots is a plot of 94 *bighas* odd and this plot of 94 *bighas* is situated to the north of the river Goghri.

The defendant withheld payment of rent, on the ground that through the connivance of the lessors he was dispossessed from that portion of the *mokurrari*. The Subordinate Judge dismissed the suit; hence the present appeal.

On behalf of the appellants it has been conceded that the law is that when the lessor is directly or indirectly concerned in the dispossession of a tenure-holder from a *mokurrari*, the tenure-holder is entitled to withhold payment of the entire rent to the superior landlord, but it was contended that the appellants' case depends on a *kabuliyat* executed by the defendant, wherein it was stipulated that in case of dispossession from any portion the defendant would be entitled to claim a proportionate abatement of rent. There is no doubt that there is such a provision, but that provision does not say that the defendant will not be entitled to withhold payment of any rent. Besides, we have to consider that clause in relation to what precedes it. Reading the *kabuliyat* as a whole, it is clear to me that what was provided was dispossession of the lessee from the *mokurrari* in consequence of litigation or owing to the action of the river. The clause relied upon is to the following effect:—"If under any circumstances this executant or his heirs and representatives be, in future, dispossessed of any portion of the said land, or if under a decision of the Court any portion of it be taken out of the possession of this executant or his heirs and representatives, then this executant and his heirs and representatives will be entitled to a decree in the rent at the rate mentioned above to the extent to which they will be dispossessed."

If we were to accept the argument on behalf of the appellants it would amount to nullifying the whole *mokurrari*, because if a wide meaning is given to this part of the *kabuliyat*, the lessor himself would be able to continue dispossessing the lessee till the latter is absolutely dispossessed from all the *mokurrari* lands. The meaning seems to me to be this: That in case of dispossession through an action in Court, or if by any act of God the lessee is dispossessed, he will be entitled to claim a proportionate abatement of rent. According to this *kabuliyat* the lessee was entitled to the produce generation after generation. There is also a very clear provision of the right to claim abatement owing to the action of the river. This being the view I take, I dismiss the appeal with costs.

ROE, J.—I agree.

Appeal dismissed.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CIVIL APPEAL No. 225 OF 1917.

October 15, 1917

Present:—Mr. Saunders, J. C.

PAUKSI HOW AND COMPANY—PLAINTIFFS—APPELLANTS

versus

SINWA NAUNG—DEFENDANT—RESPONDENT.

Kachin Hill Tribes Regulation (*I of* 1895), *ss.* 1 (3), 11—*Civil Procedure Code (Act V of* 1908), *ss.* 9, 20—*Jurisdiction—Regulation, whether applies to Kachins outside hill-tracts.*

The Kachin Hill Tribes Regulation applies to Kachins in the defined hill-tracts and does not apply outside those hill-tracts [p. 660, col. 2.]

Section 11 of the Kachin Hill Tribes Regulation applies to suits triable within a hill-tract by an officer exercising jurisdiction therein. It is permissive and gives the Special Court power to try any suit of the nature described, but it does not lay down, and it cannot be inferred, that where a suit is triable outside a hill-tract, the jurisdiction of the ordinary Civil Courts is superseded [p. 661, col. 1.]

PAUSKI HOW *v.* SINWA NAUNG.

Appeal against the order of the District Court, Myitkyina.

Messrs. *Lentaigne* and *Pillay*, for the Appellants.

JUDGMENT.—This was a suit upon a mortgage which was filed in the District Court, Myitkyina, by the plaintiffs, a Chinese firm carrying on business in Bhamo and Mogaung. The defendant is a Kachin described in the plaint as residing in Kansi, Kamaing Sub-division, Myitkyina District. It is apparently admitted that Kansi is a hill-tract as defined in the Kachin Hill Tribes Regulation No. I of 1895, that is to say, a hill-tract to which that Regulation has been extended. The plaint was returned by the District Judge to the plaintiff on the ground that he had no jurisdiction, and the order directs that the plaint be returned for presentation to the proper Court, which under the Kachin Hills Regulation is the Court of the Assistant Superintendent, Kamaing.

This appeal is under Order XLIII, rule 1 (*a*), of the Code of Civil Procedure. The District Judge held that the suit was one between a Kachin as defined in the Kachin Hills Regulation and a non-Kachin, that the subject-matter of the suit lay in the Kachin Hills and that the defendant was a permanent resident there. The suit was, therefore, in the opinion of the District Judge, controlled by section 11 of the Kachin Hills Regulation and should be tried by the Special Court established under the Kachin Hills Regulation and under the special law and procedure laid down therein.

The grounds of appeal are that the District Judge was in error in holding that the District Court, Myitkyina, had no jurisdiction to entertain the suit, that the cause of action arose at Mogaung which is not a hill-tract and as such the District Judge had jurisdiction, that the Judge erred in holding that the suit was barred under section 11 of the Kachin Hills Regulation, and that he should not have returned the plaint for presentation to the Assistant Superintendent, Kachin Hill Tracts, Kamaing.

The extent of the Kachin Hill Tribes Regulation is laid down in section 1 (3) of the Regulation, which declares that it shall extend to such hill-tracts and shall apply to such hill tribes as the Local Government may by notification direct, and sub-section 3 goes on to declare that section 11 shall apply to all persons who may be parties to a suit or other proceeding of a civil nature in which any of the parties is a member of a hill tribe to which the Regulation applies. The wording of this clause is not perhaps very clear, but there seems to be no reason for supposing that it extends, or was intended to extend, the operation of the Regulation beyond the local area to which by clause (3) of section 1 it is specifically extended. The District Judge, Myitkyina, would appear to interpret this clause as extending the operation of the Act to members of a hill tribe outside the hill-tracts. If that is so, apparently a Kachin ordinarily resident in a hill-tract might come to Mandalay, contract debts in the bazaar and plead the Regulation as a bar to the jurisdiction of the Local Courts in the Mandalay District. Apart from the actual wording of the Regulation, it appears to me very improbable that it was the intention of Government that this should be possible. It is true that the Regulation is extended to such hill tribes as the Local Government may, by notification in the *Burma Gazette*, direct, and by a notification, Political Department No. 17, dated the 29th July 1914, the Lieutenant-Governor directs that the Regulation shall apply to the undermentioned hill tribes in certain defined tracts, namely, Kachins and others. I think that this notification must be taken to mean what it says, that is to say, that it applies to Kachins in the hill-tracts defined and does not apply outside those hill-tracts. Section 3 defines what enactments are in force and apply to members of a hill tribe in a hill-tract, and declares that no other enactment shall be deemed to apply to members of a hill tribe in a hill-tract. It seems to me that it would be impossible to interpret this section as meaning that the enactments set out in the schedule apply to members of a hill tribe outside a hill-tract without straining the plain meaning of the words.

Section 11, which is referred to in section 1 of the Regulation and on which

the learned District Judge relies, lays down that the Deputy Commissioner and every Assistant Commissioner exercising jurisdiction within a hill-tract may try any suit or other proceeding of a civil nature between parties any one of whom is a member of a hill-tribe. Nothing is said about the subject-matter of the suit or about one of the parties being a permanent resident in a hill tract. This section, therefore, clearly applies to suits triable within a hill-tract by an officer exercising jurisdiction therein. It is permissive and gives the Deputy Commissioner or Assistant Commissioner power to try any suit of the nature described but it does not lay down, and it cannot be inferred, where a suit is triable outside a hill tract, the jurisdiction of the ordinary Civil Courts is superseded. Section 9 of the Code of Civil Procedure declares that the Courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred, and section 20 lays down that subject to certain limitations, every suit shall be instituted in the Court within the local limits of whose jurisdiction, among other things, the cause of action wholly or in part arises, and there can be no doubt that the plaintiff may select the forum in which to bring his suit, provided that he complies with the provisions of section 20. Here it is his case that the mortgage upon which he sues was executed in Mogaung, that is to say, within the jurisdiction of the District Judge of Myitkyina. There is no doubt therefore that even if the Kachin Hill Tribes Regulation extends beyond the limit of a hill tract, the fact that it lays down that the Deputy Commissioner or Assistant Commissioner may try a suit, cannot be a bar to the jurisdiction of the ordinary Civil Courts.

There will, therefore, be an order setting aside the order of the District Judge and directing him to admit the plaint and proceed to deal with it according to law.

Costs will follow the final result.

Order set aside.

PATNA HIGH COURT.

CIVIL REVISION No. 217 F 1917.

February 26, 1918.

Present:—Mr Justice Roe and Mr. Justice Jwala Prasad.

Musammat SOHAGBATI—PETITIONER

versus

SOURENDRA MOHAN SINGH AND OTHERS—OPPOSITE PARTY.

Evidence Act (I of 1872), s. 114—Presumption as to correctness of official acts—Burden of proof Procedure—Execution—Sale, suit to set aside—Court, duty of.

There is a presumption under section 114 of the Evidence Act that an official act has been regularly performed but when an applicant before the Court is attempting to rebut that presumption, it is not for the Court itself to give assistance to the other side or to deal with the matter otherwise than impartially. [p. 662, col. 2.]

When a Court-sale is challenged, it is not the business of the Court to collect materials upon which the sale may be supported for the sake of the reputation of the Court [p. 662, col. 2.]

Civil Revision from a decision of the Munsif, Banka.

Mr. *Lalit Mohan Ghosh*, for the Petitioner.

Messrs. *Naresh Chandra Sinha* and *Surendra Mohan Das*, for the Opposite Parties.

JUDGMENT.—We are asked in revision to consider the following judgment:—"This is an appeal against the decision of the Munsif of Banka setting aside a sale held in execution of a decree. The judgment of the learned Munsif deals also with another application to set aside the decree. This tends to cause confusion and should not have been done. The applicant before him had only a share in the land sold and her relations contested the suit and appeared in the execution proceedings. This has not been noticed by the learned Munsif who has dealt with the case in a perfunctory manner. The auction-purchaser should have been summoned and the sale should not have been set aside in his absence. He has appeared in this Court and objected to the proceedings below, and rightly so. There is an order by the learned Munsif that the execution record should be sent for, but strange to say these have not been produced and the case has been dealt with without them, a most unsatisfactory proceeding The question whether the application was barred by limitation has not been considered at all. This was necessary, as unless the provisions of section 18 of the Limitation Act were applicable the applica-

tion is barred. To talk of the fraud of the decree-holder without specifying it is to beg the question at issue. The error in the plaint in describing the applicant as a widow cannot be held to be a material irregularity justifying the setting aside of the sale. Nor because the service of sale-proclamation and attachment was not proved can fraud be declared. The learned Munsif should certainly have inspected the execution record and examined the serving peon. The latter is an officer of his Court and the reputation of the Court is at stake if the peon is guilty of misconduct. I wish this view were borne in mind by judicial officers. It is impossible to support the findings of the Munsif. The application should have been dismissed as being barred. This appeal is allowed and the order of the lower Court set aside with costs and Pleader's fee Rs. 8."

We would suggest to the learned Judge that a Superior Court, when upbraiding a Subordinate Court for perfunctoriness, should be particularly careful not to lay itself open to the same charge.

Two applications had been made in the Court of the Munsif, one for the setting aside of a decree obtained *ex parte* on the ground that no summons had been served, the other that the sale held in execution of that decree be set aside on the ground of material irregularities in the conduct of the sale. The issues raised on these two applications were tried together by consent of parties. The learned Judge says that this should not have been done because it tends to cause confusion. Why it should cause any confusion at all we cannot see. The whole proceedings were closely interwoven. If the decree was obtained by fraud, the probability that the sale was fraudulently conducted was enhanced. If it was honestly obtained, the probability that the sale was honestly proclaimed was also enhanced. The learned Munsif found on the evidence that the summons in the suit had not been served on the applicant and that the sale-proclamation had been fraudulently suppressed. He, therefore, set aside both the decree and the sale. The decree-holder did not appeal against the order setting aside the decree and the original suit is, we understand, now being re-tried. The auction-purchaser did not appeal against the order setting aside the sale. The decree-holder did appeal. The learned Judge says that the auction-purchaser should have been summoned and the sale should not have been set aside in his absence. The learned Munsif had been at pains to record that a notice had been served on the auction-purchaser and that the auction-purchaser had been carefully kept out of Court at the instance of the decree-holder, with whom he was in collusion. The whole judgment of the learned Judge indicates that he is of opinion that when a Court-sale is challenged, it is the business of the Court to collect materials upon which the sale may be supported for the sake of the reputation of the Court. This we consider a view unfair to those who contend that a sale has been improperly conducted. There is a presumption under section 114 of the Evidence Act that an official act has been regularly performed, but when an applicant before the Court is attempting to rebut that presumption it is not for the Court itself to give assistance to the other side, or to deal with the matter otherwise than impartially. The real issue in the case was: Were the sale-proclamations fraudulently suppressed? The learned Munsif found that they were. If that is correct the sale was fraudulently held, and fraudulently concealed from the applicant and limitation saved by section 18. The issue has not been touched by the learned Judge. All that he says is that fraud cannot be declared merely because the service of the sale-proclamation has not been proved and that it is impossible to support the findings of the Munsif. We are of opinion not only that the judgment is not a judgment in accordance with law, but also that it is no judgment at all. It is merely an indignant protest against the setting aside of a sale held by officers subordinate to the Judge. The learned Judge had no jurisdiction to reverse the order of the lower Court without writing a judgment in accordance with law. We, therefore, set aside the order made, and direct that the appeal be re heard. In view of the attitude of the learned Judge towards the respondent's case we direct that it be re-heard by the District Judge of Monghyr.

Order set aside.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 979 OF 1916.

November 1, 1917.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

RAMASAMI SERVAIGARAN AND ANOTHER—DEFENDANTS NOS. 1 AND 2—APPELLANTS

versus

ATHIVARAHA CHARIAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Madras Estates Land Act (I Mad. of 1908), *s.* 4—*Landlord and tenant*—Varam *tenure—Lands left waste, liability for rent for—Custom, reasonable—Burden of proof—Agricultural holding, use of, as house site—Rent, liability for, at* punjah *rate—Civil Procedure Code (Act V of* 1908), *s.* 11—*Finding in Civil Court as to landlord's right, whether* res judicata *in suit for rent in Revenue Court.*

Section 4 of the Madras Estates Land Act does not override any custom or agreement not to charge rent upon portions left waste in a tenant's holding. [p. 665, col. 1; p. 663, col. 2.]

Where lands are let on *waram* tenure, it is open to the tenant to claim exemption from rent for portions that were left fallow through no default of his. [p. 664, col. 2.]

A ryot cannot claim exemption from rent by reason of his having put an agricultural holding to some other use. The landlord is entitled to claim rent at *punjah* rate for use of agricultural land as a house site. [p. 664, col. 1.]

Per *Sadasiva Aiyar, J.*—A custom to let lands lie waste without regard to reasonable area and without regard to good or bad seasons and existence or absence of facilities for irrigation for indefinite periods at the tenant's will and pleasure, with absolute freedom from liability to payment of any rent, is not a reasonable custom which can be recognised by the Courts. [p. 664, col. 1.]

The onus is on the ryot to prove that the lands were left waste through no default of his. [p. 664, col. 2.]

A mere finding by a Civil Court as to the existence of any right in a landlord will not operate as *res judicata* in a subsequent suit in a Revenue Court having exclusive jurisdiction over such a suit. But where the right is embodied in the decree of a competent Court in the former suit, such decree is *res judicata* between the parties as regards the rights established thereby. [p. 664, col. 1.]

Second appeal against the decree of the District Court, Tanjore, in Appeal Suit No. 640 of 1915, preferred against that of the Court of the Revenue Divisional Officer, Pattukottai Division, in Summary Suit No. 130 of 1914.

The Hon'ble Mr. *T. Rangachariar*, for the Appellants.

Mr. *T. R. Venkatarama Sastri*, for the Respondents.

This second appeal and the memorandum of objections filed by the respondents coming on for hearing on the 22nd and 23rd February 1917, and the case having stood over for consideration till the 28th February 1917, the Court (Sadasiva Aiyar and Spencer, JJ.) delivered the following

JUDGMENT.

SADASIVA AIYAR, J.—The defendants Nos. 1 and 2 are the appellants in this case. The plaintiffs are landlords and the defendants are tenants under the Madras Estates Land Act. The only questions involved in the second appeal and in the connected memorandum of objections are: (1) whether the plaintiffs are entitled to claim rent on the lands left waste in the defendants' holding if the defendants do not establish that the lands were so left waste without their default, (2) whether the defendants are bound to pay ordinary dry rate of rent on the area of a house site included in the defendants' holding and whether that question is *res judicata* in favour of the defendants (as the defendants contend) or in favour of the plaintiffs (as the plaintiffs contend), and (3) whether the plaintiffs are entitled to claim rent for the house site, item 70, at Nanja rates and not merely at Punja rates.

As regards the first point, I have come to the conclusion (after the best consideration that I have been able to give to the question) that the law on this point has been correctly expressed in the judgment in *Arunachallam Chettiar* v. *Mongalam* (1), where all the principal authorities have been carefully considered. Under section 4 of the Madras Estates Land Act, the land-holder is entitled to collect rent in respect of all Ryoti land in the occupation of a Ryot and it does not make this right subject to any custom. *Prima facie*, section 4 entitles the landlord to collect rent on the land left waste by the tenant. [See *Segu Rowthen* v. *Alagappa Chetty* (2).] The intention of the parties was, however, held in the above case to override section 4. In the case in *Arunachalam Chettiar, In re* (3), the custom of allowing a reasonable portion of land in a tenant's holding

(1) 35 Ind. Cas. 329; 31 M. L. J. 168; 20 M. L. T. 70; 4 L. W. 37; 40 M. 647.

(2) 22 Ind. Cas. 834; 26 M. L. J. 269; (1914) M. W. N. 340.

(3) 30 Ind. Cas. 679; 2 L. W. 828.

to be left fallow without being charged rent on it was held a valid custom. In *Imandi Appalaswami* v. *Rajah of Vizianagaram* (4) it was held that if the tenant chooses to build on the agricultural site instead of using it for agricultural purposes, he cannot escape payment of rent on the basis of its continuing to be agricultural land. I think the observations in the judgment in *Arunachallam Chettiar* v. *Mangalam* (1) establish that the tenant is bound to pay rent on land left waste, unless he establishes an agreement or custom allowing a reasonable extent in area to lie fallow for reasonable periods or some other reasonable custom or a contract for consideration exempting him from payment of rent on lands left waste out of the lands in his holding.

In *Vedanta Chariar* v. *Ayyasami Mudali* (5) Innes and Kindersley, JJ., express an opinion that the landlord had the right to collect the whole rent notwithstanding that a portion of the land was left uncultivated through want of rain. In *Nagu Chetty* v. *Bhaskara* (6) it was held that for the protection of the "just interests of the Zamindar" it is reasonable to have a provision in a Pattah that the Ryot must pay Melwaram or Theerwa if through his fault the lands are not cultivated. I do not think that a custom to let lands lie waste (without regard to reasonable area and without regard to good or bad seasons and existence or absence of facilities for irrigation) for indefinite periods at the tenant's sweet will and pleasure, with absolute freedom from liability to non-payment of any rent, is a reasonable custom which can be recognised by Courts. In the present case, it is such a custom that seems to have been set up. I think the learned District Judge was right in throwing on the Ryots the burden of proving that the lands were left waste not through the default of the Ryots. I would, therefore, decide the first point in plaintiffs' favour.

As regards points 2 and 3, I am clear that the former decision (see Exhibits A, B, C and D) establishes and declares the plaintiffs' right to get a reasonable rate of rent on the site on which the tenants chose to build houses.

If the judgment in the former suit, which was instituted in a *Civil Court*, merely contained a finding on the question of the plaintiffs' right, such a finding may not be *res judicata* in the present suit for rent brought in a Revenue Court which has now exclusive jurisdiction over such a suit. But the plaintiffs' said right was embodied in the decree (see Exhibit B) in the former suit and a *decree* of a competent Court is clearly *res judicata* between the parties as regards the rights established thereby.

Sites which are capable of being used for house-building are presumably dry holdings and not wet holdings, and I do not think I could interfere with the lower Court's view that the plaintiffs are entitled only to claim the dry rate of rent on such sites.

It follows from the preceding that the memorandum of objections filed by the plaintiffs and which relates solely to the rate at which the rent due on the house sites has to be calculated has to be dismissed with costs.

As regards the second appeal, I was at first inclined to take the view that we might dismiss the second appeal also at once, accepting the findings of the District Judge (1) that the defendants had failed to prove a contract or a custom that they are entitled to let any lands lie waste at their pleasure without liability to pay rent thereon, and (2) that the defendants had failed to prove that the lands lay waste without any default on their part.

But my learned brother is not satisfied that the District Judge did not arrive at his second finding of fact above referred to more on presumptions than after duly considering the whole evidence in the case and I shall, therefore, concur with him in remanding the case for a fresh and definite finding on this question. In submitting such a finding, the District Judge is requested to indicate whether or not *all* the lands left waste were so left uncultivated for identical reasons in *each* of the two Faslis in question.

(4) 20 Ind. Cas. 838; 25 M. L. J. 50; (1913) M. W. N. 806.
(5) 4 M. 372: 1 Ind. Dec. (N. S.) 1060.
(6) 9 Ind. Cas. 41; (1911) 1 M. W. N. 6; 9 M. L. T. 191.

RAMASAMI SERVAIYENGAR v. ATHIVARADHA CHARIAR.

SPENCER, J.—The main question in this second appeal is whether the appellants were liable to pay rent for lands in their holding left uncultivated, the tenure upon which they hold being 'varam' tenure, according to which the crop is divided between the land-holders and the Ryots.

The District Judge observed that if there had been a fixed money rent or a fixed grain rent on the lands, the Ryots would have been bound by section 4 of the Act to pay rent so long as the land was in their holding.

If he meant by this observation that where a money assessment is fixed on the lands the provisions of section 4 would override any custom or agreement not to charge rent upon portions left waste, he was wrong; *vide Segu Rowthen* v *Alagappa Chetty* (2), *Udayal* v. *Arunachala Chettiar* (7), *Arunachalam Chettiar, In re* (3) and *Arunachallam Chettiar* v. *Mangalam* (1).

For the holdings concerned in this suit the Varam system admittedly prevails, and as regards such lands the 2nd plaintiff and his 2nd, 4th, 5th and 6th witnesses admitted in their evidence that hitherto Varam had only been collected for lands cultivated and not for lands left waste.

The District Judge was conscious of this. For he says: "It is true that Varam has never been paid for waste lands, but I do not think this fact establishes a custom not to pay for waste under any circumstances. I, therefore, find the appellants are entitled to Varam for the waste lands."

If he was of opinion that certain circumstances would justify the non-payment of rent and that certain other circumstances would not do so, it was his duty to find what the special circumstances were that differentiated the defendants' case from others.

Now in the plaint it was alleged that items Nos. 28 to 69 were wantonly left waste in Faslis 1321 and 1322, owing to defendants' carelessness and bad intention. In the written statement it was alleged that some of these lands were not fit for cultivation and that the rest had been left waste for over twelve years owing to want of proper rain and water.

(7) 27 Ind. Cas. 872; 2 L. W. 145; (1915) M. W. N. 190.

Which of these versions is true is not found by either of the lower Courts.

The District Judge notices that in Fasli 1271 the lack of Ryots was the cause of non-cultivation and he states that there is really no evidence in this case that the lands could not be cultivated. He then proceeds to the presumption that the Ryots have deliberately omitted to cultivate the waste lands.

There must be some foundation either in law or in fact for such a presumption being made, but the judgment does not refer to any.

I think the case should be remanded for a definite finding as to what was the cause of the lands, which were left waste in the suit Faslis, not being cultivated in those years.

Either side may adduce fresh evidence on this point. Two months for finding and ten days for objections.

Item No. 70, schedule 17, is occupied by house. I am of opinion that the District Judge was right in allowing rent to be paid for this land at the Punjah rate. So long as the Ryots' right to use the land for agricultural purposes subsists, they cannot claim to be exempted from paying rent by reason only of their having put it to some other use: *vide Imandi Appalaswami* v. *Rajah of Vizianagaram* (4). The memorandum of objections must be dismissed with costs.

In compliance with the order contained in the above judgment, the District Judge of Tanjore submitted the following

FINDING.

The High Court has remanded this suit for a finding as to "what was the cause of the lands, which were left waste in the suit Faslis, not being cultivated in those years."

2. Fresh evidence has been taken. The evidence on both sides, however, is so vague that it is difficult to come to any conclusion. The plaintiff's case is that the defendant has left the lands waste in order to spite him and to compel him to dispose of the Melwaram right also to him. This explanation seems to me a little far-fetched. The defendant's case is that the lands are unfit for cultivation except at considerable cost, the Punja being overgrown with prickly pear and the Nanja buried in mud

and sand; that the tanks are in bad repair and cannot hold water for a larger extent than the present cultivation and that this deficiency affects both Nanja and Punja, as the only crop suitable for the Punja land is Ragi which also requires water to be baled from the tanks. No definite evidence has been given as to the reason for any particular field lying waste. But it is at least evident, I think, that much of the present waste has been waste for many years (see the evidence of the 1st plaintiff under cross-examination and that of P. W. No. 6 and P. W. No. 1 at the original trial). The statement of P. W. No. 2 in the original trial that there is no immemorial waste is clearly false. The evidence of P. W. No. 7, the Village Munsif, so far as the reason for waste is concerned, is hearsay and of no assistance. P. W. No. 8 is a fellow Melwaramdar of the plaintiff and clearly interested in the plaintiff's case. He admits, however, that there is waste even in the lands wholly owned by the Melwaramdar and that the tanks have not been properly repaired. He asserts that the tanks will fill without a dam being constructed in the river, but the Village Munsif contradicts him on this point. It is admitted that no dam has been put up for several years. The evidence on the plaintiff's side is wholly insufficient to show that the waste is due to neglect by the defendants with a deliberate purpose to spite him. The defence witnesses examined state that the tank is badly out of repair and that on that account and on account of lack of labour the lands lie waste. The defence witnesses Nos. 6 and 7 seem to me disinterested.

3. It is the duty of the Melwaramdars to have the tanks put into order and it is, therefore, their neglect if the tanks are not repaired. On such evidence as there is, I record a finding that the lands left waste in the suit Faslis were left waste chiefly because the tanks are out of repair and partly perhaps because of the lack of labour. No distinction is made by any witness between the conditions affecting each suit Fasli and, therefore, the finding applies equally to both Faslis.

This second appeal coming on for final hearing after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.—We accept the finding that the omission to cultivate items Nos. 28 to 69 was not due to the fault of the appellants.

They are, therefore, not liable to pay rent on those items. The appeal is allowed so far as the lower Appellate Court's decree makes the appellants liable to pay such rent also and the lower Appellate Court's decree will be modified accordingly.

The respondents will pay $\frac{3}{4}$ths of the appellants' costs in this Court and in the lower Appellate Court and bear their own. The order of the first Court as to costs of that Court will stand.

Appeal partly allowed;
Decree modified.

M.C.P.

ALLAHABAD HIGH COURT.

STAMP REFERENCE IN FIRST CIVIL APPEAL No. 293 OF 1916.

January 26, 1918.

Present:—Mr. Justice Tudball.

ABINASH CHANDRA—PLAINTIFF—APPELLANT

versus

SHEKHAR CHAND AND OTHERS—DEFENDANTS—RESPONDENTS.

Court Fees Act (VII of 1870), s. 7 (i) (vi)—Pre-emption suit—Suit decreed in respect of part of property and dismissed as to remainder—Appeal—Court-fee payable.

Plaintiff sought to pre-empt five villages on payment of Rs. 2,500, alleging that the sum of Rs. 41,000 entered in the sale-deed was the ostensible amount of consideration. The suit was dismissed in respect of three villages and decreed in respect of the remaining two on payment of Rs. 21,000. The plaintiff appealed:

Held, (1) that the appeal being divisible into two parts and the sole question which arose in the part relating to the two villages being a question of consideration, the appellant must pay an *ad valorem* Court-fee on the amount by which he was seeking to reduce the amount made payable by the lower Court; [p. 668, col. 2.]

(2) that as regards the rest of the claim as the right to pre-empt was in dispute, the Court-fee in respect thereto must be calculated according to section 7 (*vi*) of the Court Fees Act. [p. 668, col. 2.]

Office Report.—This appeal arises out of a suit for pre-emption. In the plaint filed

in the Court below the plaintiff asked for possession by right of pre-emption of certain shares in 5 villages on payment of Rs. 2,500, the actual sale consideration, alleging that Rs. 44,000 entered in the sale-deed was the ostensible amount of consideration. A Court-fee of Rs. 180 was paid on the plaint on Rs. 3,100 being 5 times the Government revenue of the shares to be pre-empted. The Court below decreed the claim for possession of the property specified in the plaint situate in Mauza Parkariar and Mauza Cheontaha on condition of the plaintiff's depositing Rs. 21,000 as the proportionate amount of sale consideration in respect of those villages. The claim for possession of the three remaining villages, *viz.*, Rampur, Lachmipur and Jotepur, was dismissed.

Against the decree of the Court below the plaintiff has filed this appeal valuing it for purposes of jurisdiction at Rs. 25,000 and for payment of Court-fee at Rs. 3,100, being 5 times of the Government revenue of all the 5 villages as said above, and paying a Court-fee of Rs. 180 on the latter valuation. The relief sought in this appeal is that the decree of the Court below be varied and the claim decreed *in toto*. A reference to the pleas urged in the memorandum of appeal to this Court will show that the plaintiff not only claims possession of the 3 villages named above in regard to which the claim has been dismissed, but he also contends that the actual sale consideration of all the properties claimed is Rs. 2,500 and not Rs. 44,000 as found by the Court below, and so the claim in respect of Mauzas Parkariar and Cheontaha ought to have been decreed on payment of the proportionate amount of the actual sale consideration. Practically there are two reliefs asked for in this appeal, *viz.*, (1) to obtain possession of the three villages in regard to which the claim has been dismissed, and (2) to reduce the proportionate liability in respect of two villages decreed in plaintiff's favour. As regards (1) the Court-fee ought to be paid on 5 times the Government revenue of the three villages, *viz.*, Rampur, Lachmipur and Jotepur. According to the plaint 5 times of the revenue of these three villages is Rs. 1,741-4-0. In regard to (2) the Court-fee should be paid on the difference between the amount decreed against the plaintiff-appellant and that admitted by him as the actual sale price. According to the plaintiff's allegation as to the actual sale consideration the rateable contribution of the value of the two villages decreed should be in proportion to Rs. 44,000, 2,500, 21,000.

This comes to Rs. 1,193. The value of this relief is, therefore, Rs. 21,000 *minus* Rs 1,193=19,807. Adding the two reliefs the value of this appeal should be Rs. 21,584-4-0 and on this valuation a Court-fee of Rs. 815 is payable. A Court-fee of Rs. 180 having been paid there is, therefore, a deficiency of Rs. 635 due from the plaintiff appellant in this Court.

Objection to Office Report.—The report is not correct. The nature of the suit has not been changed in appeal and the subject-matter of the dispute between the parties is the right of pre-emption, the value of which for the purposes of Court-fees is to be determined in the manner directed by section 7, clause (*vi*), of the Court Fees Act. The matter is concluded by the following observation of their Lordships sitting in Full Bench (*sic*) in the case of *Hafiz Ahmad* v. *Sobha Ram* (1): —

"We are of opinion that where an appeal is preferred in a suit for pre emption on the grounds that the right to pre-empt has or has not been established, as the case may be, no matter what other pleas may be taken, the value of the subject-matter in dispute for the purposes of the Court Fees Act must be determined as in terms provided in Article (*sic*) (*vi*) of section 7 of the Act. But when the question in appeal relates solely to the amount to be paid by the pre-emptor then we think that it should be calculated *ad valorem* on the difference between the amounts alleged as the sale price on the one side and the other."

The present appeal not relating solely to the amount to be paid by the pre-emptor, the view taken by the Stamp Reporter is legally unsustainable and no additional amount of Court-fee is leviable.

(1) 6 A. 488 (F. B.); A. W. N. (1884) 179; 4 Ind. Dec. (N. S.) 142.

ABINASH CHANDRA v. SHEKHAR CHAND.

Taxing Officer's Report:—In this case the plaintiff claimed the right of pre emption in certain shares of five villages on payment of Rs. 2,500, the actual consideration alleged being Rs. 44,000. In regard to three villages the claim was dismissed, and in regard to the other two it was decreed on condition of the payment of Rs. 21,000, the sum of Rs. 44,000 being accepted as the true consideration. In appealing the plaintiff pays a Court-fee based on five times the revenue of the villages. Office suggests that as regards the two villages Pakariar and Cheontaha, in the case of which the sole question now at issue is the amount of consideration, the Court-fee should be paid *ad valorem* on the difference between the consideration claimed and that accepted by the lower Court. Both office and the learned Vakil for the appellant rely on the Full Bench ruling in *Hafiz Ahmad* v. *Sobha Ram* (1). It is there laid down that when an appeal is preferred on the grounds that right to pre empt has or has not been established, as the case may be, no matter what other pleas may be taken, the value of the subject-matter in dispute for the purposes of the Court Fees Act must be determined as provided in clause *vi*) of section 7 of the Act. But where the question in appeal relates solely to the amount to be paid by the pre-emptor, there it should be calculated *ad valorem* on the difference between the amounts alleged as the sale price on the one side and on the other. The appellant maintains that it is impossible to split up this appeal, that the whole consideration is one, and that the first part of this ruling must apply to the whole. Office on the other hand contend that the nature of the appeal is quite different as regards the villages Parkariar and Cheontaha, and that the appeal as regards them must be taxed as laid down in the second part of the ruling quoted. I think that office is right, but as there appears to be no clear ruling as to whether an appeal, which like this has two distinct parts with two different natures owing to the form of the decree of the lower Court, can be practically treated as two different appeals for Court fee purposes, I refer the question for your decision.

JUDGMENT.—The facts are fully set out in the referring order of the Taxing Officer. The present appeal is divisible into two parts. In regard to the three villages Rampur, Lachmipur and Jotepur, the suit has been dismissed and it has been held that the plaintiff has no right of pre-emption in these villages. In regard to Parkariar and Cheontaha the Court below has held that the right to pre-empt exists and it has directed the plaintiff to deposit the sum of Rs. 21,000 as the value thereof. The whole sale-deed purported to be for the sum of Rs. 44,000. The plaintiff sought to pre-empt the whole property upon the payment of Rs. 2,500. The Court below has held that Rs. 44 000 is the correct amount and in respect of the two villages Parkariar and Cheontaha it has directed the payment of a proportionate part, namely, the sum of Rs 21,000. The appellant claims to be allowed to appeal on the payment of Court-fee based upon five times the revenue of all five villages. The Taxing Officer's opinion is that the appeal being divisible into two parts and the sole question which arises in one part of the appeal respecting the two villages being a question of consideration, the appellant must pay an *ad valorem* Court-fee as laid down in the ruling in *Hafiz Ahmad* v. *Sobha Ram* (1). In regard to the three remaining villages, as the right to pre-empt is in dispute, the Court-fee in respect thereto must be calculated according to section 7, clause (*vi*), of the Court Fees Act. On behalf of the appellant it is urged that the question of consideration arises on the whole appeal and as that is not the sole question, inasmuch as the right of pre-emption is in dispute in respect to at least three villages, under the ruling quoted he need only pay Court-fees on five times the Government revenue as mentioned above, on the whole estate. In my opinion the appeal is divisible into two clear and distinct parts and the report of the Taxing Officer is correct. In regard to the two villages of Parkariar and Cheontaha, the Court-fee will be calculated *ad valorem* on the difference between 21/44 of Rs. 2,500 and Rs. 21,000. The Court-fee in respect of the other three villages will be calculated according to section 7, clause (*vi*), on the basis of 5 times the Government revenue. If the appellant so pleases he may

amend his plaint of which notice will have to be given to the other side, and the office will calculate the Court-fees after the amendment has been made. I allow three weeks for the making of the amendment and after it has been made, a necessary period will be allowed for the payment of any deficiency that may then be found due.

Order accordingly.

CALCUTTA HIGH COURT.
RULE No. 716 OF 1917.
February 8, 1918.
Present:—Mr. Justice Teunon and Mr. Justice Newbould.
FIRM BHUDAR MAL-RAM CHANDRA MARWARI—PETITIONERS
versus
SEW NARAYAN MARWARI—
OPPOSITE PARTY.

Contract Act (IX of 1872), ss. 69, 70—Calcutta Municipal Act (III B. C. of 1899), ss. 171, 228—Consolidated rate, payment of, by owner of premises—Owner, whether can recover half share from occupier.

In view of the provisions of section 228 of the Calcutta Municipal Act, which make the consolidated rate a first charge upon the building or land in respect of which it is payable, the owner of such building or land is a person interested in the payment of the rate within the meaning of section 69 of the Contract Act, and having paid the share of the occupier he is entitled to recover it from the latter under section 69 or 70 of the Contract Act. [p. 670, col. 1.]

Rule against an order of the Small Cause Court Judge, Sealdah.

FACTS appear from the judgment.

Babu *Kali Prosonna Piplai*, for the Petitioner.—Plaintiff is the owner of premises No. 35, Harish Mookerjee Road, defendant is the tenant. The finding is that there was no contract for payment of Municipal taxes. Under the Calcutta Municipal Act, section 171, defendant is bound to pay the occupier's share. This is a suit for recovery of the half share, *i.e.*, the occupier's share. The occupier's share was paid by me after it fell due. Under section 228 of the Calcutta Municipal Act I am ultimately responsible. The Corporation may proceed against me and need not proceed against the defaulter. It will remain the first charge upon the premises. Under section 69 or 70 of the Contract Act I can recover the sum from the defendant.

Babu *Biraj Mohan Majumdar* (with him Babu *Suresh Chandra Talukdar*), for the Opposite Party.—There was no agreement in the lease for the payment of the tax. The plaintiff should, therefore, pay the whole tax and I shall pay him a consolidated rent Under section 214 of the Calcutta Municipal Act the occupier's share is to be separately paid and the payments were made by him voluntarily - see section 222 Where the owner failed the whole amount is to be realised from the occupier.

JUDGMENT.—This Rule is directed against an order of the Small Cause Court Judge of Sealdah, by which the Small Cause Court Judge dismissed the plaintiff's suit for recovery of a sum of Rs 543-1-6. The plaintiff, it appears, is the owner of premises No. 35, Harish Mookerjee Road, and the defendant was his tenant and occupier of the said premises. The sum sued for represented payment of consolidated rate made by the plaintiff, and his case was that under the lease executed in favour of the defendant, defendant was liable to pay the whole rate. In the lease that was produced there was a stipulation to the effect that the consolidated rate should be paid in full by the tenant occupier. It has been found in a suit between the parties that that stipulation was fraudulently inserted. That being so, it is obvious that the plaintiff could not recover the sums, he had paid, in full; but under section 171 of the Calcutta Municipal Act, in the absence of any contract to the contrary, half of the consolidated rate is payable by the owner and the other half by the occupier. Falling back upon this provision of the law the plaintiff says that he should now be given a decree for half the amount he claimed.

The case for the opposite party before us is that on removal of the clause fraudulently inserted, the contract between the parties was not that the defendant should pay the whole of the consolidated rate but that the plaintiff should do so. He further contends that inasmuch as no suit or any other action was brought or taken by the Municipal Authorities in order to recover the sums paid, the payment by the plaintiff was a voluntary payment and he could not on that ground recover. From the contention he now puts forward it is quite clear that the defendant was determined not to pay either the whole or half of the consolidated rate.

It has been suggested that the plaintiff

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should have waited until a suit was brought against him, or that he should have left it open to the Municipal Authorities to proceed against the defaulting occupier by way of distress and sale under the provisions of section 213 and the following sections of the Municipal Act. In view, however, that such distress and sale would have the effect of removing the plaintiff's, the landlord's security for his rent, and in view of the provisions of section 228 of the Act which make the consolidated rate a first charge upon the building or land in question, it is clear that the plaintiff is a person who under the provisions of section 69 of the Contract Act, is interested in the payment of this money. The defendant has made it clear that he did not in fact intend to pay; if the plaintiff has paid it, he is clearly entitled to be reimbursed. In other words, section 69 or section 70 of the Contract Act is applicable, the plaintiff not having made this payment with the intention of doing so gratuitously is entitled to recover from the defendant the payments actually made in so far as such payments should have been made by the defendant.

Other defences are also put forward. It is suggested, for instance, that the plaintiff has not actually made the payments he alleges. It is further represented to us that for the period covered by these payments the defendant was not in occupation of the building. All these, however, are questions of fact into which we cannot enter here.

We, therefore, set aside the order complained of and remand the case to the Court of Small Causes in order that after ascertaining the facts the learned Judge may proceed to pass a decree for such amount, if any, as may be justly recoverable from the defendant.

Costs of this Rule will be costs in the suit. We assess the hearing fee at two gold *mohurs*.

Order set aside.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 2055 OF 1915.

July 11, 1917.

Present:—Mr. Justice Roe and Mr. Justice Jwala Prasad.

KALIKA DUTT MANDAR—APPELLANT

versus

TULSI MANDAR—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 27 (b)—Appellate Court, power of, to admit additional evidence.

Order XLI, rule 27 (*b*), of the Civil Procedure Code does not mean that in order to enable the Appellate Court to pronounce judgment in favour of a particular party additional evidence should be admitted in appeal; it means only that where it is impossible to pronounce judgment at all on the evidence the Court may call for a document. [p. 670, col. 2; p. 671, col. 1.]

Where the plaintiff on whom the onus lay failed to discharge it owing to the non-production of a document which it was in his power to produce, but for the production of which he took no steps:

Held, that the provisions of Order XLI, rule 27 (*b*) of the Civil Procedure Code could not be used in his favour and that he could not be allowed to produce the document in appeal. [p. 671, col. 1.]

Second appeal from a decision of the District Judge, Bhagalpur, dated the 25th June 1915, confirming that of the Munsif, Madhepura, dated the 9th January 1915.

Mr. *Rajendra Prasad*, for the Appellant.

Mr. *Krishna Sahay*, for the Respondent.

JUDGMENT.—The plaintiff in this suit sued upon a bond, in which it was set forth that the consideration upon which this bond was given was an existing consideration under a previous bond and account. The Court of first instance refused to accept the oral evidence given in support of this consideration and pointed out that it was impossible to give the plaintiff a decree without reliable accounts, the previous bond itself and a close inspection of these papers.

Upon appeal from the decree of the first Court dismissing the plaintiff's suit, the appellant offered to place before the District Judge the original bond whereby the original consideration might have been proved. The learned District Judge refused to accept the bond and dismissed the plaintiff's appeal. Against that decision an appeal is made to this Court. The short point, therefore, is what document should an Appellate Court accept under Order XLI, rule 27. Rule 27 (*a*) has nothing to do with the case before us, and the case comes under rule 27 (*b*): "If the Appellate Court requires any document to be produced .....to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence to be produced." This does not mean that in order to enable the Appellate Court to pronounce

judgment in favour of a particular party additional evidence should be admitted in appeal; it means only that where it is impossible to pronounce judgment at all on the evidence the Court may call for a document. In this case the burden of proof was upon the plaintiff and in the absence of proof of the consideration the Court was in a position to pronounce judgment in favour of the defendant. The document was not required to enable the Court to pronounce judgment. The highest at which this can be put is that it might have been required in order to enable the Court to pronounce judgment in favour of the plantiff, which is an entirely different thing. The question remains whether sufficient cause was shown for admitting the document in the lower Appellate Court. From the record of the case as tried before the learned Munsif it is clear that the plaintiff was fully aware of the precise place, namely, the record room at Bhagalpur, in which this document might have been found. He took no steps to search for it and and produce it in time for use during the adjudication of his claim, and the learned District Judge exercised, in our view, a very sound discretion in refusing to regard the pure laziness of the plaintiff in the lower Court as sufficient cause for giving him a peculiar license in the Appellate Court.

The appeal is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

RULE *Nisi* No. 891 OF 1917.

February 11, 1918.

Present:—Mr. Justice Richardson and Mr. Justice Walmsley.

Srimati JASHODA DASEE, MINOR, THROUGH HER NEXT-FRIEND AND GUARDIAN *Srimati* BHUBAN MOHINI DASSEE—PLAINTIFF—PETITIONER

versus

UPENDRA NATH HAZRA—OPPOSITE PARTY.

Partition suit—Preliminary decree—Appeal—Final decree as regards portion of joint property—Supplementary final decree—Jurisdiction

In an appeal from a preliminary decree in a suit for partition, the High Court during the pendency of the appeal stayed proceedings upon the preliminary decree, in so far as it related to a joint business. In the meanwhile the trial Court on the report of the Commissioner made a final decree partitioning all other properties involved in the suit. Subsequently upon the dismissal of the appeal by the High Court an application purporting to be under section 151, Civil Procedure Code, made by the plaintiff to the trial Court for the partition of the joint business, was refused with the remark that the only course open to the plaintiff was an application for review under Order XLVII, Civil Procedure Code:

Held, that the trial Court had refused to exercise a jurisdiction which was vested in it, inasmuch as it was quite competent to deal with as much of the suit as had not already been dealt with in the final decree and to make a supplementary final decree in regard to the joint business. [p. 672, col. 2.]

Rule against the order of the Sub-Judge, Howrah, in Title Suit No. 51 of 1914.

FACTS appear from the judgment.

Babu *Manmatha Nath Ganguly*, for the Petitioner.—The learned Subordinate Judge was wrong in refusing to partition the *karbar* on the ground that the suit had already been disposed of. The suit was not disposed of, and the decree, as it stands, shows that it was passed in terms of the report of the Commissioner, and the Commissioner clearly excluded the *karbar*. Moreover, certain orders passed after the passing of the final decree, *viz.*, orders requiring the defendant to file the *khata* books of the *karbar*, the list of assets, etc., show also that the suit is still pending. No doubt, the petition under section 151, Civil Procedure Code, invoking the inherent powers of the Court for the rectification of the decree was made, but your Lordships would take this into consideration that no such rectification was necessary, and the petition was made under wrong advice. As the suit is still pending the partition of the *karbar* should be allowed. Refers to *Muhammad Abdul Majid* v. *Muhammad Abdul Aziz* (1).

Dr. *Dwarka Nath Mitter* (with him Babu *Debendra Nath Mandal*), for the Opposite Party.—The remedy of the petitioner is by way of review or by suit. The partition of the other properties was effected before the disposal of the High Court appeal, and the

(1) 24 I. A. 22 at p. 32; 19 A. 155; 7 Sar. P. C. J. 111; 9 Ind. Dec. (N. S.) 103.

final decree in the suit was passed, and the suit was disposed of, so that the *karbar* cannot be partitioned in this suit. It was understood by both the parties that the suit was disposed of, and when it was found that the time for review of the decree under Order XLVII, rule 1, Civil Procedure Code, was gone, the petition under section 151 was made. The order made by the learned Subordinate Judge is, under the facts and circumstances, correct and should not be interfered with.

JUDGMENT.

RICHARDSON, J.—This Rule was issued at the instance of the plaintiff in a suit for partition. The properties to which the suit related consisted of moveable and immoveable properties and a partnership business or joint *karbar*. A preliminary decree for partition was made by the Subordinate Judge in the trial Court on the 30th November 1914. From that decree the defendant, the opposite party before us, filed an appeal to the High Court. During the pendency of the appeal the High Court made an order staying proceedings upon the preliminary decree in so far as it related to the joint *karbar*, but no further. The trial Court thereupon appointed a Commissioner to effect a partition of the properties other than the *karbar*. The Commissioner's report was duly submitted and on the 14th April 1915 the matter came before the learned Subordinate Judge and he delivered judgment. The judgment states that there was no objection by any of the parties to the Commissioner's report and goes on to direct that the proceedings of the Commissioner should be confirmed and the suit decreed accordingly. The language of the decree follows that of the judgment. The question which arises is whether that decree was a decree finally disposing of the whole suit. Obviously it was nothing of the kind. The decree disposes of that part of the suit which had been referred to the Commissioner and with reference to which the Commissioner had submitted his report. When the Subordinate Judge spoke of the suit being disposed of, he clearly meant that the suit was disposed of in regard to that part of it with which the Commissioner had dealt. At that time the stay order made by this Court was in force and the Subordinate Judge had no power then to deal with the suit in so far as it related to the *karbar*.

The appeal to the High Court from the preliminary decree was dismissed on the 22nd June 1916. The plaintiff then applied to the trial Court, over which another Subordinate Judge was now presiding, for partition of the joint *karbar*. The application purports to have been made under section 151, Civil Procedure Code, apparently on the footing that the decree of the 14th April 1915 required some amendment. In my opinion in the circumstances it was quite unnecessary to amend that decree. All that the plaintiff had to do was to apply to the Court to go on with the suit and make a supplementary final decree in regard to the *karbar*. The learned Subordinate Judge, however, seems to have been puzzled by the form of the application and on the 8th August 1917 he made the order with reference to which this Rule has been issued. By that order he declined to accede to the application and suggested that the only course open to the plaintiff was to apply for a review of the decree under Order XLVII. That amounted, as it seems to me, to a refusal to exercise a jurisdiction vested in him. It was quite competent to him to deal with so much of the suit as had not already been dealt with. In this connection reference may be made to the case of *Muhammad Abdul Majid* v. *Muhammad Abdul Aziz* (1). It is conceded that if the suit can proceed without any amendment of the previous decree no question of limitation arises.

The result is that the Subordinate Judge's order of the 8th August 1917 should be discharged and the case remanded in order that the Subordinate Judge may proceed with the remainder of the suit and dispose of it in accordance with law. The Rule is made absolute in these terms. The petitioner is entitled to his costs of the Rule, which we assess at three gold *mohurs*.

Let the record be sent down at once.

WALMSLEY, J.—I agree.

Rule made absolute.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 83 OF 1918.

January 28, 1918.

Present:—Mr. Justice Walsh.

SUNDAR NATH—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code Act V of 1898), ss. 145, 435 (3)— Government of India Act, 1915 (5 & 6 Geo. V, C. 61), s. 107—Revision—High Court, whether can interfere with proceedings under Ch. XII of Code of Criminal Procedure.

Section 107 of the Government of India Act cannot be invoked so as to question proceedings which purport to be proceedings lawfully taken by a Magistrate under Chapter XII of the Code of Criminal Procedure. [p. 673, col. 1.]

If proceedings totally without legal foundation or legislative authority are taken by a Magistrate in the name of proceedings under Chapter XII but not seriously purporting to be taken under or to comply with the provisions of that Chapter and the High Court is satisfied of that fact by reliable evidence, there is clearly a case for interference. It is always open to a party in such a case to satisfy the High Court that the property of which he is entitled to possession has been dealt with by an order which has no legal authority at all, and he may do so by an affidavit or in any other reliable manner, and thereby invoke the superintending power of the Court, but he cannot ask the High Court to interfere in revision or to send for the record merely by showing that on the face of the judgment the Magistrate has neglected or misinterpreted some of the provisions of the Chapter. [p. 673, col. 2; p. 674, col. 1.]

Criminal revision from an order of the Magistrate, First Class, Gorakhpur.

Mr. *Satya Chandra Mukerji*, for the Applicant.

JUDGMENT.—I have no power to send for the record in an application for revision relating to proceedings under Chapter XII. Sub-section (3) of section 435, Criminal Procedure Code, absolutely prohibits that course. The law as laid down by the general current of authorities in this Province is that the superintendence section, which is now section 107 of the Government of India Act, cannot be invoked so as to question proceedings which purport to be proceedings lawfully taken by a Magistrate under Chapter XII. It is well recognized that there is an irreconcilable difference of opinion on this point between some of the High Courts, notably two recent judgments, one delivered by my brother Knox and one delivered in Patna by the former Chief Justice of the Patna High Court based upon the course of authorities. It is obvious that having regard to the view established in this Province it is difficult to question proceedings of this kind at all. It has been said that proceedings which purport to be under Chapter XII may be improperly taken, improperly brought or conducted, and therefore may be treated as if they were no proceedings under the Chapter. This view is not a sound one and has been frequently dissented from—even by the Privy Council in cases of awards where the arbitrators so long as they act within their jurisdiction are masters of the situation. It has been sought by persons trying to get rid of an award to say that, if they have gone wrong either in law or procedure or something of that kind other than misconduct, although there is no appeal, the award is bad and therefore no award at all. In the same way it is sought to argue that proceedings under Chapter XII where, for example, all the proper parties are not required to attend Court and so forth, being proceedings which are defective and therefore bad, may be treated as though they were no proceedings at all. I think it is impossible to give effect to this view and there is the further difficulty as pointed out by Knox, J., that this cannot be determined without sending for the record. This is just what this Court cannot do.

On the other hand there is the difficulty in the other point of view, *viz.*, that though the Legislature has vested in this Court a complete discretionary power of superintendence to check irregular proceedings of inferior Courts which may result in serious injury or injustice, if the view which I have just stated is correct—the view with regard to the sending for record or otherwise enquiring into proceedings under Chapter XII—the jurisdiction of this Court to superintend proceedings under Chapter XII may become a dead letter. I think that this is not necessarily so. There is at any rate one way in which it seems to me both views may be reconciled. If proceedings totally without legal foundation or legislative authority are taken by a Magistrate in the name of proceedings under Chapter XII but not seriously purporting to be taken under, or to comply with, the provisions of that Chapter and this Court is satisfied of that fact by

reliable evidence, then I think there is clearly a case for interference. I myself interfered in one case which seemed to be a palpable and serious misunderstanding of the powers conferred by this section, where the Magistrate had not even had a report at all which dealt with any question of the breach of peace so that the legal foundation for his authority had never been laid, and in interfering in that case I adopted the dictum of Sir John Stanley who seemed to think that the superintendence section could be applied to any circumstances to which revision would apply if it had not been expressly excluded.

Somehow or other in that case, I do not know how the circumstances were before me, because the record had been sent for and the application had been admitted. It is always open to a party in such a case as this to satisfy the High Court that the property of which he is entitled to possession has been dealt with by an order which has no legal authority at all, and he may do so by an affidavit or in any other reliable manner, and thereby invoke the superintending power of the Court, but I do not think he can ask this Court to interfere in revision or to send for the record, merely by showing that on the face of the judgment the Magistrate has neglected or misinterpreted some of the provisions of the Chapter.

The application is rejected.

Application rejected.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT

CRIMINAL REVISION No. 687 OF 1917.

September 25, 1917.

Present:—Mr. Saunders, J. C.

Shaik AMANATH MISTRY—APPLICANT

versus.

EMPEROR—OPPOSITE PARTY.

Burma Municipal Act (III of 1898), ss. 2 (6), 142 (d)—*Lodging-house, what is—Receiving lodgers.*

A lodging-house need not be let in lodgings: it is still a lodging-house if it is occupied to any extent in common by members of more than one family. The persons living in the lodging-house are lodgers, whether they pay rent or not and the owner of the lodging-house receives them when he allows them to occupy the building. [p. 674, col. 2, p. 675, col. 1.]

Mr. *J. C. Chatterjee*, for the Applicant.

Mr. *H. M. Lutter*, for the Opposite Party.

JUDGMENT.—The applicant has been convicted and fined Rs. 30 under section 142 (*d*) of the Burma Municipal Act for failing to take out a license for a lodging-house kept by him.

The application states that the learned Magistrate has erred in law in holding that the petitioner was bound to take out a license under the Lodging-house Bye-laws, although it was not proved that he received any lodgers in his house or rented any portion of his house to others. Apparently it is the contention of the learned Advocate for the applicant that a lodger is a person who occupies rooms in a lodging-house upon payment of rent, and that it has not been shown that any rent was paid in respect of the premises here referred to. It is also urged that the premises do not constitute a lodging-house, and that whatever the meaning of the term "lodging-house" might be, the bye-laws framed by the Mandalay Municipality already showed that the Municipality did not contemplate treating a building of the kind here in question as a lodging-house or requiring its owner to take out a license for it.

It appears that the applicant is the owner of certain hackney carriages and that the premises are occupied by the drivers of these hackney carriages and the Syces attending to the ponies which draw them. The Magistrate states that the applicant admitted that he kept 12 drivers, 6 Syces and 2 watermen in the premises. He called witnesses who deposed that they drove the carriages on hire, that charges for food only were deducted from their wages, and that they did not pay any rent for the house.

"Lodging-house" is defined in section 2 (6) of the Municipal Act as a building or part of a building which is let in lodgings or occupied to any extent in common by members of more than one family. It is clear, therefore, that lodging-house need not be let in lodgings; it is still a lodging-house if it is occupied to any extent in common by members of more than one

family. By a footnote it is explained that if there are kitchens, privies or other conveniences in common, the building will be a lodging-house, and I have no doubt that this is the case whether or no rent is paid either as rent or otherwise. It seems probable here that the fact that the applicant provides his employees with house room is taken into consideration in fixing their wages, and if this is so, no doubt their wages are less than they would be if they had to find lodgings for themselves, and in that case they certainly pay rent indirectly for the lodgings. But the definition does not make the question whether a building is a lodging-house or not depend upon the letting for rent; it is sufficient that the building is occupied in common by more than one family. I cannot see that the Lodging-house Bye-laws contemplate any condition of affairs inconsistent with or narrower than the terms of section 2 (6) of the Act. The persons living in the lodging-house are lodgers whether they pay rent or not, and the owner of the lodging-house receives them when he allows them to occupy the building. No doubt the definition is extremely wide, and the servants' quarters of a private house having a common latrine or kitchen would come within it. But this Court has to interpret the law as it is laid down, and it seems to me that there is no doubt as to the meaning of the words of section 2 (6) of the Municipal Act.

The application must be dismissed.

Application dismissed.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 736 OF 1917.

January 8, 1918.

Present: Mr. Justice Piggott,

YUSUF HUSAIN—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 97, 324, 334—Private defence, right of, extent of—Inflicting wound with sharp weapon on grave and sudden provocation—Offence—Criminal trial—Alternative defences—Evidence Act (I of 1872), s. 105.

Accused was coming along the road on his bicycle when he was set upon and assaulted by the complainant. He fell off the bicycle on to the ground with the complainant on top of him. In the struggle which ensued the accused wounded the complainant in the breast with a sharp knife:

Held, that the accused was guilty of an offence under section 334 of the Penal Code, inasmuch as he acted under grave and sudden provocation. [p. 679, col. 1.]

The right of an accused person to defend himself upon a criminal charge can only be limited by the provisions of the Statute Law [p 676, col. 2]

There is nothing in law to prevent a man on his trial on a charge of culpable homicide from setting up an alternative defence, *e.g.*, *first*, that he was not present at the occurrence referred to by the prosecution witnesses and that they were giving false evidence against him; *secondly*, that even if he had failed to persuade the Court of this fact, he could show from the statements of the prosecution witnesses themselves that if he had caused the death of any person in the manner and under the precise circumstances deposed to by them, he was acting in the lawful exercise of a right of private defence. [p. 676, col. 2.]

Criminal appeal from an order of the Sessions Judge, Allahabad.

Messrs. *G. W. Dillon* and *Peary Lal Banerji* for the Appellant.

Mr. *Lalit Mohan Banerji* (Government Pleader), for the Crown.

JUDGMENT.—On the 26th of June last, in the morning, in a frequented part of the city of Allahabad, a scuffle took place between Yusuf Husain, who is the appellant now before this Court, and one Musi Raza. The two men came to the ground, the appellant being underneath and Musi Raza uppermost. When the scuffle ended Musi Raza was found to be bleeding profusely from wounds in the chest. There were two distinct wounds, one of which was on the right side of the chest and the other on the left, over the region of the heart. The wound on the right side was long and superficial, and so far as the medical evidence goes, might have been caused by the knife or other weapon which had just inflicted the wound on the right side slipping along the body. The wound on the left side was of a peculiar character and seems to have honestly puzzled the Medical Officers who examined it. The most remarkable feature about it was that it was angular in shape, with two distinct limbs, each about three quarters of an inch long. The Medical Officer whose evidence appears the more reliable was of opinion that this wound

had most probably been inflicted with a knife, but that both the injuries on the chest looked as if they had been caused by a single blow, the knife having slipped round after penetrating and then slid along the body in the course of a scuffle. It so happened that the wound on the left side, while dangerous, did not prove fatal. The pleural cavity was not penetrated and, though one of the minor arteries was severed and there was serious effusion of blood, at one time threatening to prove dangerous to life, the injury yielded to skilful treatment and Musi Raza recovered. Yusuf Husain was committed for trial on a charge framed under section 307 of the Indian Penal Code. The learned Sessions Judge has found that Yusuf Husain stabbed Musi Raza with a knife, that he did so with intent to cause death, or at least to cause such bodily injury as he knew to be likely to result in death; but that even if death had resulted the case would have been covered by Exception 1 to section 300 of the Indian Penal Code, in that Yusuf Husain had acted under sudden and grave provocation. He has accordingly convicted the appellant under section 308 of the Indian Penal Code and has sentenced him to rigorous imprisonment for three years.

The memorandum of appeal to this Court, apart from calling in question the severity of the sentence, raises two distinct pleas. The first is whether the prosecution evidence, even if accepted at the value put upon it by the learned Sessions Judge, justifies a finding that the appellant intended to cause death or even injury likely to result in death. The other is that the appellant was acting in the lawful exercise of his right of private defence and is completely protected by the provisions of section 97 of the Indian Penal Code. On this latter point there has been considerable argument before me. With regard to the legal aspects of the case, I have been referred more particularly to three reported cases of this Court: *Queen-Empress* v. *Nag Lal* (1), *Queen-Empress* v. *Tinmal* (2), *Emperor* v. *Gulla* (3).

(1) 20 A. 469; A. W. N. (1898) 117; 9 Ind. Dec. (N. S.) 654.

(2) 21 A. 122; A. W. N. (1898) 208; 9 Ind. Dec. (N. S.) 787.

(3) A. W. N. (1904) 113; 1 Cr. L. J. 427.

The first of these rulings seems to have only a remote bearing on the facts now before me. It lays stress upon the provisions of section 105 of the Indian Evidence Act, and there can be no doubt whatever that, if the present appellant is to secure an acquittal on the ground that he acted in the exercise of his lawful right of private defence, it must be because the Court finds this affirmatively, after laying the burden of proof on the accused person. With regard to the second of these two cases, it seems to me that the head-note goes very considerably beyond anything that was decided in the case itself. The learned Judges did not confine their consideration of that case to the fact that the right of private defence had not been pleaded by the persons whose case they were considering. The contention before them on behalf of the prosecution did not limit itself to this fact, but it was pleaded "further that there was no evidence on the record upon which any circumstance could be inferred which would substantiate a plea of private defence." This was the contention which found favour with the Court and upon which the case was definitely decided. There is nothing to the contrary in the third of the cases to which I have above referred. The right of an accused to defend himself upon a criminal charge can only be limited by the provisions of the Statute Law, and in this case the provisions to be considered are those of section 105 of the Indian Evidence Act already referred to. I cannot see anything in the law to prevent a man on his trial on a charge of culpable homicide from setting up an alternative defence on some such lines as these:—"*Firstly*, I was not present at the occurrence referred to by the prosecution witnesses and they are giving false evidence against me; *secondly*, even if I fail to persuade the Court of this fact, I can show from the statements of the prosecution witnesses themselves that, if I had caused the death of any person in the manner and under the precise circumstances deposed to by their evidence, I should have been acting in the lawful exercise of a right of private defence."

Now in the present case the accused has done something like this, but not precisely this. He said that he was coming

along the road on his bicycle when he was set upon and assaulted by Musi Raza, that he fell off his bicycle on to the ground and Musi Raza on top of him, the two of them being mixed up with the bicycle which fell to the ground at the same time. Musi Raza received his injuries in the course of this fall and they must presumably have been caused by some portion of the bicycle. The defence as thus set up was not substantiated by the evidence. If it were necessary for me to go into the matter, I could give my reasons for concurring in the finding of the learned Sessions Judge that Musi Raza was not injured by falling on the bicycle, but that he was struck in the chest by the appellant Yusuf Husain, holding a penknife or some similar implement in his hand. I do not feel called upon to go into this question in detail, because the appeal has been argued before me, in substance, upon the admission that this was what actually happened. It is unfortunate that Yusuf Husain was not sufficiently well advised to have admitted this fact frankly in the Trial Court. The result has been to involve him in the necessity for arguing two inconsistent defences, on which stress is laid in more than one of the rulings to which I have just referred. He endeavoured to support his position by calling a number of witnesses, and these witnesses themselves laboured under the disadvantage which the accused had imposed on the entire conduct of the defence. They gave evidences as to the circumstances under which the affray between the two men commenced, which evidence has in the main been accepted by the trial Court in preference to that of the prosecution witnesses. They described Musi Raza as the aggressor and as having set upon Yusuf Husain while the latter was riding by on his bicycle. They said that the two men fell together on the ground with Musi Raza uppermost; but there they had to stop, unless they were to give away the defence principally relied upon at the trial. None of the defence witnesses would admit that he saw Yusuf Husain strike a blow with any weapon or instrument whatsoever. They could only say that when the two men stood up Musi Raza was bleeding at the chest. The defence evidence given under these limitations cannot be relied upon further than it has been by the learned Sessions Judge himself. It was not accepted even by the assessors who would have preferred to find the accused not guilty. They were both of opinion that the injuries on Musi Raza's person were caused by a blow or blows struck by Yusuf Husain. On the principles already laid down, the only question which remains is whether the plea of private defence can be made out on the evidence of the prosecution witnesses themselves. I have to criticise that evidence in connection with the other plea taken in the memorandum of appeal and I need not anticipate those criticisms. It is sufficient for me to say that even the evidence of the witness Safdar Husain, who is certainly the most reliable of the prosecution witnesses, falls short of making out a satisfactory answer to the charge on the ground of private defence. He admits that he saw the two men struggling on the ground, that Yusuf Husain was underneath with Musi Raza on the top of him and that Musi Raza had his hands, one on the back of the accused's neck and one underneath it; then he says he saw two distinct blows struck by the accused, inflicting stabs on the chest of his opponent. We have no statement from Yusuf Husain himself that he was being throttled, that the pressure upon his neck was such as to inspire him with fear for his own life; in fact, we have no exposition from the accused himself of the motives for his action. On the evidence therefore as it stands, I am not prepared to find that the right of private defence of the person in favour of Yusuf Husain, even admitting such right to have arisen in consequence of an assault commenced by Musi Raza, was not vitiated by the fact that harm was caused more than was necessary for the purposes of defence.

At the same time I think that the case comes very near the limit, and that it is at least possible that a full defence on these lines might have been made out if the appellant had been better advised at his trial. It does not seem to me at all necessary to take as serious a view of this case as has been done in the Court below. The prosecution evidence is scanty to a

degree. The statement of Musi Raza is corroborated by two witnesses only—Safdar Husain and a woman named *Musammat* Sakina. The learned Sessions Judge has distrusted the evidence of the woman, and I think it sufficient to say that the record discloses abundant grounds for putting her statement aside as altogether unreliable. The long and short of the matter is that Musi Raza elected to come into Court with a version of the facts which diverges very widely from the truth as regards the origin and commencement of the affray. He found it difficult to get any witness to support his false statements on this point. The learned Sessions Judge remarks that the investigating Police Officer found it difficult to obtain evidence because the sympathies of persons in the neighbourhood seemed to be with Yusuf Husain. He does not appear to have adequately appreciated the importance of this remark. What the investigating officer found difficult to obtain was evidence supporting Musi Raza's version of the facts, and his difficulty arose simply from the fact that the shopkeepers of the neighbourhood saw no adequate reason for perjuring themselves to oblige Musi Raza. Their sympathy for the accused amounted to mere disinclination to see him involved in a serious charge upon a version of the facts which they knew to be in material points untrue. When a number of them finally decided to come in Court as witnesses for the defence, they unfortunately thought themselves to be precluded, under the circumstances already referred to, from telling the whole truth; but their version of the commencement of the affray has been in substance accepted by the trial Court. The result of this is that Musi Raza has been disbelieved by the learned Sessions Judge in very material parts of his evidence and, this being the case, I do not find myself able to follow the learned Sessions Judge in accepting as established beyond reasonable doubt Musi Raza's version as to the particular manner in which he was struck by the accused. The medical evidence is not merely consistent with the assertion that only one blow was struck, but it tends to make that assertion probable. The appearance of the wounds as described by that Medical Officer, whose evidence I agree with the learned Sessions Judge in accepting as reliable, suggests that the theory formed by that officer as to the manner in which the injuries were caused is probably correct. I think it quite unlikely that Musi Raza is speaking the truth when he says that the superficial cut on the right side of his chest was inflicted first and was followed by a stab aimed directly at his heart. It is true that Musi Raza's statement on this point is to some extent corroborated by the evidence of Safdar Husain. The latter speaks of two distinct blows being struck, though of course he cannot say which of the two injuries was caused by which blow. In some respects Safdar Husain has shown himself an impartial witness and I do not see that the learned Sessions Judge was in any way justified in rejecting that portion of his evidence which bears out the statements of the defence witnesses as to the position of Musi Raza's hands at the moment when the accused struck him. It must be remembered, however, that this witness is admittedly a friend of Musi Raza and that his account of the manner in which the affray commenced has been rejected by the learned Sessions Judge, who has preferred the version given by the defence witnesses. It seems to me that to hold that Yusuf Husain struck two blows at his assailant, or even to hold that the curiously shaped injury on the left side of Musi Raza's chest was the result of a blow intentionally aimed at that portion of his anatomy, is to place an unwarranted degree of reliance on the veracity of Safdar Husain and on his opportunities of observing precisely what took place in what must have been a very brief scuffle.

In my opinion the prosecution evidence fairly considered, so far from warranting the conclusion that when Yusuf Husain struck at Musi Raza with the pen-knife, or whatever other implement he had about his person at the time, he did so with the intention or knowledge referred to in section 299 of the Indian Penal Code, does not even justify the conclusion that the hurt which he intended to cause or knew himself likely to cause was grievous hurt, reference being made to the provisions of section 322. The offence committed, therefore, would be that made punishable by section 324, were it not for the fact that the appellant acted on grave and sudden provocation. This has

been found by the learned Sessions Judge himself and I agree with him. The offence committed, therefore, must be reduced to one punishable under section 334, Indian Penal Code. The result is that I set aside the conviction and sentence in this case, convict Yusuf Husain of an offence punishable under section 334, Indian Penal Code, and sentence him to pay a fine of Rs. 100. I allow one week within which the fine may be paid, the appellant's security remaining in force till that period. In default of such payment the appellant will suffer simple imprisonment for a period of one month.

Conviction altered; Sentence reduced.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEALS NOS. 227, 228 AND 229 OF 1917.

November 27, 1917.

Present:—Mr. Saunders, J. C.

NGA PO THA AND OTHERS—APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 304—Beating woman to death believing her to be possessed by evil spirit—Offence—Intention, what is.

Accused, believing the deceased to be possessed by an evil spirit, beat her to death in the hope of curing her. The deceased protested that she was not possessed and did not consent to be beaten:

Held, that the accused were guilty of an offence under the second part of section 304 of the Penal Code. [p. 682, col. 2.]

Intention is a question of fact which must be decided upon the circumstances of each particular case. It may be a legal fiction as, for instance, where knowledge is presumed in the case of a person who is intoxicated and intention is the inference drawn from such knowledge, or it may be proved by evidence of the particular circumstances in each case. [p. 681, col. 1.]

Mr. *Maung Su*, for the Appellants.

Mr. *H. M. Lutter*, for the Crown.

JUDGMENT.—This is a case of a kind which, though fortunately not common, is not unique. The deceased was believed to be possessed by an evil spirit and was beaten to death by four persons acting, it is alleged, under the mistaken belief that, by beating her, she would be cured of her unnatural illness. The 1st appellant who is a Burmese *saya* has been sentenced to death, and the other two appellants have been sentenced to transportation for life under section 302 of the Indian Penal Code. The 4th accused was sentenced to pay a fine of Rs. 50 or to suffer three months' rigorous imprisonment under section 323 of the Indian Penal Code and this accused has not appealed.

The facts of the case are briefly as follows:—

Ma Chon, mother of Ma Me Te, called in the 1st appellant, who happened to be visiting the village, to attend her daughter, Ma Me Te, who had a sore upon her leg. The appellant, who apparently professes to be a specialist in the cure of witchcraft, took with him the two other appellants, fellow-villagers of the deceased, and one of them, Nga Shwe Pyan, a lover of Ma Me Te. He was also accompanied by Ma Me Tin, the 4th accused, who was said to be a *natkadaw*, described as a person who acts as a spirit medium, capable of becoming possessed by a *nat*. The 1st appellant, Po Tha, appears immediately to have assumed that the girl was possessed by an evil spirit and gave her a betel leaf to chew, and when she said that the leaf tasted hot, he declared that she was possessed by a spirit which must be exorcised by beating her. He and his companions thereupon beat and kicked her for a short time. She received several contusions described by the medical witness, and the treatment was evidently brutal enough to cause the mother, Ma Chon, to weep. Appellant, Po Tha, thereupon said the spirit had gone into Ma Chon. She was tested in the same way with a betel leaf and was then beaten from about 10 o'clock that night until just before dawn, when she succumbed to her injuries.

Although there is nothing on the record to show that the 1st appellant was called in to drive out an evil spirit, the evidence in fact being that he was not called to do so but to treat an ulcer, it appears to me possible that there may have been some suspicion on the part of the mother or the girl's relations that she was possessed. The man, who called in the 1st appellant, says he was called for that purpose, and

there seems to be no doubt that he professed to be able to cure such cases. It is also difficult to understand the conduct of the appellant, Shwe Pyan, in beating the girl to whom he was paying his addresses and subsequently her mother, and of the villagers who, though they say they remonstrated, did not, as they certainly could have done, interfere more effectively and put a stop to the beating, if they had nothing more than 1st appellant's word to induce them to think that the girl and her mother were "possessed." But whether this is so or not there is no evidence upon the record that either the girl, Ma Me Te, or her mother, Ma Chon, gave any consent to the treatment to which they were subjected. On the contrary it seems clear that Ma Chon at least protested that she was not possessed by an evil spirit and that she should not be beaten.

The learned Sessions Judge in convicting the accused has referred to the case of *Nga Po Kyaw* v. *King-Emperor* (1), in which the persons who inflicted a fatal beating upon a woman alleged to be possessed by an evil spirit were found to have committed an offence under section 304A of the Indian Penal Code, and the Sessions Judge has questioned the correctness of that decision. But it was expressly stated in the judgment of my learned predecessor in that case that the evidence left no doubt that the girl's mother and her relatives contemplated that she should be beaten, and that the girl herself voluntarily submitted to that treatment. The girl would seem to have been suffering from hysteria or some similar complaint for years, and among her own people she was universally believed to be under the domination of an evil spirit that had located itself in her body.

The case, therefore differs from the present case in important particulars. Here there is no evidence upon the record that the girl was suffering from anything but an ulcer on her leg, or that there was any reason which would lead her relations to suppose that she was possessed of an evil spirit. As I have said above, it is possible that they did so, but there is not a particle of evidence to that effect. The woman whose death was caused, it is not suggested and there seems to be no reason whatever to suppose, was afflicted in any way. The only reason given for leading the 1st appellant and his assistants to suspect that she was possessed and to turn their attention to her was that she performed the perfectly natural act of weeping, probably loudly, when she saw her daughter being severely beaten. Neither she nor her daughter consented, and the evidence indeed goes to show that Ma Chon, so far from consenting, protested vigorously against being suspected of being possessed and beaten in consequence.

I have read the judgment of the Sessions Judge in Criminal Appeal No. 64 of 1893 which is referred to in *Po Kyaw's case* 1). It appears there that the girl had been afflicted for five years or so with hysteria or some form of hysterical mania; she was subjected to severe beating with sticks while in this condition by her relations. It does not appear that she submitted or consented to the treatment. The learned Sessions Judge held that it was clear that the accused had no intention of causing bodily injury likely to cause death, nor had they any knowledge that they were likely to cause death. No reason whatever was given for this conclusion, but it was not questioned by the learned Judicial Commissioner, who remaked, "the fact that the deceased died from the shock of the beating need not necessarily enter into the consideration of the question of punishment, and that death may have been accelerated by disease of the heart, but anyhow the appellants have not been convicted of the offence of causing death."

From the extracts of the medical evidence given in the judgment of the Sessions Judge in that case, it was apparent that there were very severe contusions on the body of the woman extending from the nape of the neck down to the thighs, and also on both shoulder joints extending to the elbows, that there must have been a repeated and protracted beating which was dangerous to life and which might have caused death. The medical witness thought that the woman's death was caused by severe shock produced by the injuries sustained. Her heart was a little fatty and that might have accelerated death. The

(1) U. B. R. (1902-03) I, Penal Code, 1.

accused were sentenced by the Sessions Judge to two years' rigorous imprisonment, which was reduced by the Judicial Commissioner for the reasons quoted in *Po Kyaw's case* (1) to six months' rigorous imprisonment.

Mr. Burgess found that the beating was administered in perfect good faith, but as he went on to say it was carried out to excess and no precautions were taken to guard against misadventure, it is clear that he used the words "good faith" in some other sense than that with which they are used in the Indian Penal Code. As section 52 lays down that nothing is said to be done or believed in good faith which is done or believed without due care and attention, it seems obvious that the beating carried out to excess, without precautions to guard against misadventure, cannot have been administered in good faith.

Nor do I think that the finding of the Sessions Judge was necessarily endorsed by the Judicial Commissioner or can be accepted, in the absence of any reasons, as authority for holding that where a number of persons inflict a beating upon a woman which in the ordinary course of nature is sufficient to cause death or which is likely to cause death, it can be assumed that there was no intention to cause death or to cause such injuries. Intention is a question of fact which must be decided upon the circumstances of each particular case. It may be a legal fiction as for instance where knowledge is presumed in the case of a person who is intoxicated and intention is the inference drawn from such knowledge, or it may be proved by evidence of the particular circumstances in each case.

It appears to me further that in considering the question of sentence in the case referred to, Mr. Burgess, for whose opinion I in common with other Judges of this Court have a great respect, did not deal with the whole aspect of the matter. It is no doubt incontrovertible that there is no reason for punishing ignorance as ignorance, but where a person is convicted of a brutal crime of a kind repugnant to the natural instincts of mankind, it is necessary to pass a sentence which will punish such brutality even where it proceeds from ignorance, and I am not aware that any protest has ever been raised against the provisions of the law under which persons who have taken part in proceedings sanctioned possibly by ignorance but also by a belief in certain religious teachings, are subject to very severe penalties, *e. g.*, in the case of *suttee*.

It appears clear, moreover, that the occurrence of a case in 1917, even more brutal than that dealt with in Criminal Appeal No. 64 of 1893, goes to show that the punishment there considered appropriate has not had the effect of putting a stop to the practice complained of.

The fact in the present case that the deceased woman did not consent to be beaten makes section 304A of the Indian Penal Code inapplicable. If there was no intention to cause death or knowledge that death would ensue, the appropriate section would appear to be section 325 of the Indian Penal Code. If there was, the question is whether section 302 or 304 applies.

As to the 1st appellant, he described himself as a *saya* or doctor, and it must, therefore, be presumed that he had some knowledge, however slight and empirical, of the effects of violence upon human beings. The evidence goes to show that the deceased woman actually died while being beaten; the witnesses who went into the house as soon as the appellants had left it, found her dead. The evidence is that the woman was kicked with the bare heel, beaten and slapped with the fist or open hand, and also that her feet and hands were joined by a rope by which she was lifted from the ground and dropped. Although the witnesses did not depose to this last treatment in the Committing Magistrate's Court, it seems unlikely that they can have invented it, but whether it took place or not it is obvious from the medical evidence that the woman received injuries from which she could not possibly have recovered. She was a woman of 45 years of age or more, of weakly physique. The ordinary lay person looking at her would consider that she was somewhat weak. Her whole body and head were covered with a mass of bruises. Death was due to internal hæmorrhage and shock, and the Medical Officer said that these were sufficient in the ordinary course of nature to cause the death of a normally healthy person.

I think it is impossible to believe that the 1st appellant did not know that the treatment to which this woman was subjected, was likely to cause her death.

The question whether he intended to cause such injuries is not so easy to answer. Assuming that he did believe that she was possessed by an evil spirit, his primary intention no doubt was not to cause the patient's death but to drive the spirit out. There is no doubt that a belief in witchcraft is extremely common among Burmans, and it is difficult to imagine that if they did not think that the treatment of Ma Chon was justified and that it would have the desired effect, the villagers would not have interfered early in the proceedings. That they did not interfere is, however, no evidence that the conduct of the appellant was not unnecessarily brutal.

Great stress has been laid by the learned Advocate who has argued this appeal on the reply made by the 1st appellant to remonstrances, that he was not beating the woman but was beating the spirit and that the woman would not be marked by so much as a scratch. But it appears to me that very much stronger evidence would be necessary to prove that the appellant acted in the *bona fide* belief that the laws of nature would be suspended in this particular instance for his convenience. It is necessary to assume a certain standard of common sense among all persons accused of committing crime, in the absence of a plea or evidence of insanity or mental deficiency.

But I do not think that it is necessary to convict the appellant under section 302 of murder. He certainly had no intention, as far as can be judged, to kill the deceased and the intention, which may be inferred from knowledge, is not an intention which must necessarily be inferred in every case. Up to a certain point the appellant's acts, though in the circumstances probably criminal, did not endanger life and I do not think that it is necessary to infer that because he went beyond that point, he intended to cause injuries which he knew to be likely to cause death. Each of the blows struck by itself was probably comparatively light, and the prevailing intention throughout would seem to have been to drive out the spirit. In any case the reasons given by the learned Sessions Judge for passing the capital sentence appear to me to be too remote to be sound, and it was pointed out in *Nga Tha Kin* v. *Emperor* (2) that when the discretion as to punishment is vested in the Judge, it is his duty to exercise it and not to compel the executive Government to interfere by way of remission. The sentence of death may appropriately be passed in cases where from motives of revenge, anger or the like a person causes death by such means as make it clear that it was his intention that his victim should not escape.

In the case of the 2nd and 3rd appellants the same remarks apply, with this qualification that they were probably acting under the instructions and influence of the 1st appellant and that they had not the same means as he had of judging of the effect of their acts. I think, however, that in treating the deceased woman as the evidence shows they did treat her, the woman herself being elderly and weakly, they must have known that they were likely to cause death.

The convictions and sentences are set aside, and in lieu thereof, the 1st appellant, Po Tha, is convicted of an offence punishable under section 304 of the Indian Penal Code, second part, and Nga Po Tha sentenced to undergo transportation for seven years.

Nga Shwe Pyan and Nga Pyaing are convicted of an offence punishable under section 304 of the Indian Penal Code, second part, and sentenced to undergo two years' rigorous imprisonment each.

Convictions altered; Sentences reduced.

(2) 11 Ind. Cas. 792; U. B. R. (1910-13) I, 87; 12 Cr. L. J. 448.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 977 OF 1917.

January 11, 1918.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

RAM DASS—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 350, 537—Applicability of s. 350—Transfer of case—Transfer of Magistrate—Judgment pronounced on evidence

RAM DASS *v.* EMPEROR.

recorded by another Magistrate—Irregularity—Revision.

Section 350 of the Criminal Procedure Code applies as much to cases in which a Magistrate ceases to exercise jurisdiction by reason of the transfer of the case to another Court, as to cases in which the Magistrate ceases to exercise jurisdiction by reason of his own death or transfer to another post. In other words, the section covers cases of transfer as well as those cases in which the Court remains the same but the person of the presiding officer is changed. [p. 684, cols. 1 & 2.]

A complaint filed against the accused was referred for trial to a Second Class Magistrate, who recorded the whole of the prosecution evidence and a portion of the evidence for defence. The accused then applied to the District Magistrate for transfer on the express undertaking that in the event of transfer he would be satisfied if the Court, to which the transfer was made, pronounced judgment after recording the evidence of the remaining defence witnesses. The District Magistrate transferred the case to a First Class Magistrate, with the direction to proceed with the trial from the stage which it had reached in the Court of the Second Class Magistrate. The accused did not claim that the evidence should be recorded *de novo* and the First Class Magistrate passed sentence upon him after recording the rest of the defence evidence:

Held, (1) that inasmuch as the accused did not demand that any of the witnesses should be re-summoned and re-heard, proviso (*a*) to clause (1) of section 350 of the Criminal Procedure Code did not apply and could not be relied upon in support of an application for revision; [p. 685, col. 1.]

(2) (per *Walsh, J.*) that even if the Magistrate commited an irregularity it was curable by section 537 in the absence of circumstances showing a failure of justice. [p. 685, col. 2.]

Criminal reference made by the Sessions Judge, Ghazipur.

Mr. *Peary Lal Banerji*, (with him Messrs. *K.N. Laghate*, *Janaki Prasada* and *Kamla Kant Varma*), for the Applicant.

Mr. *Uma Shankar Bajpai*, for the Opposite Party.

JUDGMENT.

PIGGOTT, J.—The case before us is a reference by the learned Sessions Judge of Ghazipore, recommending that the conviction of one Ram Das on a charge under section 323 of the Indian Penal Code and the sentence of rigorous imprisonment for one month passed on him be set aside, on the ground that the trial in the Magistrate's Court was vitiated by illegality. It appears that the complaint filed against Ram Das was referred for trial to the Court of an Honorary Magistrate exercising the powers of a Magistrate of the Second Class. This Court recorded the whole of the evidence for the prosecution and a portion of the evidence for the defence. When it had reached this stage, Ram Das applied to the District Magistrate to have the case transferred to some other Court. He gave an undertaking that, in the event of such transfer, he would not ask the Court to which the transfer was made to re-hear the entire evidence *de novo*, but would be satisfied if that Court proceeded to call and examine the remainder of the defence witnesses and pronounce judgment on the materials then before it. The case was then transferred by the District Magistrate to the Court of a stipendiary Magistrate of the First Class. Ram Das made no attempt to evade the undertaking which he had given to the District Magistrate, that is to say, he did not demand that the witnesses, or any of them, who had been already examined by the original trial Court should be re-summoned and re-heard. The First Class Magistrate accordingly heard and examined the remainder of the defence witnesses named on behalf of Ram Das, convicted him on the charge as framed under section 323 of the Indian Penal Code and sentenced him to rigorous imprisonment for one month. The learned Sessions Judge has referred the case to this Court on the ground that the provisions of section 350 of the Criminal Procedure Code do not apply to cases which are transferred from one Court to another, and that the First Class Magistrate on receiving this case for trial was bound to commence the trial *de novo* by the examination of all the prosecution witnesses. There is authority for this proposition in one single case of this Court, *Queen-Empress* v. *Angnu* (1). That case was decided by a single Judge upon a reference by a Sessions Judge. The case was not argued and the judgment is of the briefest. We can only take it that in the opinion of the learned Judge of this Court who disposed of that reference the provisions of section 350 of the Criminal Procedure Code were not intended to apply to cases of transfer. There was a suggestion in the referring order in that case that the accused had been prejudiced by the course adopted. Apparently there had been some com-

(1) A. W. N. (1889) 130.

plaint on his part against the manner in which the evidence had been recorded by the original trial Court. We do not know how far the learned Judge of this Court was affected by this consideration in passing the order which he did. The learned Sessions Judge has referred to another decision of this Court, *Queen-Empress* v. *Bashir Khan* (2). He is entitled to rely upon the opinion expressed by the learned Judge who disposed of this case by way of *obiter dictum*; but the actual point for decision was different. On the facts of that case, even assuming that the provisions of section 350, Criminal Procedure Code, did apply, those provisions had been contravened and the order quashing the proceedings was obviously right on this ground alone. In a recent case, *Emperor* v. *Nanhua* (3), one of us has committed himself to a contrary view. Some stress was laid in deciding that case on the fact that the proceedings transferred from one Court to another were only an enquiry preliminary to commitment, and no doubt the question of possible prejudice to the accused person would require to be more carefully considered in the case of the transfer of a trial than in the case of an enquiry preliminary to commitment. At the same time it is quite clear that either the provisions of section 3 0, Criminal Procedure Code, do not apply at all to cases of transfer, or they apply to trials just as much as to preliminary enquiries. This decision is based on certain recent pronouncements of the Calcutta and Madras High Courts. It is sufficient to refer to the cases of *Mohesh Chandra Saha* v. *Emperor* (4), *Kudrutullah* v. *Emperor* (5) and *Palaniandy Gounden* v. *Emperor* (6). The last of these cases was also a case of an enquiry preliminary to commitment; but in this case, as well as in the two Calcutta cases, the principle was most clearly affirmed that section 350 of the Criminal Procedure Code applied as much to cases in which a Magistrate ceases to exercise jurisdiction, so far as the particular case in question is concerned, by reason of its transfer to another Court, as to cases in which the Magistrate ceases to exercise jurisdiction by reason of his own death or transfer to another post. It has been shown to us that the two Calcutta cases are not entirely consistent with certain prior decisions of that Court, but they do represent the latest views of that Court on the question for determination before us. On the wording of the section itself it seems impossible to deny that the words used are wide enough to cover cases of transfer, as well as those cases in which the Court remains the same, but the person of the presiding officer is changed. As the learned Judges of the Madras High Court have pointed out, the words "ceases to exercise jurisdiction *therein*" must be given their appropriate meaning; and certainly a Magistrate who takes cognisance of a case on the passing of an order of transfer by a competent Court has jurisdiction "*therein*", that is to say, in the said case, by reason of the order of transfer.

On the ground of public convenience there seems to be no good reason why the words of the section should not receive a liberal interpretation, provided such interpretation is not inconsistent with the words themselves.

It seems to us that there is no good reason why the practice of this Court should not be brought into conformity with that of the High Courts of Calcutta and Madras, and we are prepared to hold that the provisions of section 350, Criminal Procedure Code, do apply under the circumstances of the case now before us.

It has been further suggested that we ought to interfere on the ground that Ram Das was prejudiced in his defence by the form of the order of transfer passed by the District Magistrate. The learned District Magistrate would have been better advised, if he had contented himself with calling attention to the fact that his order was made largely on an undertaking by Ram Das that he would not claim his right to have all the witnesses re-summoned and re heard. He went a little further than this, and by his order of transfer purported to direct the First Class

(2) 14 A. 346; A. W. N. (1892) 19; 7 Ind. Dec. (N. S.) 589.

(3) 23 Ind. Cas. 722; 12 A. L. J. 467; 36 A. 315; 15 Cr. L. J. 354.

(4) 35 C. 457; 12 C. W. N. 416; 7 C. L. J. 488; 7 Cr. L. J. 220.

(5) 14 Ind. Cas. 314; 39 C. 781; 13 Cr. L. J. 218.

(6) 1 Ind. Cas. 54; 32 M. 218; 5 M. L. T. 218; 9 Cr. L. J. 146.

Magistrate to whose Court he transferred the case to proceed with the trial from the stage which it had reached in the Court of the Honorary Magistrate. If the applicant Ram Das had come before the First Class Magistrate and had repudiated the undertaking which he had given to the District Magistrate, and offered some explanation of his conduct in doing so, and had definitely claimed the right conferred by proviso (*a*) of clause (1) of section 350 of the Criminal Procedure Code, it may well be that other considerations would arise. Certainly the Magistrate who decided this case could not be bound in his judicial capacity by any direction in the order of transfer. It would have been his duty to consider the application and give such effect to it as he thought just and lawful. The fact remains, however, that Ram Das did not demand that any of the witnesses should be re summoned and re-heard. Proviso (*a*) to clause (1) of section 350 of the Criminal Procedure Code has no application to the facts before us and cannot be relied on in support of the application.

Something has been said as regards the severity of the sentence. This point was not taken in the application to the Sessions Judge and we are not prepared to interfere, on this ground, as the judgment convicting Ram Das seems to be a just and a proper one. We decline to accept the reference and order the record to be returned, the conviction and sentence to stand. If Ram Das has been released pending this reference, he must surrender to his bail and undergo the unexpired portion of his sentence.

WALSH, J.—I entirely agree. Apart from authority, I think the section is clear and too strong for the argument of the applicant in this case. Criticism has been made upon the construction of the section, but it seems to me a simple and compendious statement to cover all cases thus:—"Whenever any Magistrate ceases to exercise jurisdiction in a case and he is succeeded by another Magistrate having such jurisdiction" (that may occur by death, promotion, retirement or transfer by a superior authority), "the Magistrate so succeeding may act on the materials already before him."

Lest it should be supposed that the accused is caught by a strict application of the technical provisions of the Statute, I want to draw attention to one or two matters to which my brother has not referred. The appellant asks for reduction of sentence, on the ground that it was too severe. He called a number of witnesses to allege that he was not there at all and on the other hand he brought a cross-charge against a prosecution witness for assaulting him at the place in question. Under these circumstances, having a reasonable apprehension that he was going to be convicted, he applied for transfer. In my judgment the accused, Ram Das, got a very favourable order out of the District Magistrate and he is the one person who has no right to complain. I should want to hear considerable argument before deciding that under such circumstances in acting upon the evidence already recorded the Magistrate committed any irregularity which could not be cured by section 537 in the absence of circumstances showing a failure of justice. I entirely agree with my learned brother in the order that this reference must be rejected.

Reference rejected.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 758 OF 1917.

October 13, 1917.

Present:—Mr. Saunders, J. C.

NGA HPAY AND ANOTHER—APPLICANTS

versus

NGA AUNG BAW AND OTHERS—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), ss. 145, 435 (3)—Proceedings under s. 145—Revision—High Court, power of interference of.

Orders passed under Chapter XII of the Code of Criminal Procedure are not subject to revision, being expressly excluded from the operation of section 435 of the Code by clause (3) of that section. But in order to make the provisions of section 435, clause (3), applicable, that is to say, to deprive the

High Court of the power of interference in revision, the proceedings must be proceedings under Chapter XII of that Code in fact, and not only in name.

Mr. *Razak*, for the Applicants.

Mr. *Mitter*, for the Respondents.

JUDGMENT.—This is an application to deal in revision with an order of the Headquarters Magistrate, Yamethin, passed, or purporting to be passed, under the provisions of Chapter XII of the Code of Criminal Procedure.

The application is resisted on the ground that orders passed under Chapter XII are not subject to revision, being expressly excluded from the operation of section 435 of the Code by clause 3 of that section. There is no doubt that this is the case and any conflict of opinion which may exist in India appears rather to be due to questions affecting the construction of the charters of Chartered High Courts than the meaning of section 435 of the Code of Criminal Procedure. But there can be no doubt that in order to make the provisions of section 435, clause (3), applicable, that is to say, to deprive the High Court of the power of interference in revision, the proceedings must be proceedings under Chapter XII of that Code in fact, and not only in name. For instance in *Maharaj Tewari* v. *Har Charan Rai* (1) it was pointed out that the mere adding as a postscript to proceedings which were throughout taken under Chapter VIII of the Code of Criminal Procedure that a final order has been passed under section 145, will not make that order a proceeding under Chapter XII of the Code.

The only point for decision here is whether the proceeding was under Chapter XII of the Code of Criminal Procedure. It is alleged that there is no finding that there was likely to be a breach of the peace. It is true that there was no such finding in the final order, but in an order in the diary under the 19th June 1917, the Magistrate recorded an order that from the papers filed it appeared that a dispute likely to cause a breach of the peace, existed. The procedure followed appears to have been in accordance with that laid down in section 145 of the Code of Criminal Procedure.

(1) 26 A. 144; A. W. N. (1903) 212.

The final order is attacked on the ground that the Magistrate went into questions of title and decided accordingly. But it is clear that the Magistrate did endeavour to ascertain and decide which of the parties was in possession and although he would seem to have decided erroneously in coming to a conclusion by questions of title, there is in fact a distinct finding that Aung Baw and Min Din were in possession of the land at the time of the order.

I have no hesitation in holding that the proceedings were under Chapter XII of the Code of Criminal Procedure and this Court is not entitled to interfere in revision.

The application must, therefore, be dismissed.

Application dismissed.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 41 OF 1918.

January 28, 1918.

Present:—Justice Sir P. C. Banerji, KT., and Mr. Justice Piggott.

GAURI SHANKAR—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 302—Murder—Death caused by arsenic—Offence.

Accused administered arsenic to a boy of nine years of age with the object of preventing the boy's father from giving evidence against the accused in a criminal trial. The boy died from the effects of the poison:

Held, that the accused was guilty of murder, inasmuch as he knew that the act committed by him was so imminently dangerous that it must in all probability cause to the boy such bodily injury as was likely to cause death. [p. 688, col. 2.]

Criminal appeal from an order of the Sessions Judge, Cawnpore.

Mr. *E. A. Howard*, for the Appellant.

Mr. *A. E. Ryves* (Government Advocate), for the Crown.

JUDGMENT.—In this case Gauri Shankar Bhat, aged fifty-eight years, has been found guilty by the learned Sessions Judge of Cawnpore on a charge framed under section 302 of the Indian Penal Code, the case against him being that he

GAURI SHANKAR *v.* EMPEROR.

caused the death of a little boy named Parmanand by arsenical poisoning. The record is before us for confirmation of the sentence of death and a petition of appeal has been presented by Gauri Shankar through the Superintendent of the Jail in which he is confined. We have also had the advantage of hearing the case argued on behalf of the appellant by a learned Advocate of this Court. The story for the prosecution is that, on the 23rd of September last, in the course of the forenoon, the accused asked two little boys, Parmanand and Durga, the sons of his neighbours Lala and Jawahir Kurmis, to come to him at a certain temple in order to study. The accused's own boys were there studying their books just outside the temple. It is alleged that Gauri Shankar offered some sugar to the boys, Parmanand and Durga, taking precautions at the same time that his own sons should not receive any share of it. The boys ate the sugar on the spot and, after sometime, they were both taken ill with vomiting and purging. They were carried to the hospital and the first report was made at the Police station of Derapur on the 24th of September at 1 P. M., that is to say, within about twenty-four hours of the occurrence. In this report Lala, the father of the boy Parmanand, plainly accused Gauri Shaṅkar of having given the two boys some poisonous substance in sugar. He did this on the strength of the statements made to him by the boys themselves. The boys were treated at the hospital and it was apparent that the case of the younger of the two, Parmanand, who was only about nine years of age, was the more serious, and on the 24th of September the statement of Parmanand was recorded by the Tahsildar Magistrate. It is to the effect already explained. It alleges that Durga and Parmanand had been sent to the temple by their mother at Gauri Shankar's instance, that they were given sugar to eat, that they complained at the time that it had a curious taste, but were encouraged by the accused to eat it, and that they were taken ill shortly afterwards. The parents of the two boys removed them from the hospital on the morning of the 25th of September, perhaps injudiciously so far as regards Parmanand. The result was that, while Durga recovered, Parmanand died on the 26th September. The subsequent autopsy, taken in connection with the report of the Chemical Examiner, puts it beyond doubt that death was the result of arsenical poisoning. The hospital assistant who treated both the boys gives evidence to the same effect. The symptoms observed by him were those of arsenical poisoning and he suspected arsenic from the first.

The evidence on the record is not voluminous, but it seems straightforward and reliable as far as it goes. *Musammat* Jasoda is able to prove that Parmanand was sent to Gauri Shankar at the temple, at the latter's express request, and that when he returned home about noon he was vomiting and soon became seriously ill. The most important evidence in the case is the statement of the boy Durga. He says that he was given sugar by the accused at the temple along with Parmanand; that they both complained of the sugar tasting bitter, but the accused re-assured them, saying that there was pepper in it. There is one slight discrepancy between his statement and the dying declaration of Parmanand. According to the latter the boys were taken ill at the temple and had both of them vomited before they left it. According to Durga he was able to go away and visit his house and another place and had also eaten two *puris*, before he was taken ill. On a consideration of the evidence given by Lala the father of Parmanand and by Jawahir the father of Durga it seems probable that some confusion of memory on the part of the boy Durga is responsible for the discrepancy. The evidence of Lala as to what he was told by Parmanand clearly supports the version in the dying declaration. The point, however, does not seem of material importance, whatever the explanation of the discrepancy may be.

There is clear evidence of motive, although it may fairly be argued on the accused's behalf that the motive is not a strong one for the commission of such an offence as murder. There was a criminal prosecution pending against Gauri Shankar and the case was down for hearing before the Tahsildar Magistrate on the 24th of September. Lala had been active in arranging for the prosecution and was the most important witness in the case. Jawahir, father of Durga,

had also been summoned as a witness. In the result Lala was unable to attend because he was waiting upon his sick son, and the complaint was dismissed without any regular trial, the Magistrate apparently accepting a statement made to him by Gauri Shankar and not considering himself called upon to make further enquiry in the absence of the principal witness for the prosecution.

The accused sets up no defence worthy of consideration, either in the Court below or in the petition of appeal which he has addressed to us. He denies all the facts alleged against him. He says he was not in the village at all on the 23rd of September and that the boys never came to him at the temple. In his petition of appeal to this Court he goes so far as to suggest that the parents of the two boys were so seriously at enmity with him that they administered poison to their own children in order to get him into trouble. A defence of the sort certainly does not help the accused. The assessors, as well as the learned Sessions Judge, were satisfied that the prosecution evidence was reliable and that Gauri Shanker had certainly administered arsenic to these two boys with the intention to make them ill. We have felt called upon to consider carefully the question as to the precise nature of the offence thereby committed by the accused. The learned Sessions Judge passes over the point somewhat lightly, with the remark that the accused must have known that he was likely to cause the death of Parmanand by giving him arsenic. The question requires to be considered somewhat more carefully with reference to the provisions of sections 299 and 300 of the Indian Penal Code. With regard to the former of these sections, we think there can be no doubt that Gauri Shankar intended to cause bodily injury to the two boys and that the bodily injury which he intended to cause by the administration of arsenic was of a kind likely to result in death, especially in the case of a little boy about nine years of age. Further, we are quite prepared to hold that in administering arsenic to these boys he knew that he was likely thereby to cause death. When we come to consider the provisions of section 300, clause (2), it becomes evident that the present case is one which lies very much on the boundary line. Somewhat similar questions have had to be considered by this Court in cases of *dhatura* poisoning and there has been some conflict of authority, as may be seen from the following cases:—

Queen Empress v. *Tulsha* (1), *Emperor* v. *Bhagwan Din* (2), *Emperor* v. *Gutali* (3).

Each case must, of course, be decided upon its own facts, but it seems a grave matter to hold that a man of the accused's age, administering a substance like arsenic, with the effects of which the agriculturist population of Northern India is well acquainted, to a boy of Parmanand's age, and actually causing his death thereby, is to be found guilty of any offence short of murder, even though his intention at the time may not have been (and probably was not) to cause the death of the child. Taking the provisions of the section in question as applicable to the facts of the case, we think we are bound to hold that Gauri Shankar, in committing the act proved against him, knew it to be so imminently dangerous that it must in all probability cause to the boys such bodily injury as is likely to cause death. The case, therefore, just falls within the definition of the offence of murder. Regarding it, however, as a case standing very much upon the border line, and accepting, as we do, the conclusion that the intention was not to cause the death of either of the boys, we do not think it necessary in this case to pass the severe sentence provided by law. We so far accept the appeal of Gauri Shankar that we set aside the sentence of death passed upon him, but affirm his conviction. We direct that he undergo transportation for life with effect from the 2nd of January 1918, the date of his conviction in the Sessions Court.

Sentence reduced.

(1) 20 A. 143; A. W. N. (1897) 225; 9 Ind. Dec. (N. S.) 453.

(2) 30 A 368; A. W. N. (1908) 243; 4 M. L. T. 402; 8 Cr. L. J. 383.

(3) 1 Ind. Cas. 765; 31 A. 148; 6 A. L. J. 129; 9 Cr. L. J. 383.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 194 OF 1917.

December 15, 1917.

Present:—Mr. Justice Rafique.

DRIG PAL SINGH—PLAINTIFF—APPLICANT

versus

KUNJAL—DEFENDANT—RESPONDENT.

Provincial Small Causes Courts Act (IX of 1887), Sch. II, Art. 31—Suit for mesne profits of grove wrongfully received by defendant, whether cognizable by Small Cause Court—Jurisdiction.

A suit to recover mesne profits of a grove which the plaintiff has been wrongfully kept out of possession of by the defendant, falls under Article 31, Schedule II, of the Provincial Small Causes Courts Act and is not cognizable by a Small Cause Court.

Civil Revision from an order of the Judge of the Court of Small Causes, Fatehpur.

Mr. *Purusottam Das Tandon*, for the Applicant.

Mr. *Mangal Prasad Bhargava*, for the Respondent.

JUDGMENT.—This is an application in revision from the order of the Small Cause Court at Fatehpur returning the plaint to be presented to the proper Court. It appears that the plaintiff-applicant sued to recover mesne profits of a grove from which he said he had been wrongfully kept out of possession for three years by the opposite party. The learned Judge considered that the claim of the applicant fell under Article 31, Schedule II, of the Small Causes Courts Act and was not, therefore, cognizable by him. He accordingly returned the plaint for presentation to the proper Court. He is supported in the view of the law he has taken by a case of this Court, *i. e.*, *Sheo Bodh* v. *Surjan* (1), as also by several cases of the Bombay and the Madras High Courts. For the applicant reliance is placed on the Full Bench ruling of *Kunjo Behary Singh* v. *Madhub Chundra Ghose* (2). The view taken by the Calcutta High Court seems to have been adopted by this Court about eighteen years ago in the case of *Prasadi Lal* v. *Imdad Husen* (3). The facts of that case are not quite the same as those of the present case. In the case of *Prasadi Lal* v. *Imdad Husen* (3) the plaintiff had sued for damages for wrongful eviction. In the present case the plaintiff is suing for the mesne profits of the property from which he was kept out of possession for three years. The case of *Prasadi Lal* v. *Imdad Husen* (3) does not apply to the present case. The application fails and is dismissed with costs. Let the original plaint be returned.

Application rejected.

(1) 19 Ind. Cas. 427; 11 A. L. J. 238.
(2) 23 C. 684; 12 Ind. Dec. (N. S.) 587 (F. B.).
(3) A. W. N. (1898) 10.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 144 OF 1915.

January 22, 1918.

Present:—Mr. Justice Richardson and Mr. Justice Beachcroft.

Raja SASHISHEKHARESWAR REY BAHADUR—DEFENDANT No. 1—APPELLANT

versus

Rani HEMANGINI DEBI AND OTHERS—PLAINTIFFS AND *Rani* KAMAL KUMARI DEBI AND ANOTHER *Pro forma* DEFENDANTS—RESPONDENTS.

Co-sharers, rights of—Co-sharer in exclusive possession—Suit for possession by other co-sharer, maintainability of.

A co-sharer in joint lands can maintain a suit in ejectment against his other co-sharer, claiming joint possession with him where the latter is not only in exclusive possession of the lands but asserts in his written statement exclusive possession in denial of the title of the plaintiff. [p. 690, col. 1.]

Appeal against the decree of the Subordinate Judge, Rajshahi, dated the 4th January 1915, modifying that of the Munsif, Bonalia, dated the 27th February 1914.

Babus *Dwarka Nath Chackerbutty* and *Gunada Charan Sen*, for the Appellant.

Babus *Sarat Chandra Roy Chowdhry* and *Priya Sankar Mazumdar*, for the Respondents.

JUDGMENT.—The plaintiff and the principal defendant No. 1 are co-sharers in certain lands. The lands are described in two schedules attached to the plaint. The land entered in Schedule (*ka*) is described as appertaining to the demarcated land of Touzi No. 1576 and the land in Schedule (*kha*) is described as appertaining to Touzi No. 218. In the former estate the share of the plaintiffs is 15 annas 8 *gandas* 1 *kara* 1 *kranti* and in the latter the share of the plaintiffs is one-sixth. In Estate No. 1576 the remaining share belongs to defendant No. 1 and in Estate No. 218 defendant No. 1

has a two-third share. The plaintiffs sued to recover joint possession with the defendant No. 1 of the lands of these two schedules on the footing that they had been ousted therefrom by defendant No. 1. There is abundant authority on the principle governing cases of this kind between co-sharers. The difficulty arises in the application of the principle to the facts of particular cases. In the present case it is clear that the plaintiffs by their plaint complained of ouster by defendant No. 1. The plaintiffs say that the defendant No. 1 has no right to hold exclusive possession of the said lands owned and held by the plaintiffs jointly and as appertaining to these demarcated shares by ousting the plaintiffs therefrom. It seems to me again that by his written statement defendant No. 1 in effect admitted that his possession of the lands in dispute had been possession in exclusion of the plaintiffs and in denial of the plaintiff's title. By his written statement he claimed the major portion of the land as appertaining to another Touzi No. 208 of which he was the sole owner. In that state of the pleadings, in my opinion, it was open to the plaintiff to sue the defendant No. 1 in ejectment. It has been suggested that the learned Judge has not found that the defendant No. 1 excluded the plaintiffs from those lands and denied their title. An examination of the judgment, however, will show that the learned Subordinate Judge intended to find an ouster of the plaintiffs by defendant No. 1. He was referred to reported cases on the subject and he distinguished those cases from the case he had before him on the ground that in those cases there was no question of ouster or exclusive possession on the part of the defendant and he came to the conclusion that there was absolutely no analogy between those cases and the present. In my opinion, the ouster necessary to support such a suit as this, has been sufficiently pleaded and found. The appeal should accordingly be dismissed with costs.

BEACHCROFT, J.—I agree.

Appeal dismissed.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CIVIL APPEAL No. 180 OF 1917.

November 16, 1917.

Present:—Mr. Saunders, J. C.

MA TU AND ANOTHER—DEFENDANTS—APPELLANTS

versus

KUMAR GANGADHAR BAGLA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 24—Upper Burma Civil Courts Regulation I of 1896, s. 15—Costs—Appeal as to costs, when maintainable—Order of transfer and costs—Appeal, whether lies.

An appeal does not lie on the question of costs where there has been no appealable decree. [p. 691, col. 1.]

An order passed under the provisions of section 24 of the Code of Civil Procedure read with section 15 of the Upper Burma Civil Courts Regulation, is not a decree and is not appealable. No appeal, therefore, lies from an order as to costs forming part of such order. [p. 691, col. 1.]

Mr. *S. Vasudevan*, for the Appellants.

Mr. *D. Dutt*, for the Respondents.

JUDGMENT.—The respondent in the course of a suit against the appellants for an injunction, applied for a temporary injunction, and being dissatisfied with the progress made by the Court which was trying the suit, applied to the Divisional Court praying that the suit should be transferred to the file of the District Judge, and that the Divisional Judge should take upon his own file the application for a temporary injunction. The Divisional Judge, without referring to, or noticing the latter application, transferred the suit to the file of the District Judge and directed that the present appellants who had opposed the application, should pay the costs, fixed at Rs. 50. Against this order requiring them to pay costs, the defendants appeal.

A preliminary objection is taken by the respondents that an appeal does not lie against the order of the Divisional Judge directing the appellants to pay costs. I think there is no doubt that this view is correct. The appellants relied on various Indian cases, among others *Ranchordas Vithaldas* v. *Bai Kasi* (1), where it was held that, where the Original Court has made an erroneous order for costs under a misapprehension of fact and law, an appeal lies from such order although the appellant complains of nothing else but the order for costs so erroneously made.

(1) 16 B. 676; 8 Ind. Dec. (N. S.) 929.

And in other cases, *e. g.*, *Kuppuswami Chetty* v. *Zamindar of Kalahasti* (2) and *Dildar Ali Khan* v. *Bhawani Sahai Singh* (3), it was held that an appeal may be entertained on a question of costs only, when a matter of principle is involved, since costs are awarded in the exercise of the discretion of the Judge with reference to general principles.

But it does not appear to me that any of these cases are authority for holding that where there is no appealable decree, the Court may entertain an appeal on a question of costs. In each of the Indian cases which I have referred to, there was an appealable decree and the appeal was entertained as against that part of the decree which dealt with costs. Here the order of the Divisional Judge was an order passed under the provisions of section 24 of the Code of Civil Procedure read with section 15 of the Upper Burma Civil Courts Regulation, and the order was not a decree and was not appealable. No. appeal, therefore, lies.

Order accordingly.

(2) 27 M. 341.
(3) 34 C. 878; 5 C. L. J. 642.

CALCUTTA HIGH COURT.

CIVIL RULE No. 874 OF 1917.
February 8, 1918.

Present:—Mr. Justice Richardson and Mr. Justice Beachcroft.

THE EAST INDIAN RAILWAY CO.—DEFENDANTS—PETITIONERS

versus

KANAK BEHARY HALDAR—PLAINTIFF—OPPOSITE PARTY.

Railways Act (*IX of* 1890), *s.* 76—*Goods consigned under risk note B, loss of—Damages, suit for—Burden of proof.*

In a suit for damages against a Railway Company for the loss or non-delivery of goods consigned under a risk-note in form *B*, the burden of proving the cause of loss or non-delivery is on the plaintiff. [p. 692, col. 2.]

Rule against the order of the Sub-Judge, First Court, Burdwan, exercising the powers of a Court of Small Causes in Small Cause Court Suit No. 141 of 1917, dated the 11th July 1917.

FACTS appear from the judgment.

Mr. *L. James* (with him Babu *Ambicapada Chaudhury*, for the Petitioners.—I am not liable if the goods are lost in transit. The Judge disbelieved the plaintiff-opposite party's story that the bags fell short in Allahabad. The question is on whom does the onus lie to show how the loss occurred. The question is who will come within the exception? There are two cases on the point—*Sheo Barat Ram* v. *Bengal and N. W. Railway Co.* (1), *East Indian Railway Co.* v. *Nilkanta Roy* (2).

The risk-note is in form B. The Railway Company is not a common carrier according to Common Law of England and do not come under the Carriers Act. Those terms in the new form were put in for the benefit of the consignors and as it was put for his benefit, the onus is on him, when he took advantage of it and paid a lower freight for the consignment.

The principle in *Sheo Barat Ram* v. *Bengal and N. W. Railway Co.* (1) is exactly in point.

In *East Indian Railway Co.* v. *Nilkanta Roy* (2) the risk-note was under form H but the terms are exactly the same and it follows the case of *Sheo Barat Ram* v. *Bengal and N. W. Railway Co.* (1). The question of onus has been dealt with at page 579* in *East Indian Railway Co.* v. *Nilkanta Roy* (2). These two decisions are absolutely in point. The lower Court relies on certain decisions in *Akhil Chandra Shaha* v. *India General Navigation and Railway Co. Ltd.* (3) and *Surendra Lal Chaudhuri* v. *Secretary of State* (4).

Akhil Chandra Shaha v. *India General Navigation and Railway Co., Ltd.* (3) is the case of the river company and is the case of a common carrier, the principle of which does not apply to Railway Companies.

Surendra Lal Chaudhuri v. *Secretary of State* (4) is the case of the liability of a Railway Company under risk note A.

Babu *Surendra Chandra Sen*, for the Opposite Party.—I rely on the finding of the Court below. The seven bags have not at all been sent from Bhatinda. The question of onus does not arise; even if it arises, the onus is on the other side and that I shall show from reported cases. The case

(1) 15 Ind. Cas. 53; 16 C. W. N. 766.
(2) 22 Ind. Cas. 679; 41 C. 576; 19 C. L. J. 142; 19 C. W. N. 95.
(3) 29 Ind. Cas. 260; 21 C. L. J. 565.
(4) 38 Ind. Cas. 702; 25 C. L. J. 37.

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of *East Indian Railway Co.* v. *Nilkanta Roy* (2) is a case relating to the entire loss of goods and has no application to his case. *Sesham Patter* v. *L. M. Moss* (5) is in point. In *Surendra Lal Chaudhuri Secretary of State* (4) the risk-note is not material. The risk-note is controlled by section 76 of the Railways Act. See section 76 of Railways Act of 1890. The risk-note gives a limited liability to the Railway Company otherwise the Railway Company will be entirely liable. See section 72 of the Railway Act. Section 76 does not make any difference whether there is limited or entire liability and lays down how the burden of proof is to be discharged. See *Sesham Patter* v. *L. M. Moss* (5).

The amount of liability maybe determined by the risk notes. See section 106 of the Evidence Act: the goods were in possession of the Railway Company. In *Surendra Lal Chaudhuri* v. *Secretary of State* (4) there is no mention of any risk note. In *Sheo Barat Ram* v. *Bengal and N. W. Railway Co.* (1) theft was proved. The case of *Surendra Lal Chaudhuri* v. *Secretary of State* (4) is contrary to *Sheo Barat Ram* v. *Bengal and N. W. Railway Co.* (1) and is upon the general principle governing all cases. See also *Akhil Chandra Shaha* v. *India General Navigation and Railway Co., Ltd.* (3).

JUDGMENT.—This is a Rule issued at the instance of the East Indian Railway Company Ltd., calling upon the opposite party to show cause why the judgment and decree of the Small Cause Court Judge of of Burdwan, dated the 11th July 1917, should not be set aside on certain grounds mentioned in the petition. The Rule relates to a consignment of 170 bags of flour and *sooji* which was delivered short at Burdwan by 7 bags. The decree awards the opposite party damages for the short delivery in accordance with the claim. The ground which has been taken on the petitioner's behalf is that the learned Small Cause Court Judge has misapplied the law inasmuch as he has thrown the burden of proving the cause of the loss or non-delivery on the petitioner.

It appears that the goods were carried under a risk-note in form B. When goods are so carried, the consignor in consideration of the reduced freight charged, engages "to hold the Railway Company harmless and free from all responsibility for any loss, destruction or deterioration of, or damage, to the said consignment from any cause whatever except for the loss of a complete consignment or of one or more complete packages forming part of a consignment, due either to the wilful neglect of the Railway administration, or to theft by or to the wilful neglect of, its servants, transport agents or carriers employed by them before, during and after transit over the said Railway."

As these words stand, they have the effect of throwing the burden of proving in what manner a particular consignment or part of a consignment is lost, on the consignor or the person claiming damages from the Railway Company. This view is in accordance with two previous decisions of this Court in *Sheo Barat Ram* v. *Bengal and North Western Railway Company* (1) and *East Indian Railway Company* v. *Nilkanta Roy* (2).

The learned Pleader appearing for the opposite party, has in the course of his argument laid stress on the provisions of section 76 of the Railways Act. The same argument was used in the second of the two cases cited and used without success. The learned Pleader has suggested that that case is distinguishable because it was a case relating not to the loss of a complete package but to the loss of the contents of a tin. The learned Judges though they held no doubt that the delivery of a tin with the contents missing, was not the loss of a complete package, nevertheless were clearly of opinion that assuming that there was loss of a complete package, the burden of proving how the loss was caused, lay on the consignor and not upon the Railway Company. The cases cited by the learned Pleader are distinguishable. In the case of *Sesham Patter* v. *L. M. Moss* (5) no question arose as to the special contract incorporated in form B. The same observation may be made with regard to the case of *Surendra Lal Chaudhuri* v. *Secretary of State* (4). As to the case of *Akhil Chandra Shaha* v. *India General Navigation and Railway Company Ltd.* (3), the liability dealt with there, was not

(5) 17 M. 445; 6 Ind. Dec. (N. S.) 308.

the liability of a Railway Company but the liability of a common carrier. Under the Railways Act of 1890, the liability of a Railway Company differs from that of a common carrier. That decision, therefore, has no bearing.

In view of the authorities to which I have referred, this Rule must be made absolute. The petitioner is entitled to his costs which we assess at one gold *mohur*.

BEACHCROFT, J.—I agree.

Rule made absolute.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 16 OF 1917.

October 22, 1917.

Present:—Mr. Saunders, J. C.

MAUNG PO U AND ANOTHER—APPLICANTS

versus

MAUNG KYAW—RESPONDENT.

Contract Act IX of 1872), *ss.* 134, 137—*Civil Procedure Code (Act V of* 1908), *O. IX, r.* 5—*Principal and surety—Suit dismissed as against principal—Surety, whether discharged.*

Plaintiff sued a principal debtor and the surety for the price of goods sold. Service of summons could not be effected upon the principal debtor and the plaintiff applied that he should be dismissed from the suit. The suit proceeded against the surety alone and the plaintiff obtained a decree:

Held, that the legal consequence of the act of the plaintiff was to discharge the principal debtor within the meaning of section 134 of the Contract Act, so that he had no further right of suit against the surety. [p. 694, col. 1.]

Mr. *L. K. Mitter*, for the Applicants.

Mr. *C. G. S. Pillay*, for the Respondent.

JUDGMENT.—The plaintiffs sued to recover the price of goods sold. The 2nd defendant was the principal debtor and the 1st defendant was the surety. The plaintiffs were unable to serve the 2nd defendant, they applied that he should be dismissed from the suit and proceeded against the surety. They obtained a decree in the Court of first instance which was reversed in appeal on the ground that, the principal debtor having been discharged by the creditor, the creditor could not recover from the surety. Against this the plaintiffs now come to this Court in revision on the ground that the ruling relied upon by the lower Appellate Court was not sound law. The lower Appellate Court referred to *Maung Pho Tha* v. *Ko Min Pyu* (1).

It is urged that the defendant did not abandon his claim or waive his claim against the principal debtor but that it should be taken that he was unable to ascertain the principal debtor's residence and that the order of the Court was passed under Order IX, rule 5 of the Code of Civil Procedure, and various Indian rulings of which *Nathabhai Tricamlal* v. *Ranchodlal Ramji* (2) is the latest, are relied upon. In that suit it was held that there was some difficulty in serving the 1st defendant whose name was struck out; as a year had not elapsed, presumably this was done if not at the request, at least with the consent, of the plaintiff, and that the striking off of the 1st defendants's name was a procedure under Order IX, rule 5, rather than under Order XXIII, rule 1. It was said that "all the authorities in all the Courts of India who have had this question under consideration,... are in agreement that the mere omission of the plaintiff to pursue his suit against one of the defendants with the result that that defendant's name is struck off and the suit dismissed against him under Order IX, rule 5, does not discharge the surety, provided the suit be still in time against the principal."

The terms of Order IX, rule 5 of the Code of Civil Procedure are as follows:—"Where, after a summons has been issued to the defendant, or to one of several defendants, and returned unserved, the plaintiff fails for a period of one year from the date of the return made to the Court by the officer ordinarily certifying to the Court returns made by the serving officers, to apply for the issue of a fresh summons and to satisfy the Court that he has used his best endeavours to discover the residence of the defendant who has not been served, or that such defendant is avoiding service of process, the Court may make an order that the suit be dismissed as against such de-

(1) 1 L. B. R. 150.

(2) 27 Ind. Cas. 165; 39 B. 52; 16 Bom. L. R. 696.

fendant." And clause 2 lays down that in such a case the plaintiff may, subject to the law of limitation, bring a fresh suit.

I am at a loss to understand how a Court can be said to be adopting a procedure under this section which expressly enables it to take certain action after the period of one year when it takes that action before the expiry of the year. But assuming the view taken in the Bombay, case to be correct, it would appear that there the Court struck the 1st defendant's name off without any application in that behalf by the plaintiff. In the Lower Burma case relied upon by the lower Appellate Court, it was pointed out that in the Indian cases there referred to, the plaintiff did not, by his own act, relinquish his claim, whereas in that case he expressly waived his claim against the principal, and the same distinction was drawn in the case of *Williams, F. G.* v. *King, T.* (3), where the plaintiff's Advocate told the Judge that his principal debtor had absconded, he would waive claim against the principal and would obtain decrees against the sureties. I think that that distinction is sound. In the present case, the diary shows that the plaintiff informed the Court distinctly that he waived his claim against the principal debtor.* * * * * * * * * * This entry in the diary was made on the 26th February 1916, the suit having been filed on the 8th January 1916. I am of opinion that this amounted to much more than mere forbearance within the meaning of section 137 of the Indian Contract Act. It was an act or omission the legal consequence of which was to discharge the principal debtor within the meaning of section 134, for it was a distinct waiver of the plaintiff's claim against the principal debtor and the plaintiff had no further right of suit against the principal debtor.

There are no grounds for interference on the facts and this application must be dismissed with costs.

Application dismissed.

(3) 20 Ind. Cas. 189; 6 Bur. L. T. 62.

CALCUTTA HIGH COURT.

RULE *Nisi* No. 753 OF 1916.

January 3, 1918.

Present:—Mr. Justice Richardson and Mr. Justice Beachcroft.

THE BENGAL PROVIDENT AND INSURANCE COMPANY LTD.—DEFENDANT —PETITIONER

versus

KAMINI KUMAR CHOUDHURY—PLAINTIFF—OPPOSITE-PARTY.

Civil Procedure Code (Act V of 1908), ss. 20, 21—"Cause of action," meaning of—Suit on policy of insurance—Place of suing—Death of assured, whether part of cause of action.

One *R* sent proposal forms for two policies of life insurance from some place in the District of Chittagong to the head office of the defendant company at Calcutta, and the policies were made out in that office and thence despatched to the assured *R. R.* subsequently died in the District of Noakhali. Thereafter *R's* son brought a suit in the Munsif's Court at Feni in the District of Noakhali upon the policies issued to *R.* by the defendant company. Objection was taken at the trial that the Court at Feni had no jurisdiction, but it was overruled and the suit was tried on the merits:

Held, that although the objection as to jurisdiction was taken at the earliest possible opportunity and before the issues were settled, yet having regard to the provisions of section 21 of the Civil Procedure Code and to the fact that evidence had been taken at length in the Feni Court, this was not a case in which the High Court should interfere in the exercise of its revisional jurisdiction as no attempt was made to show that the company had been prejudiced in any way by the case being tried at Feni or that the disposal of the suit had been prejudicially affected on the merits. [p. 697, col. 1.]

Per *Richardson, J.* (*Beachcroft, J.* not expressing any opinion).—The death of the assured being a part of the plaintiff's cause of action and the death having taken place within the Feni jurisdiction, a part of the cause of action arose there and the Feni Court had jurisdiction to try the case. [p. 696, col. 2.]

The expression 'cause of action' means the whole cause of action, or every fact which must be either admitted or proved before the plaintiff can succeed. [p. 696, col. 1.]

It is not justifiable to interpret the language of section 20, clause (*c*) of the Code of 1908 now in force by reading into it a repealed explanation, *viz.* explanation III of section 17 of the repealed Civil Procedure Code of 1882. [p. 696, col. 1.]

Rule against the order of the District Judge, Noakhali, dated the 11th July 1916.

FACTS appear from the judgment.

Babu *Prokash Chandra Majumdar*, for the Petitioner, submitted that the Courts below were wrong in holding that the Feni Court had jurisdiction to try the suit

inasmuch the assured had died within the jurisdiction of that Court. Section 20 clause (*c*) of Act V of 1908 should be construed with reference to Explanation III of the Civil Procedure Code of 1882. See *Salig Ram* v. *Chuba Mal* (1). The cause of action arose in the District of Chittagong whence the assured sent proposal forms for the policies of life insurance upon which the suit was brought. If section 20 (*c*) of the Code of 1908 were construed with reference to the repealed explanation of the Code of 1882, then the Feni Court had no jurisdiction to entertain the suit. The contract with the defendant company had been made from the district of Chittagong, and the cause of action did not arise within the jurisdiction of the Feni Court.

Babu *Bhagirat Chandra Das*, for the Opposite Party, submitted that the language of the Code of 1908 could not be interpreted by reading into it a repealed explanation from the repealed Code of 1882. Section 20, clause (*c*), must be construed with reference to the wording of the section itself. See *Bank of England* v. *Vagliano* (2), *Norendra Nath Sarcar* v. *Kamalbasini Dasi* (3). The expression "cause of action" was defined in several cases. *Doya Narain Tewary* v. *Secretary of State* (4), *Dobson* v. *Bengal Spinning and Weaving Company* (5), *Seshagiri Row* v. *Nawab Askur Jung* (6). The cause of action arose partly within the jurisdiction of the Feni Court where the assured died, and, therefore, the Feni Court had jurisdiction.

Even assuming that the Feni Court had no jurisdiction, the case had been tried at Feni, evidence had been taken at length in the Feni Court, and, therefore, as no attempt had been made either in the Courts below or in the High Court to show that the Company had been prejudiced in any way by the case having been tried at Feni, the High Court should not, having regard to the provisions of section 21 of the Civil Procedure Code interfere in revision. *Hamidunnissa Bibi* v. *Gopal Chandra Malakar* (7), *Raghunath Charan Singh* v. *Shamo Koeri* (8), *Govinda Menon* v. *Karunakara Menon* (9), *Wahidullah* v. *Kanaya Lal* (10).

Babu *Prokash Chandra Majumder* in reply.

JUDGMENT.—This is a Rule issued at the instance of the petitioner (The Bengal Provident and Insurance Company Limited) calling upon the opposite party (Kamini Kumar Choudhury) to show cause why the decree of the District Judge of Noakhali, dated the 11th July 1916, should not be set aside or why such other order should not be made as to this Court may seem fit. The matter arises out of a suit brought by the opposite-party upon two policies of life insurance issued by the petitioner Company to his father Ram Gour Choudhury now deceased. It appears that Ram Gour Choudhury the assured, sent proposal forms for those policies from some place in the Chittagong District to the head office of the Company at Calcutta and that the policies were made out in that office and thence despatched to the assured. The assured subsequently died at Baspara in the District of Noakhali and this suit was instituted in the Court of the Local Munsif at Feni in that district. Objection was taken at the trial that the Court at Feni had no jurisdiction. That objection, however, was overruled and a decree was made in favour of the plaintiff. The case then went on appeal to the District Judge who agreed with the learned Munsif on the question of jurisdiction, but for reasons into which we need not enter, has set aside the decree of the Trial Court and has remitted the case to that Court with certain directions.

The sole point taken before us in support of the Rule, is the point of jurisdiction. The question is whether the Munsif's Court at Feni is a Court within the local limits of whose jurisdiction the cause of action in this case has in part arisen within the meaning of clause (*c*) of section 20 of the present Civil Procedure Code. The

(1) 11 Ind. Cas 712; 34 A. 49; 8 A. L. J. 1160.
(2) (1891) A. C. 107; 60 L. J. Q. B. 145; 64 L. T. 353; 39 W. R. 657; 55 J. P. 676.
(3) 23 C. 563 (P. C.); 23 I. A. 18; 6 Sar. P. C. J. 667; 6 M. L. J. 71; 12 Ind. Dec. (N. S.) 374.
(4) 14 C. 256; 7 Ind. Dec. (N. S.) 170.
(5) 21 B. 126; 11 Ind. Dec. (N. S.) 86.
(6) 27 M. 494.
(7) 24 C. 661; 1 C. W. N. 556, 12 Ind. Dec. (N. S.) 1110.
(8) 31 C. 344.
(9) 24 M. 43.
(10) 25 A. 174 (F. B.); A. W. N. (1902) 222.

learned District Judge has held that inasmuch as the assured died within the jurisdiction of the Feni Court and the death of the assured was a part of the cause of action, therefore, a part of the cause of action has arisen at Feni and the Court there has jurisdiction. The learned Pleader for, the petitioner contests that view. He has argued that clause (*c*) of section 20 must be construed with reference to an explanation which found place in section 17 of the Code of 1882 but which has not been reproduced in the present Code. Under that section every suit not previously provided for was to be instituted in the Court within the local limits of whose jurisdiction either the cause of action arose or certain other conditions were fulfilled to which we need not now refer. At the end of the section there was an Explanation III dealing particularly and especially with suits arising out of contract. It is said for the petitioner that if the provisions of that explanation be read into the present Code and applied to the present case then the Feni Court had no jurisdiction, and in this connection reference is made to the decision of the Allahabad High Court in *Salig Ram* v. *Chuba Mal* (1). It may be doubted whether that decision goes as far as is now contended. Speaking for myself upon the point as it is put to us, I cannot suppose it justifiable to interpret the language of the Code now in force by reading into it a repealed explanation from the repealed Code.

In the case of *Bank of England* v. *Vagliano* (2) Lord Herschell dealt in a well-known passage with the interpretation of codifying Statutes. His observations were cited at length by Lord Macnaghten in the case of *Norendra Nath Sarcar* v. *Kamalbasini Dasi* (3), which turned upon the meaning of section 111 of the Indian Succession Act.

The Court designated by clause (*c*) of section 20 of the present Code is the Court within the local limits of whose jurisdiction "the cause of action wholly or in part arises." It appears to be well settled that the expression "cause of action" (especially when part of the cause of action is also referred to) means the whole cause of action, or every fact which must be either admitted or proved before the plaintiff can succeed. *Doya Narain Tewary* v. *Secretary of State* (4), *Dobson* v. *Bengal Spinning and Weaving Co.* (5), *Sashagiri Row* v. *Nawab Askur Jung* (6). The cases cited were decided under clause 12 of the Letters Patent which gives the High Court original jurisdiction in all cases other than the case of suit for land, "if the cause of action shall have arisen, either wholly, or, in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original jurisdiction." That provision bears a close analogy to clause (*c*) of section 20 and I can see no reason why the similar language of clause (*c*) should not be similarly interpreted. If then in relation to suits generally, the term "cause of action" in clause (*c*) means the whole cause of action, it would be difficult to give it a more restricted meaning for the purposes of the clause in relation to suits arising out of contract.

In the case before us, it is not disputed for the petitioner that the death of the assured is a part of the cause of action, using the term in the sense indicated, and as authority for that proposition the learned Pleader for the opposite-party has cited the case of *Cailland* v. *Champion* (11) though he is unable to refer us to any more recent case precisely in point. Confining myself, therefore, to the language of the existing Code, I can see no escape from the conclusion that the death of the assured being a part of the plaintiff's cause of action and the death having taken place in British India within the Feni jurisdiction, a part of the cause of action arose there and the Feni Court has jurisdiction. In other words I am not satisfied that the contention upon which the petitioner relies, can be supported. The question, however, may be one of some importance to Insurance Companies and if it were necessary for us to express a final opinion upon it, I might have preferred to take time for consideration. It is sufficient perhaps without actually deciding the question to say that the Rule may be disposed of on another ground.

The present Code contains a new provision, section 21, which runs as follows:— "No objection as to the place of suing shall be allowed by any Appellate or Revisional Court unless such objection was taken in the

(11) (1797) 7 T. R. 205; 101 E. R. 933.

Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice." Now it is not disputed that the objection here was taken in the Trial Court at the earliest possible opportunity and before the issues were settled. But it is contended for the opposite party that the petitioner has not shown that the trial of the suit at Feni has led to any failure of justice. The lower Appellate Court was as much bound as we are, by the Rule enacted in section 21. No attempt seems to have been made there to show that the Company had been prejudiced in any way by the case being tried at Feni or that the disposal of the suit had been prejudicially affected on the merits. The petition on which this Rule was issued, is entirely silent upon this question. In fact the learned Pleader for the petitioner has candidly admitted that the point had not occurred to him till it was raised in the course of the argument. There is apparently no reported case in which this provision has been applied but there are several cases decided upon the analogous provision in section 11 of the Suits Valuation Act which may serve to show the intention and the object of the Legislature in the present connection, for example *Dinesh Chunder Roy* v. *Sarnamoyi Debi* (12), *Hamidunnissa Bibi* v. *Gopal Chandra Malakar* (7), *Raghunath Charan Singh* v. *Shamo Koeri* (8), *Govinda Menon* v. *Karunakara Menon* (9) and *Wahidullah* v. *Kanaya Lal* (10). The effect is to confer a qualified or conditional jurisdiction on the Court in which the trial actually takes place. In the circumstances, having regard to section 21 and to the fact that evidence has been taken at length in the Feni Court, in my opinion, this is not a case in which we should interfere in the exercise of our revisional jurisdiction.

The result is that the Rule will be discharged with costs. We assess the hearing fee at two gold *mohurs*

BEACHCROFT, J.—I agree that the Rule should be discharged, not on the ground that the Court at Feni had jurisdiction, as to which I express no opinion, but because section 21 applies to the case.

Rule discharged.

(12) 1 C. W. N. 136.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 86 OF 1916.

February 26, 1918.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

GIRDHAR DAS AND OTHERS—DEFENDANTS—APPELLANTS

versus

SIDHESHWARI PRASAD NARAIN SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 91, 92, 93—Execution—Sale—Property sold twice over—Suit by second purchaser to recover purchase-money, maintainability of.

Where the property of a judgment-debtor has once been sold by Court-auction, he has no interest in the property subsequent to the sale and a purchaser at a second sale of the same property, therefore, acquires no interest by his purchase and is entitled to maintain a suit for the refund of the purchase-money paid by him against all the creditors of the judgment-debtor to whom payments have been made out of that money.

First appeal from a decree of the Subordinate Judge, Benares.

Messrs. *Jawahirlal Nehru* and *Harnandan Prasad*, for the Appellants.

Messrs. *Brij Nath Vyas* and *Kanhya Lal*, for the Respondents.

JUDGMENT.—The essential point raised by this first appeal is quite a simple one. Certain house property situated within the city of Benares belonged to one Rajendradhari Singh, who seems to have been heavily in debt. There were two auction sales of the house property in question: One on the 15th of February, 1906, resulting in a purchase by Ram Prasad Singh, and another on the 18th of March 1907, resulting in a purchase by the present plaintiffs-respondents. The latter paid their purchase-money into Court and that money passed under the orders of the Court into the hands of a large number of creditors of Rajendradhari Singh, who had applied for rateable distribution in respect of any

money which might be realised by the auction-sale. Subsequently Ram Prasad Singh brought a suit, in which he impleaded the judgment-creditor on whose application the attachment resulting in the sale of March the 18th, 1907, had been made, and also the present plaintiffs, the auction-purchasers at the said sale. The result of that suit was a decision, between these parties, that the same property had been sold twice over, first to Ram Prasad Singh in February 1906, and then to the plaintiffs in March 1907. It followed as a necessary consequence that on the date of the latter sale, the judgment-debtor Rajendradhari Singh had no saleable interest in the property purchased by the plaintiffs. The latter had, therefore, obtained nothing by their purchase and became entitled to maintain a suit against all the judgment creditors of Rajendradhari Singh to whom payments were made out of the money which the plaintiffs had paid into Court. The law on this point is clearly settled, as may be seen by referring to the cases of *Kishun Lal* v. *Muhammad Safdar Ali Khan* (1) and *Muhammad Najib Ullah* v. *Jai Narain* (2). The Court below has accordingly decreed the plaintiff's claim against a large number of defendants, in accordance with the sums found to be respectively due from each defendant, or group of defendants. The appeal now before us is by five of the defendants only. The question as to the maintainability of the suit must be decided against the appellants in accordance with the rulings above referred to. The question whether the present suit was or was not within limitation, has already been up to this Court in appeal and has been decided in the plaintiff's favour. The report may be found in *Sidheswari Prasad Narain Singh* v. *Mayanand Gir* (3).

There are pleas taken in the memorandum of appeal before us which are apparently intended to suggest that the decision in the suit brought by Ram Prasad Singh has in some way been used against the present defendants improperly in this litigation. The plaintiffs were obviously entitled to prove that they had lost the benefit of their auction-purchase by reason of the fact that Ram Prasad Singh had succeeded in proving that he had himself purchased identically the same property at the auction-sale of February 1906. This fact could most readily be proved by the record of the suit in which Ram Prasad Singh was the plaintiff and the present plaintiffs, along with the attaching creditor of Rajendradhari Singh, were the defendants. Beyond this, I do not think that the Court below has made any use of the record of this previous litigation. The contesting defendants, other than original attaching creditor, were allowed to raise every question of fact which could have been raised by them if they had been defendants in the suit brought by Ram Prasad Singh. They could not as a matter of fact have been made defendants in that suit, because it had been instituted before the order for rateable distribution of the sale-proceeds of the sale of March 1907, had been passed. This, however, I only mention incidentally. The questions of fact requiring determination at this trial, were the identity or otherwise of the property purchased at the two sales of February, 1906 and March 1907, and *secondly*, the validity or otherwise of the plea taken by these defendants that Ram Prasad Singh was merely a *benami* purchaser for the benefit of the judgment-debtor, Rajendradhari Singh. The identity of the properties sold at the two auction-sales has been established by abundant evidence and the point scarcely admits of argument. The truth of the matter is that Rajendradhari Singh had purchased a number of contiguous houses in the city of Benares and had then built himself a residence, with suitable out-houses and other appurtenances, situated within one single enclosure covering the sites of the various houses purchased by him. At both the auction-sales, everything within the enclosure, the boundaries of which were clearly specified in the sale-proclamation, was put up for sale and was purchased by Ram Prasad Singh in February 1906, and by the present plaintiffs in March 1907. There is no force in the contention that different house numbers were mentioned in the sale proclamations of the two years. The identity of the property sold is suffici-

(1) 13 A. 383; A. W. N. (1891) 138; 7 Ind. Dec. (N. S.) 244.
(2) 26 Ind. Cas. 59; 12 A. L. J. 908; 36 A. 529.
(3) 19 Ind. Cas. 986; 35 A. 419; 11 A. L. J. 606.

ently established by the sale proclamations and by the evidence of the Court official who conducted the sales. Ram Prasad Singh was at any rate the ostensible purchaser at the sale of February 1906. The evidence by which the defendants in this suit have sought to show that he was a *benamidar* for Rajendradhari Singh, is of very little substance. Certain evidence has been produced tending to show that Rajendradhari Singh was in funds in the month of February 1906, so that he could have made this purchase if he wanted to do so. The case for the defendants can scarcely be said to go beyond this. It is true that Ram Prasad Singh does not appear to have taken as yet effective possession of the whole of the property sold to him; but the evidence on the record supplies abundant explanation of this fact. When the time for delivery of possession came, Rajendradhari Singh was lying seriously ill inside the house, and it would seem that he died there shortly afterwards. The evidence for the defendants does not carry us beyond the fact that Ram Prasad Singh has not hitherto taken steps to evict Rajendradhari Singh's widow from the premises. This may be due to sympathetic consideration on his part, or it may be that he does not desire to contest the possible question of the widow's right of residence. Moreover, it must be remembered that Ram Prasad Singh's position has been complicated by the subsequent auction-sale of 1907 and by the litigation in which he has been involved in order to enforce his title. The decision of the High Court in his favour was not pronounced until the month of November 1909. On the whole, there seems no valid basis for a finding that the purchase effected by Ram Prasad Singh at the auction-sale of February 1906 was *benami* on behalf of the judgment debtor, or was anything but a *bona fide* purchase for his own benefit. The defendants have further raised another very curious plea, suggesting that the auction-purchase by the plaintiffs themselves in the month of March 1907 was also *benami* on behalf and for the benefit of Rajendradhari Singh or his heirs. In fact this seems to have been treated as the main issue in the case. We have been taken through the evidence on the point, and it is really unnecessary for us to say more than that we find no reason for dissenting from the opinion formed by the trial Court regarding that evidence. We can find no real reason for doubting, that the purchase-money paid in connection with the auction-sale of March 1907, was found by the plaintiffs themselves and that the purchase was effected on behalf of the plaintiffs, for their benefit, by their agent, Sheodhar Prasad.

The only remaining plea in the memorandum of appeal before us is that Ram Prasad Singh's decree invalidating the sale of March 1907, and affirming the validity of his own purchase at the sale of February 1906, was obtained by some sort of fraudulent collusion between himself and the then defendants. There is no basis for that contention, beyond the fact that the present plaintiffs did not choose to appeal against Ram Prasad Singh's decree; but the matter was fully fought out by the principal defendant, the attaching judgment-creditor, and the essential issues of fact were found in favour of Ram Prasad Singh after contest, as they have again been found in his favour after contest in the present litigation. There is, therefore, no force in this appeal. We dismiss it with costs.

Appeal dismissed.

MADRAS HIGH COURT.

FULL BENCH.

SECOND CIVIL APPEAL No. 1660 OF 1913.

November 23, 1917.

Present:—Sir John Wallis, KT., Chief Justice, Mr. Justice Sadasiva Aiyar and Mr. Justice Kumaraswami Sastri.

August 15, 1917.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Phillips.

September 20, 1916.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

KUMARAPPA REDDI—

PLAINTIFF—APPELLANT

versus

MANAVALA GOUNDAN—

DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 100 (a), 103—Madras High Court Appellate Side Rules, r. 2—Custom or usage, evidence as to, whether question of fact—Appeal, second—High Court, power of, to review

KUMARAPPA REDDI *v.* MANAVALA GOUNDAN.

*evidence of custom—Genuineness of documents, finding on—Full Bench, reference to, of whole case, legality of—Landlord and tenant—*Mirasi *tenure—*Thunduvaram, *levy of—Customary right—Agreement by tenant to pay cess, admissibility of—Admission against interest—Evidence Act (I of 1872), s. 21—Burden of proof—Settlement Register, negation of right in, effect of—Custom, evidence of, how to be dealt with by Courts—Provincial Small Causes Courts Act (IX of 1887), Sch. II, Art. 13—*Thunduvaram, *whether rent or 'dues'—Limitation Act (IX of 1908), Sch. I, Art. 131.*

By the Full Bench.—The findings of an Appellate Court as to instances of usage, the genuineness of documents put forward as regards usage and the credibility of witnesses, are findings of fact and the High Court cannot, in second appeal, review the evidence on these matters and interfere with such findings. [p. 716, col. 1.]

Kakarla Abbayya v. *Raja Venkata Papayya*, 29 M. 24 16 M L J. 8, overruled.

The liability to pay *thunduwaram* is a well-known incident of *mirasi* tenure in the Chingleput District but as it is not universally applicable, it is for the *mirasidar* to show that he is entitled to enforce it by the custom of the estate or the neighbourhood. [p 715, col. 1.]

Sakkaji Rau v. *Latchmana Goundan*, 2 M. 149; 4 Ind. Jur. 560; 1 Ind Dec (N. S.) 375, followed.

The recognition of a *mirasidar's* right to *swantantram* or *thunduvaram* in the Settlement Register is of great evidentiary value as a strong instance of the assertion of the right on the estate and is, therefore, entitled to great weight while, on the other hand, the refusal of the Settlement Officer to register the *swantantram*, is not conclusive as he has no authority to determine the question and does not detract from the weight of other evidence relating to the *mirasidar's* right by custom to collect such dues. [p. 712, col. 1.]

A written agreement by a tenant to pay the *swantantram* or *thunduvaram* is admissible as an admission of the evidence of custom unless the tenant explains away the admission and its effect cannot be discounted or neutralised on the ground that the admission is recent. [p. 716, col. 2.]

Per *Wallis, C J.*—The words 'usage having the force of law' in section 100, Civil Procedure Code, are little more than words of amplification and do not give the Court any larger powers of interference with findings as to custom in so far as they are findings of fact, than with any other findings of fact. [p. 714, col. 2.]

Per *Sadasiva Aiyar and Phillips, JJ.*—It is competent to a Divisional Bench of the High Court to refer to a Full Bench, not merely a question of law but the whole matter of an appeal. [p. 712, col. 1; p. 714, col. 1.]

In dealing with second appeals the High Court is bound by the lower Appellate Court's opinion on the reliability of evidence but the value to be attached to the evidence (provided it is not mere opinion evidence) supposing it is accepted as true, and the relevancy of evidence, are questions to be considered by the High Court also. If notwithstanding uncontradicted instances ranging over a long period and recognised judicially in several cases, the lower Appellate Court finds against the existence of a proper custom on the ground that in its opinion the instances are insufficient in number, the High Court is entitled to hold that on the facts found by the lower Appellate Court, the custom is legally established. [p. 713, col. 2; p. 716, col 2.]

By the Division Bench, (Sadasiva Aiyar and Napier, JJ.)—The *thunduvaram* cess claimed by a *mirasidar* is not of the nature of rent but comes under the general expression 'dues' in Article 13 of the Provincial Small Causes Courts Act. [p. 700, col. 2.]

The refusal of Government to recognise the *thunduvaram* does not amount to a 'refusal' by the tenant to pay the due to the *mirasidar* within the meaning of Article 131 of the Limitation Act. [p. 701, col. 1.]

In dealing with evidence of custom, Courts should examine the evidence covering the whole period of the custom. It may be that the earlier evidence is not sufficient to establish the custom: it may be that it is sufficient but that later evidence establishes a discontinuance—all these aspects must be considered. [p. 702, col. 1.]

Where abandonment of a customary due is pleaded it is for the tenant to prove it and mere non-receipt of the due will afford very weak evidence of such abandonment. [p. 702, col. 2.]

Second appeal against the decree of the District Court, Chingleput, in Appeal Suit No. 542 of 1911, preferred against, that of the Court of the District Munsif, Chingleput, in Original Suit No. 12 of 1910.

This second appeal coming on for hearing on the 5th and 6th of September 1916, and having stood over for consideration till the 20th of September 1916, the Court (Sadasiva Aiyar and Napier, JJ.), delivered the following

JUDGMENT.—The plaintiff is the appellant. He brought the suit to recover Thunduwaram alleged to be due to him as Mirasidar by the defendant who is a Government Ryot in a Mirasi village. A preliminary objection was raised by the respondent's learned Vakil (Mr. T. R. Ramachandrier) that no second appeal lies as the suit was of a small cause nature and the value of the claim is less than Rs. 500. In our opinion, Mirasi right is an interest in the village lands, though it may not now be a proprietary interest therein. The Thunduwaram payable to the Mirasidar (assuming it to be payable) might have once been part of the Kudivaram produce, but it is now claimed merely as the fee due to the Mirasidar as such by custom. Hence it is not of the nature of "rent" (like Jodi), but comes under the general expression "dues" in Article 13 of the Provincial Small Causes Courts Act.

We, therefore, overruled the above preliminary objection. We are unable to agree with the learned District Judge that the

plaintiff's claim to obtain Thunduwaram (a part of the Mirasidar's Swathantram) from the defendant became barred in 1890, because the Government refused some time prior to 1878 to recognize the custom under which the Mirasidar claimed such dues. Evidently the learned District Judge has applied Article 131 of the Limitation Act as he states that "there must have been a refusal" (by the defendant to pay the Thunduwaram to the Mirasidar) " prior to 1878. ". The learned Judge then on this sole ground of the Government's disinclination in 1878 to recognize the custom in favour of the Mirasidar considered that he would be legally justified in finding that " there must have been a refusal " (by the defendant) " prior to 1878." We think that such a finding must be treated as one based on no legal evidence and cannot be accepted. The recent Full Bench decision in *Seshachala Chetty* v. *Para Chinnasami* (1) does not deal directly with the Mirasidar's right to Thunduwaram (the question directly in issue in that case being the Mirasidar's alleged right to eject occupiers of Nattam Poramboke land sites held under Pattahs). There are, however, passages in two of the judgments in that case which relate to Thunduvaram and which are entitled to great respect. We, therefore, refer to them. Mr. Justice Ayling says " there are undoubtedly certain incidents, which have been claimed as attaching to it " (the Mirasi tenure) " from ancient times and have to some extent been recognised, " one of such incidents being " the right to certain fees (Thunduwaram) on lands granted for cultivation to non-Mirasi cultivators (Payakaris) by the Government." Then the learned Judge says that this right also requires to be separately established by the Mirasidar and that he ought to adduce proof of the existence of the custom to pay such dues, and he refers to *Sakkaji Rau* v *Latchmana Goundan* (2). Mr. Justice Kumaraswami Sastri refers to the opinion of the Collector of Chingleput in 1839 which admitted the Mirasidar's right to collect Thunduwaram, Swatantrams, etc., in the Sheikal lands. In another place the learned Judge quotes the opinion of the Board of Revenue in 1892 as follows :— " Briefly, the system, as it at present exists, rests on the claims of the Mirasidars to all the waste lands in their villages and to the levy of Swathanatram or fees from Payakarees or non-Mirasidars who may take up land for cultivation. This claim was fully recognised in the new settlement carried out in 1876—78 (*Vide*, Government Order dated 15th February 1876, No. 221) and after full consultation with the Mirasidars, a memorial fee (Swatantram), fixed at an average rate of 2 annas on every rupee of Government assessment, was declared to be leviable by the Mirasidars not only on every field lying waste in each village, but also on all lands now held by the Mirasidars themselves and included in their Pattas, should such land be subsequently relinquished and taken up by a non-Mirasidar. The fee claimable on each field, was duly entered in the settlement registers against every field liable to it. The only lands against which fees were not entered, were those which had already been obtained by strangers and which were held under lease or Patta from Government. " Then the learned Judge refers to the Government Orders passed on the 19th October 1903 about Swatantrams as follows :—"The right of the Mirasidars to levy a fee at the rate of 2 annas in the rupee of the assessment of both dry and wet lands, has been recognised by Government except in the case of the undermentioned fields which are free of Swatantrams so long as they are held under the terms of the original grants". Next the learned Judge referred to *Sakkaji Rau* v. *Latchmana Goundan* (2) in which it was held that "where the right was denied there should be enquiry whether by custom it prevails on the estate or if there are not sufficient instances on the estate to afford grounds for a decision, on similar estates in the neighbourhood. "

In the result, following the decision in *Sakkaji Rau* v. *Latchmana Goundan* (2) which was recognised as good law by the Judges who decided the above Full Bench case, we hold that where (as in this case) the tenant denies the right of the Mirasidar to Thunduwaram, the burden of proof is on the Mirasidar to prove the existence in himself of the right by establishing a custom to pay such dues.

Now the learned District Judge in considering the evidence in this case as to custom

(1) 40 Ind. Cas. 909; 40 M. 410; 32 M L. J. Sup 1.
(2) 2 M. 149; 4 Ind. Jur. 560; 1 Ind. Dec. (N. S.) 375.

has fallen into several material errors. He thinks that documents relating to other than the plaint lands which establish the claim of the Mirasidar to Thunduwaram, are not of much value. But the decision in *Sakkaji Rau* v. *Latchmana Goundan* (2) which states that evidence even as to neighbouring villages and estates is admissible, is clearly against the District Judge's view. Then he seems to think that Exhibits H, E and K do not relate to plaint lands, but it has been shown that they do relate to some of the lands against which no Swatantram is shown as due in Exhibit J. It is contended for the respondent that the lands to which those documents refer, were waste lands granted by Government after the year 1878 when an arrangement was made between the Collector and the Mirasidars by virtue of which they were to be allowed Swatantrams on such lands in consideration of their waiving their claim in respect of lands already granted by Government and lands taken up by the Mirasidars themselves and abandoned. This may or may not be so but we are at present only concerned with the question how these documents have been dealt with by the District Judge and there is no doubt that he has fallen into an error of fact. Then he thinks that the omission in the documents Exhibits III to V (*b*) and VII to VIII (*b*) of any reference to Thunduwaram, is strong evidence in the defendant's favour. Most of them are, however, sale-deeds and it is not usual or necessary in such deeds to insert a recital that a purchaser should thereafter pay the Theervai or Thunduwaram payable on the lands sold. It is the duty of the purchaser to do so, whether it is mentioned in the sale deed or not. The District Judge has declined to give any weight to old documents on the ground that it is admitted that Mirasidars had many more privileges in the old days. (*Vide*, paragraph 5). This method of dealing with a question of custom is not correct. The evidence covering the whole period must be examined. It may be that the earlier evidence is not sufficient to establish the custom: it may be that it is sufficient but that later evidence establishes a discontinuance—all these aspects must be considered, which admittedly has not been done in this case. The agreement, Exhibit B, again, is brushed aside by the District Judge as a document executed without consideration. If, of course, we assume that the Mirasidar has no right to Thunduwaram, Exhibit B was executed without consideration. But that is the very point in issue. Anyhow, Exhibit B is a clear acknowledgment by the tenant of the Mirasidar's right to Thunduwaram and must be given whatever consideration it is worthy of, in arriving at a conclusion on the question of the Mirasidar's right by custom to claim Thunduwaram. The Diglot Register Exhibit VII read with Mr. Puckle's report and the subsequent conduct of the Mirasidar in not claiming Thunduwaram for 16 years before 1905, may afford evidence that the Mirasidar had no right by custom to claim Thunduwaram on waste lands which he had not been cultivating and which had been granted as waste by Government to outside Payakaree tenants and it can even afford evidence that he abandoned his customary right so far as those lands are concerned. But as regards those lands in respect of which the right to Thunduwaram is recognised in the Diglot Register itself, it is for the defendant to prove that the Mirasidar has abandoned such customary rights and mere non-receipt of the dues will afford very weak evidence of such abandonment. There are other matters in which the judgment is unsatisfactory, notably the statement in paragraph 4, line 35 that the defence witnesses deny payment of Thunduwaram. This is not correct. They admit payment but seek to explain it away.

We cannot accept findings based on incorrect tests as to custom and mistakes of fact as to the effect of documents. We, therefore, send back the records to the District Judge for fresh findings on issues Nos. 1 and 2 with reference to the above observations and for findings on the 3rd and 4th issues. The time for submission of findings will be four weeks from the receipt of records and 10 days for objections.

In compliance with the order contained in the above judgment, the District Judge of Chingleput, submitted the following

FINDINGS.

The High Court has called for findings on issues Nos. 1, 2, 3 and 4.

2. This was a suit to recover arrears of Thunduwaram or Mirasi perquisites alleged to be due to the plaintiff from the defendant, a Ryot of Chittamur village.

3. Chittamur is a Government village in Madurantakam Taluk. It is undoubtedly a Mirasi village and it is not disputed that the plaintiff is the sole Mirasidar.

4. The plaintiff bases his right, (1) on custom, and (2) on Exhibit B, an agreement alleged to have been executed by the defendant in his favour in 1905. In his written statement the defendant denied the plaintiff's right. As laid down in *Sakkaji Rau* v. *Latchmana Goundan*(2) and the remand order of the High Court in the present case, the main question for consideration is, whether by custom prevailing in the village, the plaintiff is entitled to Thunduwaram. The defendant's holding consists of A and B schedule lands attached to the plaint, the former being wet lands and the latter dry. As regards the wet lands, in the settlement register, Exhibit J, no Swatantram fee is entered, but in respect of the first seven fields, *viz.*, Nos. 5, 6, 20, 22, 24, 45, 48 and 129 in B Schedule, it is entered and against No. 114 B the remark is, no Swatantram is due until resigned.

5. The earliest documents filed in the suit are Exhibits L and L (1) of the year 1826. There was litigation between the plaintiff's grandfather and one Nagammal and her son. The question of Mirasi right was not directly involved in it. The parties compromised the matter, Exhibit L (1) being a copy of the compromise petition. The then defendants executed an agreement, Exhibit C, in pursuance of the compromise. These documents are relied upon on behalf of the plaintiff as showing that the plaintiff's predecessor's title to collect Thunduwaram and other Mirasi dues was recognised. It has to be observed that the dispute was not between the Mirasidar and Sukhavasi Ryots and that the question of the right to collect Mirasi dues, was not formally adjudicated upon by the Court. The next set of documents relied upon by the plaintiff are Exhibit C series, C (1) to C (15). Exhibit C (1) purports to be an agreement of the year 1829 executed by Ulkudi Sukhavasis and Parakudi Sukhavasis recognising the Mirasi right of the plaintiff's grandfather and undertaking to pay Mirasi dues to him. The District Munsif suspected the genuineness of this document. The writing looks too fresh to be as old as it purports to be. Some of the other documents in the Exhibit C series purport to be debt bonds for arrears of village Adaya income and there is no reference to Thundu or Thunduwaram in them. The rest, however, are debt bonds for arrears of Thunduwaram. Exhibits C series were not filed in the suit of 1905 which was brought by the defendant against the plaintiff. Further Exhibit C (1) refers to lands leased by the Mirasidar, and with regard to the other documents, which refer to Thunduwaram, it is not stated to what lands they refer and it is possible that they also refer only to lands leased by the Mirasidar. The practice in the case of such lands cannot be invoked in proof of a customary right to Mirasi dues from tenants introduced by the Government. Exhibits F and G have next to be considered. Exhibit F was a joint statement prepared by the then Kurnam and the agent of the plaintiff's grandfather at the time of the settlement in 1878. Having regard to the fact that the Government did not act upon it, as is clear from the settlement register, not much importance can be attached to it. As regards Exhibit G, which is a copy of the shares of the Mirasidars, it has to be observed that it is not signed by any one and it does not convey any information as to what lands are included in it and it is, therefore, doubtful whether it included also lands not included in the Mirasidar's *patta*.

6. The next set of documents relied upon by the plaintiff are Exhibits E, H and K. Exhibit E is a mortgage of the year 1887 in favour of the defendant. The mortgagee is therein directed to pay the Government Tirvai and Tundu. According to the plaintiff, Tundu mentioned therein, refers to Thunduwaram due to the Mirasidar. Exhibit H is a mortgage deed of the year 1885 in favour of one Narayana Chetty. The mortgagee was therein directed to pay Circar Tirvai and village Tundu and there is a reference to the existence of arrears of Thunduwaram to the villagers (Gramattar). Exhibit K is also a mortgage deed in favour of the defendant wherein

the mortgagee was directed to pay Tirvai and Tundu. The lands referred to in Exhibits H and K are 177 (B) and 137 (E), and 245 respectively, and in the settlement register no Swatantram fee is entered against them. This certainly indicates that the Mirasidar has a right to Thunduwaram even on lands against which no Swatantram fee is entered in the settlement register. On behalf of the defendant, it is urged that Exhibits E, H and K are not sufficient to prove a general custom, especially as they relate only to a small extent of land. I think, there is considerable force in this argument.

7. Next we come to recent documents Exhibits B and D series. Exhibit B is an agreement taken from the defendant himself in 1905. Exhibit D series are similar agreements taken from other tenants and attested by the defendant. I do not think any importance should be attached to these documents as they are recent.

8. Coming to the documents filed on behalf of the defendant, reliance is placed on Exhibit X, the partition deed in the plaintiff's family in which no reference is made to Mirasi dues. I do not think any inference can be drawn from the omission of Mirasi dues in this document. The other documents relied upon are sale-deeds and mortgage deeds, Exhibits III to VIII series, in which no reference is made to the payment of Tundu by the purchaser or the mortgagee. It is urged on behalf of the defendant that the omission, though not a conclusive piece of evidence, suggests that there is no such general custom as is set up by the plaintiff.

9. The plaintiff has examined nine witnesses including himself. When giving evidence in the suit of 1905, he stated he had no personal knowledge of the estate prior to 3 years when he entered upon it, but now he says he saw Thunduwaram being collected by his predecessor. He admits he has not collected Thunduwaram from any one. He does not produce any account regarding payment of Tundu kept by his predecessor. P. W. No. 2 was Kurnam at the time of settlement. He speaks to Exhibits F and G. His evidence is that Tundu was being paid to Muttu-rama Reddi, a former Mirasidar by Sukhavasi Pattadars. He says he saw a collection account of Thunduwaram which is not now produced. He gives instances of persons holding Sukhavasi Patta lands, not paying Thudunwaram. He is now plaintiff's Gumas-tah and cultivates a land under him. He admits he was dismissed from the office of Kurnam, though he says he was restored on appeal. He also admits having given evidence in a dacoity case against the defendant. P. W. No. 3 says he was Gumastah under the plaintiff's predecessor-in-title, Muthurama Reddi. He merely says that there is a custom to pay Thunduwaram to the Mirasidar. According to him there was no account for the collection of Thundu-waram. P. W. No. 4 says that he holds lands in Chittamur and that he used to pay Thunduwaram. He states that he pays it even to the plaintiff. It will be re-membered that the plaintiff himself says that he has not collected Thunduwaram. Later on, in his deposition he admits that since the plaintiff's advent no collection has been made. He cannot say who else paid Tundu. He admits he gave evidence against the defendant in a criminal case. P. W. No. 5 says he used to pay Thundu-waram and obtained receipts. In cross-examination he says he does not know who paid Tundu for wet lands. P. W. No. 6 is an Inamdar and is connected with Nagammal referred to in Exhibits L and L (1). He says he used to see some ten-ants pay grain to the Mirasidars of the plaintiff's predecessor-in-title. He cannot give details. When giving evidence in the suit of 1905, he said he could not give the names of persons who paid Thunduwaram. He admits that in respect of certain lands which were transferred to himself he does not pay Tundu. According to him the practice of paying Thunduwaram has not been in existence for about 16 years past. P. W. No. 7 in chief examination says that there is a custom for Sukhavasi tenants to pay Tundu to the Mirasidar, but in cross-examination he states that it became dis-continued 12 or 15 years ago. His master is the plaintiff's brother-in-law. P. W. No. 8 has no land at Chittamur and yet says he used to see collections of Tundu some 15 years ago. He cannot mention any one who paid it. P. W. No. 9 gives similar evidence. He admits that a con-tribution used to be made by the villagers

for the temple of the village goddess. From the above oral evidence adduced on behalf of the plaintiff, it is clear that Thunduwaram has not been collected for many years past and that, according to some of them, the practice was discontinued.

10. The defence witnesses Nos. 1 to 6 say that no Tunduwaram was ever collected. They have attempted to make out that the contribution to the festival of a village goddess is called Tundu, but it cannot be said that they have succeeded. The defendant tries to explain Exhibits E and H by saying that the Tundu referred to therein was a contribution to a temple and not the Mirasi perquisite known as Tundu.

11. For the defendant, much stress is laid on the Settlement Register, Exhibit J. It is urged that the distinction between *pangu lands*, *durkhast land* and *waste lands* should be borne in mind, and that what we have to consider is how far did the Government recognise the custom set up by the plaintiff. Though the Government cannot take away any pre-existing rights enjoyed by the Mirasidar, the fact that it recognised them only to a certain extent, cannot altogether be ignored. The plaintiff has to show not merely that the perquisites which he claims were paid at some former period of time, but also that he can enforce their payment now. The settlement register is, therefore, an important piece of evidence. The learned Vakil who appears for the defendant relies upon the observations of their Lordships of the Privy Council in *Secretary of State for India* v. *Bai Rajbai* (3) and refers to page 29 of the recent Full Bench decision* on Mirasi tenure: "What we have to consider is whether this power to evict under the circumstances contemplated by the reference is an incident of Mirasi and whether it has been recognised by the Government. That the latter is a necessary condition of enforceability has been laid in the most stringent terms by their Lordships of the Privy Council, etc." The learned Vakil for the plaintiff points out that the above decision of the Privy Council applies only to the state of things that prevailed when the British Government first assumed sovereignty and not to any subsequent period. He further urges that the Government at first fully recognised the rights of Mirasidars and only gradually began to curtail them. In my opinion the settlement register must be regarded as a Record of Rights showing how far the Government was prepared to recognise the claims of the Mirasidar. The Ryots knowing as they did that there was a conflict between the Mirasidar and the Government would have naturally refrained from paying all the dues claimed by the Mirasidar. The settlement register coupled with the oral evidence shows that there was interruption in the enjoyment of the Mirasidar's right to Thunduwaram. It is urged on behalf of the plaintiff that the burden lies on the defendant to show that the Mirasidar abandoned his right. The explanation offered on behalf of the plaintiff for the discontinuance or interruption of his right is that the plaintiff's predecessor was a woman and her agents failed to collect the Mirasi dues. This explanation cannot be accepted, for the evidence shows that the payment ceased to be made even earlier when males were in possession of the estate. No doubt when a custom has been proved to exist, any subsequent interruption cannot by itself extinguish it, but if the interruption is not due to natural or incidental causes, a presumption arises against the existence of the custom itself. In the present case, in my opinion, Exhibits E, H and K are the only instances which may be said to afford evidence of the custom set up by the plaintiff. There is no evidence that the Mirasidar has attempted to enforce his right in a Court of law during all these years. Under these circumstances the interruption raises a presumption against the existence of the custom.

12. I, therefore, hold that the plaintiff is not entitled by custom to collect Thunduwaram and this applies even to the lands in the B Schedule some of which are liable to Swatantram fees according to the settlement register, and I find accordingly on issue (2).

13. *Issue* (1).—Whether the plaint agreement bears no consideration. Exhibit B is the plaint agreement. The defendant brought a suit in 1905 to declare that it was not genuine. Both the Court of first instance

(3) 30 Ind Cas. 303; (1915) M. W. N. 563; 19 C. W. N. 1087; 13 A. L. J. 953; 29 M. L. J. 242; 18 M. L. T. 179; 2 L. W 731; 17 Bom L. R. 730; 39 B 625; 23 C. L. J. 1; 42 I. A. 229 (P. C.).

*See 40 Ind. Cas. 909 at p. 941.—*Ed.*

and the Appellate Court found it to be genuine. The consideration for it is said to be the pre existing liability of the defendant to pay Thunduwaram. In the view I have taken, I hold that there was no consideration for it, and find accordingly.

14. *Issue* (3).—Whether the plaintiff's right to the dues became barred by limitation to any and to what extent. The contention raised on behalf of the plaintiff is that the plaint claim is not one for rent but for a customary due and that the article of the Limitation Act which applies to it is Article 120. On behalf of the defendant it is urged that Thunduwaram is in the nature of rent as the Mirasidar is a middleman between the tenant and the Government. The plaintiff relies on the observations in the remand judgment in the present case. Following *Venkatavaraga* v. *District Board of Tanjore* (4) and *Rathna Mudaliar* v. *Tiruvenkata Chariar* (5), I hold that it is not rent but a customary due. I find that the article applicable is 120 of the Limitation Act, and, therefore, the suit is not barred by limitation.

15. *Issue* (4).—What sum, if any, is due to the plaintiff? If it is held that the plaintiff is entitled to Tundu, I hold that, according to Exhibits B and D, he is entitled to it at 15 Marakals per Cawni of wet for the 1st crop $7\frac{1}{2}$ Marakals for the 2nd crop, and $3\frac{1}{2}$ annas per Cawni of dry land and that he is not bound to collect only at the rate of 2 annas in the rupee as laid down in the settlement register. I find accordingly on issue No. 4.

This second appeal coming on for hearing on 3rd May 1917 and on 7th August 1917, after the return of the findings of the lower Appellate Court upon the issues referred to by this Court for trial, upon perusing the grounds of appeal, the judgments and decrees of the lower Appellate Court and the Court of first instance, the findings of the lower Appellate Court upon the said issues and the memoranda of objections to the said findings, and upon hearing the arguments of Messrs. *L. A. Govindaraghava Aiyar* and *D. V. Nilameghachariar*, for the Appellant, and of Mr. *T. R. Ramachandra Aiyar*, for the Respondent, and the case having stood over for consideration till the 15th August 1917, the Court (Sadasiva Aiyar and Phillips, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

SADASIVA AIYAR, J.—The plaintiff is the appellant. This litigation commenced in December 1909 (nearly 8 years ago) but I have felt it advisable that the whole matter of this second appeal should be referred to a Full Bench as some questions of law of more than ordinary importance are involved in its decision. Without expressing a final opinion on any of the questions involved or as to what should be the final result of the second appeal, I shall set out the material questions of fact and law making provisional comments here and there.

The suit was brought for recovery of Rs. 168 11-3 being the amount of Thunduwaram perquisites due to the plaintiff as Ekaboga Mirasidar of Chittamur village (in the Madurantakam Taluk, Chingleput District) from the defendant who is a Ryot in the village, the Thunduwaram being claimed at 15 Marakals per Cawni of wet land for the first crop, $7\frac{1}{2}$ Marakals per Cawni for the second crop and $3\frac{1}{2}$ annas per Cawni of dry land. The Thunduwaram was claimed by the plaintiff by virtue of his Mirasi right over the village and also by reason of an agreement, that is, a registered Muchilika, dated 26th January 1905, Exhibit B, executed by the defendant. The District Munsif held, (*a*) that the Mirasidar's right to collect the plaint perquisites "fell into disuse" about 1870, that "it was too late in the day for him now to seek its enforcement as subsisting right on the basis of the general custom in the village;" (*b*) that the defendant executed the Muchilika, Exhibit B of 1905, possibly "in order to help the plaintiff in his endeavours to resuscitate the plaintiff's primitive right which had fallen into disruption" and that it was also possible "that the defendant executed a document under a misapprehension as to the exact right of plaintiff to enforce the fee at present" and the District Munsif finally thought that "on the whole there was no legal consideration" for the plaint agreement. He, therefore, dismissed the plaintiff's suit.

On appeal, the learned District Judge (Mr. Booty) held that as in the settlement register (Exhibit J of 1878) it was recorded that "the lands for which Pattas had

(4) 16 M. 305; 5 Ind Dec. (N. S.) 920.
(5) 22 M. 351; 8 Ind. Dec. (N. S.) 260.

been given by Government to Payakaris or on Dharkast to Mirasidars were exempted from Swatantram fees" and as the plaintiff had failed to prove that the plaint lands fell under the category of lands other than those exempted from Swatantram fees according to that settlement register and as the defendant had probably refused prior to 1878 to pay Thunduwaram to the Mirasidar on the strength of the statement in the settlement register, "the Mirasidars' right was dead by limitation in 1890." He further held that the Muchilika, Exhibit B of 1905, had absolutely no consideration to support it. He, therefore, dismissed the appeal.

When this second appeal first came on for hearing on the 17th December 1914 before a Divisional Bench of this Court, it was adjourned *sine die* for the decision of the Full Bench to which the general question of Mirasidars' rights were referred in *Seshachala Chetty* v. *Para Chinnasami* (1). The opinions of the Full Bench in that case were pronounced on the 17th February 1916 and they are reported as *Seshachala Chetty* v. *Para Chinnasami* (1) (see from page 447*). The present second appeal then came on for hearing before myself and Mr. Justice Napier in September 1916. We found ourselves unable to accept the finding of the District Judge "that the plaintiff's claim to obtain Thunduwaram" (a part of the Mirasidar's Swatantram) "became barred in 1890." Then as regards the right of the Mirasidar to collect Thunduwaram, I shall here quote from my above order of the 20th September 1916 concurred in by Mr. Justice Napier. "Mr Justice Ayling [in *Seshachala Chetty* v. *Para Chinnasami* (1)] says: 'There are undoubtedly certain incidents, which have been claimed as attaching to it' (the Mirasi tenure) 'from ancient times and have to some extent been recognised,' one of such incidents being, 'the right to certain fees (Thunduwaram) on lands granted for cultivation to non-Mirasi cultivators (Payakaris) by the Government.' Then the learned Judge says that this right also requires to be separately established by the Mirasidar and that he ought to adduce proof of the existence of the custom to pay such dues, and he refers to *Sakkaji Rau* v. *Latchmana Goundan* (2). Mr. Justice Kumaraswami Sastri refers to the opinion of the Collector of Chingleput in 1839 which admitted the Mirasidar's right to collect Thunduwaram, Swatantrams, etc., in the Sheikal lands. In another place, the learned Judge quotes the opinion of the Board of Revenue in 1892 as follows:—'Briefly the system, as it at present exists, rests on the claims of the Mirasidars to all the waste lands in their villages and to the levy of Swatantram or fees from Payakarees or non-Mirasidars who may take up land for cultivation. This claim was fully recognised in the new settlement carried out in 1876-78 (*Vide* Government Order, dated 15th February 1876, No. 221) and after full consultation with the Mirasidars, a memorial fee (Swatantram), fixed at an average rate of 2 annas on every rupee of Government assessment, was declared to be leviable by the Mirasidars not only on every field lying waste in each village, but also on all lands now held by the Mirasidars themselves and included in their Pattas, should such lands be subsequently relinquished and taken up by a non-Mirasidar. The fee claimable on each field was duly entered in the settlement registers against every field liable to it. The only lands against which fees were not entered were those which had already been obtained by strangers and which were held under lease or Patta from Government.' Then the learned Judge refers to the Government Orders passed on the 19th October 1909 about Swatantrams as follows:—'The right of the Mirasidar to levy a fee at the rate of 2 annas in the rupee of the assessment of both dry and wet lands, has been recognised by Government except in the case of the undermentioned fields which are free of Swatantrams so long as they are held under the terms of the original grants.' Next he refers to *Sakkaji Rau* v. *Latchmana Goundan* (2) in which it was held that 'where the right was denied, there should be enquiry whether, by custom, it prevails on the estate or if there are not sufficient instances on the estate to afford grounds for a decision, on similar estates in the neighbourhood.' In the result, following the decision in *Sukkaji Rau* v. *Latchmana Goundan* (2) which was recognised as good law by the Judges who decided the above Full Bench case, we hold that where (as in this case) the tenant denies the right of the Mirasidar

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to Thunduwaram, the burden of proof is on the Mirasidar to prove the existence in himself of the right by establishing a custom to pay such dues."

After thus indicating our opinion that the custom of paying Thunduwaram when set up by the Mirasidar is one to be proved by the Mirasidar by adducing proofs of instances of levy of such fees in his own estate and similar estates in the neighbourhood, we sent back the record to the District Court for fresh findings on issues Nos. 1 and 2, pointing out some of the errors which, in our opinion, occurred in the judgment of the District Judge. The issues Nos. 1 and 2 are as follows:—

(1) "Whether the plaint agreement, Exhibit B, bears no consideration?

(2) Whether the plaintiff is entitled to the dues claimed, even apart from the agreement?"

On remand, the case was heard in the District Court by another District Judge (Mr. Venugopala Chetty) and he recorded findings against the plaintiff, his material conclusions being as follows:—

(*a*) In the settlement register, Exhibit J of 1878, Swatanteam fee due to the Mirasidar is entered only in respect of some fields, namely, Nos. 5, 6, 20, 22, 24, 46, 48 and 129 in the plaint B schedule (which relates to dry lands in defendant's Patta). Against No. 114 B in that same schedule, the remark in the settlement register is that no Swatantram is due until the land was relinquished, that is, until it was given up by the then Pattadar and taken up by another. Against the wet lands in the A schedule, no Swatantram fee is entered in the appropriate column as due to the Mirasidar. "The settlement register must be regarded as a Record of Rights showing how far the Government was prepared to recognise the claims of the Mirasidars." "The Ryots knowing as they did that there was a conflict between the Mirasidar and the Government, would have naturally refrained from paying all the dues claimed by the Mirasidar. The settlement register coupled with the oral evidence shows that there was interruption in the enjoyment of the Mirasidar's right to Thunduwaram. There is no evidence that the Mirasidar has attempted to enforce his right in a Court of law during all these years. Under these circumstances, the interruption raises a presumption against the existence of the custom."

(*b*) Exhibits L and L1 of the year 1826 relate to litigation between the plaintiff's grandfather and certain Maniamdars (not Sukhavasi tenants). Though the plaintiff's predecessor's right to collect Thunduwaram and other Mirasi dues was recognised therein, the dispute there was not between the Mirasidar and the Sukhavasi Ryots and the question of the right to collect Mirasi dues was not formally adjudicated upon by the Court. (Though the District Judge does not expressly say that these ancient documents of 1826 are, therefore, not of much value, he evidently means to suggest it).

(*c*) The documents Exhibits C2 to C15 beginning with 1864 are debt bonds executed to the Mirasidar by Sukhavasi tenants. Some of them are for arrears of village Adaya income and others expressly state that they are debt bonds for arrears of Thunduwaram. "It is possible that they refer only to lands leased by the Mirasidar." "The practice in the case of such lands cannot be invoked in proof of a customary right to Mirasi dues from tenants introduced by the Government." (The reasoning in this part of the learned District Judge's judgment is not quite clear, but he evidently means that as the settlement register, Exhibit J, does not mention the Swatantram fees with reference to most of the plaint lands, the defendant's predecessor-in-title must be deemed to have been a tenant introduced to those lands by the Government and a customary right to collect Mirasi dues from such lands can only be proved by evidence of payment made specifically for such lands).

(*d*) As regards Exhibits F and G, Exhibit F was a statement prepared by the then Kurnam and the agent of the plaintiff's grandfather at the time of the settlement in 1878. Having regard to the fact that the Government did not act upon it as is clear from the settlement register, Exhibit J, not much importance can be attached to it. As regards Exhibit G, it is not signed by any one and does not convey any information as to what lands are included in it and it is, therefore, doubtful whether it included also lands not *included in the Mirasidar's patta* (that *is*, lands

for which Government issued Pattas directly to the tenants).

(*e*) Exhibits E, H and K, (two of them executed to the defendant himself) no doubt refer to the right of the Mirasidar to receive Melwaram Thundu from certain lands in the village. They are of the years 1885, 1887, and 1889, long after the settlement register, and though in the settlement register, Exhibit J. Swatantram is not entered against the lands mentioned in these mortgage deeds, the right of the Mirasidar is acknowledged in these documents. The District Judge, however, held that there was "considerable force in the defendant's argument that these documents are not sufficient to prove a general custom, especially as they relate only to a small exent of the lands."

(*f*) As regards B and D series, Exhibit B being the plaint agreement executed by the defendant himself in 1905 and the other Exhibits agreements taken from other tenants, though attested by the defendant himself, the District Judge thinks that no importance should be attached to these documents of 1905 as they were "recent".

(*g*) Then the District Judge refers to some document on defendant's side on which it was argued that the omission to expressly mention Thunduwaram in those documents was against the plaintiff's claim and to the fact that no Thunduwaram has been collected for several years before suit. (The question whether Exhibit B was supported by consideration or not, is so closely interwoven with the question whether the Mirasidar has a right by custom to recover Thunduwaram that it might be said to stand or fall with it. As regards the rate of the Thunduwaram, the District Judge decided that if the plaintiff was entitled to it at all, he was entitled at the rates claimed by him).

Mr. Govindaraghava Aiyar, the learned Vakil for the appellant, strenuously contended (*a*) that he was entitled to argue on the whole evidence adduced as to custom just as if it were a question of fact the finding on which might be attacked in a regular appeal preferred to this Court, (*b*) that even if he was bound to accept particular facts and pieces of evidence which the lower Court held to be not established or false as conclusive, he was entitled to argue that on the facts held to be established and the pieces of evidence accepted as genuine by the District Judge, the District Judge ought to have found as a matter of law that the custom set up by the plaintiff was established; (*c*) that the learned District Judge was mistaken in his statement that Exhibit G is not signed by any one, and (*d*) that he was not justified in making a distinction between the right to collect Mirasi dues from tenants introduced by the Government and tenants introduced by the Mirasidar and in rejecting the evidence indicating the collection of Thunduwaram on the mere ground that it was not specifically shown that that evidence related to the former class of lands.

I shall deal now with the first question, namely, that as this second appeal relates to a question of custom, we are entitled to consider the whole evidence ourselves including the evidence which was not believed by the District Judge to be true or genuine. As I said in the very beginning, I do not intend to deal finally with any of these questions as I have considered it advisable that the whole case should be decided by a larger Bench.

In *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (6) Sir S. Subramania Aiyar, Officiating Chief Justice, and Boddam, J., refer to *Hanumantamma* v. *Rami Reddi* (7), *Mirabivi* v. *Vellayanna* (8) and *Vishnu* v. *Krishnan* (9) (the last of which was decided by a Full Bench) as establishing that a finding as to the non-existence of an alleged local custom could be revised by the High Court on second appeal *on the evidence*. They then refer to the language of section 584 of the old Civil Procedure Code, [corresponding to the present section 100 (*a*)] which contains the words "the decision being contrary to (some specified) law *or usage having the force of law*." The learned Judges then continue: "This language is so explicit as to render superfluous the seeking for the reason of the provision though that is not difficult to discover, *viz.*, that a usage of the kind

(6) 29 M. 24; 16 M. L. J. 8.
(7) 4 M 272; 1 Ind. Dec. (N. S.) 1025.
(8) 8 M. 464; 9 Ind. Jur. 207; 3 Ind. Dec. (N. S.) 317.
(9) 7 M. 3; 2 Ind. Dec. (N. S.) 588 (F. B.)

mentioned, being in its nature such as must necessarily affect, not only parties to the particular litigation and their privies, but whole bodies of people, stands on a footing similar to a matter of law derived from other sources than usage. The very limited scope which is allowed to usages in England, due to special historical causes (See Pollock and Maitland's History of English Law, 1st Edition, Vol. 1, page 163), accounts for questions as to their existence being treated as falling under the category of questions for the Jury. Of course, it is otherwise in this country where from the days of Manu it has been laid down that 'custom is transcendent law.' It is clear, therefore, both upon authority *which is binding upon us as the opinion of a Full Bench*, and as the right interpretation of the provision in question of section 584 of the Civil Procedure Code, that, though the section disallows a second appeal with reference to findings of fact, yet, the existence or non-existence of a usage having the force of law is unaffected by such disallowance. Consequently, it is the duty of this Court, when it has to pronounce upon that question, to examine the evidence bearing upon it, not only as to the sufficiency thereof to establish all the elements (antiquity, uniformity, etc.,) required to constitute a valid usage having the force of law, *but also the credibility, of the evidence relied on and the weight due to it. Accordingly we heard Mr. Rangachariar upon the evidence in support of the alleged usage.*" Thus according to this decision even the credibility of pieces of evidence adduced in support of local usage can be considered by the High Court on second appeal. In *Mahamad Meeran Bibi* v. *Mahamed Rowther* (10) Spencer and Phillips, JJ., have held that the question whether the parties in a suit are governed by the Hindu or Muhammadan Law, is a question of fact and does not relate to any usage having the force of law. The parties in that case were Muhammadan Labbais of the Trichinopoly District. It seems to me fairly arguable with the greatest respect to the above decision, that the question whether the local usage among these Labbais had the force of a law which made their rights of succession governed by the rules of Hindu Law, comes under section 100 of the Code of Civil Procedure though the rules of both the Hindu and Muhammadan Laws always have the force of law. [The learned Judges refer to a prior decision in *Kunhambi* v. *Kalanathar* (11) decided by Tyabji and Spencer, JJ.] The most recent case which I have come across in this Court (decided in November 1916 is that reported as *Pankajammal* v. *Secretary of State for India* (12), by Ayling and Seshagiri Aiyar, JJ. That related to the custom as to the order of succession of trustees of a particular Kattalai in the Conjeevaram temple. The following observations occur: "Before we send the case down, it is desirable to advert to the extreme contention that was put forward in this Court that in all cases where evidence as to custom has been let in, we are bound to weigh such evidence and decide for ourselves upon the materials. Mr. Ramachandrier, who came in at a later stage of the case, conceded that this contention is not supported by authority. The learned Vakil argued that the question, whether on the facts as found, the Courts below were justified in saying that a custom has not been proved, is a point on which the High Court is entitled to draw its own inference. To the proposition thus advanced, we see no objection. But we must point out that the value to be attached to the evidence let in, its reliability and, in a measure, its relevancy are all matters for the Court below and that the High Court *would not be justified in weighing the evidence*, as if it were sitting to hear a first appeal. It is open to doubt whether the expression, 'a usage having the force of law' in section 100 (*a*) of the Civil Procedure Code, should not be confined to the usages of the country or of the community as suggested by Petheram, C. J., in *Nirath Singh* v. *Bhikki Singh* (13). Customs like pre-emption, the law merchant and usages

(10) 37 Ind. Cas. 879; (1917) M. W. N. 98.

(11) 24 Ind. Cas. 528; 27 M. L. J. 156; 16 M. L. T. 17; 38 M. 1052.

(12) 40 Ind. Cas. 516; 32 M. L. J. 237; 5 L. W. 346; 21 M. L. T. 411; 40 M. 1108.

(13) 7 A. 649; A. W. N. (1885) 151; 4 Ind. Dec. (N. S.) 830.

like those referred to in section 11 of Act VIII of 1865, seem to have been in the contemplation of the Legislature. It seems doubtful whether a private right, like the one we are considering, falls within section 100, clause (a). However that may be, we feel no doubt that the High Court should not be called upon to examine the oral and documentary evidence relating to a private custom as if it were hearing a first appeal." I must, however, say that the decision of this Court in *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (6), following the Full Bench decision in *Vishnu* v. *Krishnan* (9), is not adverted to by the learned Judges who refer to the case in *Nivath Singh* v. *Bhikki Singh* (13), which seems to have never been followed in this Court as law. I shall now refer to a very recent decision of the Privy Council in *Palaniappa Chetty* v. *Sreemath Deivasikamony Pandara Snnadhi* (14). There a custom of granting permanent leases of the property of a particular temple was set up. Their Lordships of the Privy Council say at page 13*: "It has, however, been pressed on behalf of the appellants that there are two findings: one by the Munsif and one by the Subordinate Judge, who agrees with him, that the ancient custom relied upon has been proved, and that, as that is an issue of fact, it must be accepted. No doubt, two findings upon questions of pure fact must be accepted by this Board, but questions of the existence of an ancient custom are generally questions of mixed law and fact; the Judge first finding what were the things actually done in alleged pursuance of custom, and then determining whether these facts so found satisfy the requirements of the law. This latter is a *question of law—not fact.*" I think that this case gives to the expression "local usage" a much wider meaning than Sir C. Petheram, C. J., was inclined to allow in the case of *Nivath Singh* v. *Bhikki Singh* (13). I shall now turn to the case of *Kailas Chandra Dutta* v. *Padma Kishore Roy* (15), decided in April 1917. Here Mookerjee, J., reviews the authorities, dissents from *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (6), and *Vishnu* v. *Krishnan* (9), and sums up as follows: "But this does not entitle the High Court in second appeal to determine whether the evidence of the existence of the alleged usage is or is not credible, *though the High Court is competent to determine, whether the usage, proved by evidence to exist, does or does not possess the force of law.....* The substance of the matter is that while the question *whether a given state of facts establishes a binding custom or usage is a question of law*, the question whether such a state of facts has been proved by the evidence is a question of fact." In this conflict of authorities, in view of the facts that *Vishnu* v. *Krishnan* (9), was decided by a Full Bench of this Court consisting of four very learned Judges (Turner, C. J., Innes J., Kindersley, J., and Muthusami Aiyar, J.) and was followed in *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (6), and having in view the fact that this question of Mirasi rights is reaching its final stage, I think that not only the mere questions of law, (namely, whether the High Court in second appeal can go into the credibility of the evidence, whether it can consider the weight to be given to the evidence which is believed by the lower Appellate Court and whether the evidence taken as a whole is legally sufficient to establish the custom and the legality and binding force as law of the custom, etc.,) but even the decision of the whole matter might be left to a larger Bench.

The Appellate Side Rules of the High Court, page 3, rule 2, says: "The following matters shall ordinarily be heard and decided by two Judges," and then among the matters are mentioned "appeals from the decree of a Civil Court" which I take it, includes a second appeal. So, a second appeal is treated as one of the "matters" to be heard by a Bench of two Judges. Then it says "provided both Judges agree that the determination involves a question of law, they may order that the *matter*, or the question of law, be referred to a Full Bench." I think that this empowers us to refer not only a question of law but the whole "matter" of the second appeal to

(14) 39 Ind. Cas. 722; 33 M. L. J. 1; 21 C. W. N. 729; 15 A. L. J. 485; 1 P. L. W. 697; 19 Bom. L. R. 567; 22 M. L. T. 1; (1917) M. W. N. 477 and 507; 26 C. L. J. 153; 40 M. 709; 6 L. W. 222 (P. C.).

(15) 41 Ind. Cas. 959; 25 C. L. J. 613; 21 C. W. N. 972.

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a Full Bench. If a question of law alone is referred, then rule 3 (page 4) would apply and the "matter" (or the case) would ultimately come back to us.

I have thus dealt with the contentions (*a*) and (*b*) of Mr. Govindaraghava Aiyar. As regards contention (*c*) about the learned District Judge's alleged mistake in his statement that Exhibit G is not signed by any one, Mr. Govindaraghava Aiyar has not printed the whole of Exhibit G and I think it is better to leave it to the Full Bench to decide whether they would allow him to have it printed in order to prove his contention.

As regards the last contention (*d*), I think there is much force in his argument that the District Judge ought not to have rejected the evidence afforded by Exhibit C series on the ground that such evidence is valueless unless it was shown to specifically relate to lands granted by Government. I am also inclined to hold that the Government's non-recognition in the settlement register of the Mirasidar's right to collect Swatantrams from such lands cannot be said to detract in any appreciable manner from the weight of the other evidence relating to the Mirasidar's right by custom to collect such dues having regard to the history of the Mirasi tenure rights and to the fact that the Government has been trying to gradually restrict such rights. I might also state that as at present advised (assuming that this Court is entitled to weigh the evidence), I should be inclined to hold that the learned District Judge has not given sufficient weight to Exhibits E, H, K, B and the old legal records Exhibits L and L1. (I would accept the rate of Thunduwaram found by the District Judge if the plaintiff is held entitled to collect Thunduwaram.) I am inclined further to doubt very much the soundness of the view of the District Judge that even as regards the plaint lands, fields Nos. 5, 6, 20, 22, 24, 45, 48 and 129 which are specially mentioned in the settlement register itself as liable to pay Swantantram fee to the Mirasidar, the custom set up should be held to be not proved because the custom is not (in the learned Judge's view) proved as regards the other lands also and because there has been an interruption for several years. However, as I said, I would, having regard to the difficulty and importance of all the questions involved, refer the whole matter to a Full Bench.

PHILLIPS, J.—This suit was remanded for a finding on several issues the most important of which is issue No. 2 "whether the plaintiff is entitled to the dues claimed even apart from the agreement." The dues claimed consist of what is called Thunduwaram, and the plaintiff alleges that, as Mirasidar, he is, according to custom, entitled to levy those dues from the defendant. The District Judge has tried the issue and has found that no custom has been proved to exist under which the plaintiff is entitled to make this claim. This finding is a finding on custom and it is now sought to impeach it upon the evidence.

No doubt, a question of the existence of a custom is a question of mixed law and fact, and under section 100 of the Code of Civil Procedure, a second appeal may lie to the High Court on the ground that the decision is contrary to law or to some usage having the force of law. The question of custom has been repeatedly considered and it has been held that the question of the mere existence of a custom is a question of fact [*vide* in *Hureehur Mookerjee* v. *Judoonath Ghose* (16) and *Syud Ali* v. *Gopal Doss* (17)], and this has also been the view of the Judicial Committee in *Muhammad Kamil* v. *Imtiaz Fatima* (18) and in *Anant Singh* v. *Durga Singh* (19). In *Ramratan Sukal* v. *Nandu* (20 it was held by the Judicial Committee that, "no Court of second appeal can entertain an appeal upon any question as to the soundness of findings of fact by the Court of first appeal, and if there is evidence to be considered, the decision of the Court, however unsatisfactory it might be, if examined, must stand final."

(16) 10 W. R. 153.
(17) 13 W. R. 420.
(18) 4 Ind. Cas 457; 31 A. 557; 10 C. L. J. 297; 11 Bom L. R. 1210; 19 M. L. J. 697; 13 O. C. 183; 14 C. W. N. 59; 36 I. A. 211 (P. C.).
(19) 6 Ind. Cas 787; 34 A. 364; 14 C. W. N. 770; 7 A. L. J. 704; 12 C. L. J. 33; 7 Bom. L. R. 504; 8 M. L. T. 79; 20 M. L. J. 605; 13 O. C. 163 (P. C.).
(20) 19 C. 249; 19 I. A. 1; 6 Sar. P. C. J. 119; 9 Ind. Dec. (N. S.) 611.

In *Ramgopal* v. *Shamskhaton* (21) this principle was approved, although it was held that in that particular case, which related to a custom, the facts found need not be questioned, but the soundness of the conclusions from them was in question and that was a matter of law. In *Mohesh Chunder Dhal* v. *Satrughan Dhal* (22) it was held that the question of the existence of a custom of lineal primogeniture as the rule of succession was a question of fact. In *Kunhambi* v. *Kalanathar* (11) it was held by this Court that "whether an alleged custom can be enforced at all or whether it is uncertain, irregular or unreasonable and as such ought not to be recognised, is a question of law, but the question whether the custom exists and if it exists, it applies to a particular person or set of persons, is a question of fact," and this seems to me to correctly describe the principle laid down by the Judicial Committee in the above cases. In the present case, the question that has to be decided is whether the plaintiff is entitled to collect Thunduwaram from the defendant, the right claimed being based upon an alleged custom. The existence of this custom in certain places has been held to be true and the right has been held to rest in certain Mirasidars as such. The Full Bench decision reported as *Sehachala Chetty* v. *Para Chinnasami* (1) has recognised this customary right of levying Thunduwaram but the Court was of opinion that its existence in any particular case was a matter of proof. When, therefore, it is not a question as to whether a certain set of circumstances forms a custom having the force of law, but where the question is whether a custom which has already been recognised by Courts as having the force of law, exists in a particular locality or between particular parties, it seems to be a question of fact, and if the matter were *res integra*, I should feel inclined to hold that the present finding of the District Judge to which exception has been taken, is a finding of fact with which this Court cannot interfere in second appeal. In *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (6), however, it was held that when the finding was as to an alleged local custom, the finding could be examined in second appeal and a conclusion arrived at. The decision was based upon the decisions in *Hanumantamma* v. *Rami Reddi* (7), *Vishnu* v. *Krishnan* (9) and *Mirabivi* v. *Vellayanna* (8) in all of which cases a question of custom has been considered by this Court in second appeals, but in which the contention had not been put forward that such a question could not be raised in second appeal. In *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (6) this Court went, as it seems to me, considerably further than the dictum laid down by the Privy Council in *Ramgopal* v. *Shamskhaton* (21), which was that the facts found need not be questioned but the question of the soundness of the conclusion arrived at, was a matter of law, for it held that where the existence or non existence of a usage having the force of law was in question, "it is the duty of this Court. . . . to examine the evidence bearing upon it, not only as to the sufficiency thereof to establish all the elements (antiquity, uniformity, etc.,) required to constitute a valid usage having the force of law, but also the credibility of the evidence relied on and the weight due to it." If this be accepted as correct law, a Court in second appeal would be bound to examine the whole evidence relating to an alleged custom and to see what weight is to be attached to each particular portion of it, and I decide whether the evidence was reliable and witnesses worthy of credit. This appears to be somewhat inconsistent with the usual understanding that in a finding of fact upon the evidence, the lower Appellate Court's decision is final; and in *Kailas Chandra Dutta* v. *Padma Kishore Roy* (15), *Kakarla Abhayya* v. *Raja Venkata Papayya Rao* (6) has been expressly dissented from. In a recent case in *Pankajammal* v. *Secretary of State for India* (12) another Bench of this Court remarked that the contention put forward that, in all cases where evidence as to custom had been let in, the Court was bound to weigh such evidence and decide upon the materials was not supported by authority, but apparently the decision in *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (6) was overlooked. The learned Judges proceeded to say that the question whether, on the

(21) 20 C. 93; 19 I. A. 228; 6 Sar. P. C. J. 247; 17 Ind. Jur. 38; 10 Ind. Dec. (N. S.) 63.

(22) 29 C. 343; 29 I. A. 62; 6 C. W. N. 459; 4 Bom. L. R. 372; 8 Sar. P. C. J. 238 (P. C.).

facts as found, the Courts below were justified in saying that the custom had not been proved. was a point on which the High Court was entitled to draw its own inference, and that in accordance with the abovementioned dictum of the Privy Council in *Ramgopal* v. *Shamskhaton* (21). In *Palaniappa Chetty* v. *Sreemath Devasikamony Pandara Sannadhi* (14), the Judicial Committee also remarked that "questions of the existence of an ancient custom are generally questions of mixed law and fact, the Judge first finding what were the things actually done in alleged pursuance of custom, and then determining whether these facts so found satisfy the requirements of the law. This latter is a question of law—not fact." If we apply this principle to the present case it would appear that the finding that the custom of levying Thunduwaram does not exist as between plaintiff and defendant, is a finding of fact. In view, however, of the decision in *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (6), I agree that it is advisable that the question should be submitted to a Full Bench, and as my learned brother wishes to refer, not an abstract question, but the whole of this case, I concur.

This second appeal coming on for final hearing in accordance with the above Order of Reference, on the 12th of November 1917, upon perusing the grounds of appeal, the judgments and decrees of the lower Appellate Court and the Court of first instance and the material papers in the suit and upon hearing the argument of Counsel on both sides the case having stood over for consideration till this day, the Court delivered the following

JUDGMENT.

WALLIS, C. J.—As regards the question of law referred to us I am of opinion that the decision in *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (6) must be overruled. In the cases to which Sir Charles Turner was a party the Court no doubt examined the evidence in detail to see if it was sufficient to support the custom, but in no case did they interfere with the findings except in *Mirabivi* v. *Vellayanna* (8) and thereafter referring to the findings they observed that the question before them was "whether there is evidence on which such custom could reasonably have been found to exist." They came to the conclusion that the evidence was not reasonably sufficient to support the custom. No question of the limits of the Court's right of interference in second appeal was raised or decided in these cases. As regards *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (6) I am unable with great respect to agree with the observations of Subramania Aiyar, J., as to the effect of the words "usage having the force of law." in that section. This section has a long history going back to the days of the Sudder Court. Act XVI of 1853 gave a special appeal to the Sudder Courts from any decision passed on a regular appeal in any of the Subordinate Civil Courts "1st on the ground that the decision hath failed to determine all material points in difference in the cause, or hath determined the same or any of them contrary to law or usage having the force of law." Under that section, as under this, where one of the material points in the case is the existence of a custom, that, as the Privy Council has recently laid down, is a mixed question of fact and law; and the Sudder Court was only entitled to interfere if the Subordinate Court had determined it "contrary to law or usage having the force of law," and not, also, as in ordinary appeals, on the ground that the Subordinate Court had determined the point contrary to the weight of the evidence The words "usage having the force of law" in the section appear to me to be little more than words of amplification, and in any view not to give the Court any larger powers of interference with findings as to custom in so far as they are findings of fact than with any other findings of fact. This section was re-produced in the successive Codes of Civil Procedure with alterations that in no way affect its scope so far as the present question is concerned. The more recent decisions of Ayling and Seshagiri Aiyar, JJ. [*Pankayammal* v. *Secretary of State for India* (12),] and of Mookerjee and Beachcroft, JJ., in *Kailas Chandra Dutta* v. *Padma Kishore Roy* (15), where all the cases are exhaustively reviewed, take the same view.

Even so, I am of opinion that the finding of the District Judge that the custom is inapplicable to this estate cannot be accepted. He does not find that there has been in law a discontinuance of the custom,

but uses the fact that Swatantrams are not proved to have been paid for a long time as evidence against the existence of the liability. He gives no effect to the record in the settlement register of 1878 that the lands in B schedule were liable to pay Swatantrams. This is a strong instance of the assertion of the right on the estate and entitled to great weight, while on the other hand the refusal of the Settlement Officers to register the Swatantram as payable in support of the lands in A schedule is not conclusive as they had no authority to determine the question. As regards Exhibits E, H, and K, the District Judge finds that they indicate a right to Thunduwaram even in suit lands against which no Swatantram is entered in the register, but observes that they relate only to a small extent of land. Lastly we come to the documents Exhibit B in which the defendant agrees to pay Swatantrams and Exhibit D series to the same effect which were taken from the other tenants. These are strong admissions against interest, and the District Judge was not justified in dismissing them as of no importance because they are recent. The liability to pay Swatantrams is a well known incident of Mirasi tenure in Chingleput; but as it is not universally applicable, it has been held by the Full Bench in *Sakkaji Rau* v. *Latchmana Goundan* (2), that it is for the Mirasidar to show that he is entitled to enforce it "by the custom of the estate or the neighbourhood." The above findings of fact by the District Judge are in my opinion sufficient to raise a presumption in the plaintiff's favour which is not rebutted by any other findings, and I would reverse the decrees and decree the suit with costs throughout.

SADASIVA AIYAR, J.—I confess that I have felt great hesitation in arriving at a conclusion on the question whether in second appeal, the High Court has got a right to itself examine the evidence with reference to which the finding of the District Judge on the issue of custom was given. On the one side, there are the decisions of this Court in *Hanumantamma* v. *Rami Reddi* (7), *Vishnu* v. *Krishnan* (9) and *Mirabivi* v. *Vellayannu* (8), where several learned Judges of this Court (including Sir Charles Turner, C. J., and Muthusami Aiyar, J.) have assumed as indisputable that this Court has got such a right. I agree with Sir S. Subramania Aiyar (Officiating Chief Justice) in *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (6) that "it is impossible to believe that the learned Judges who decided" those cases "overlooked so obvious an objection." In *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (6) Sir S. Subramania Aiyar (Officiating Chief Justice) and Boddam, J., directly decided that whatever may be the English law, where a question of "usage having the force of law," is concerned, the High Court in second appeal ought to have and has the power to consider even the oral evidence as regards facts, incidents and instances on which the parties relied in the lower Courts to prove or to disprove the alleged usage. The tendency of recent decisions in this Court has been to follow the Calcutta decisions. In *Kailas Chandra Dutta* v. *Padma Kishore Roy* (15) that very learned Judge Sir Asutosh Mookerjee who was one of the Bench which decided the case, very exhaustively deals with the question and I shall extract from that judgment the material conclusions arrived at therein:—

(1) "The question of the existence of an alleged custom is a question of fact."

(2) The finding of the lower Appellate Court " is liable to attack on the ground that irrelevant evidence has been received" "or that relevant evidence has been excluded".

(3) " also on the ground that there is no evidence of the alleged custom" or "that the finding is based on *legally insufficient evidence*" or that "the facts found do not constitute evidence of the alleged custom."

(4) also, "on the ground that legal principles or tests have been erroneously applied or that the Court has not correctly appreciated the essential attributes of a custom," "or has overlooked the distinction between a custom and a usage".

(5) "consequently, the question whether the *facts found pro e* the existence of the essential attributes of a custom, is a question of law which may be discussed in second appeal."

I am naturally very loth to differ from the opinion of Sir S. Subramania Aiyar, J., especially as he gives very cogent reasons for

his conclusion in *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (6), but I think that there are certain dicta of their Lordships of the Privy Council which are more binding upon me. In *Ramgopal* v. *Shamskhaton* (21) their Lordships quote their own decision in *Ramratan Sukal* v. *Nandu* (20) and lay down as regards the construction of sections 584 and 585 of old Civil Procedure Code (re-enacted practically in the same terms in the new Code) that "it has now been conclusively settled that the third Court cannot entertain an appeal upon any question as to the soundness of *findings of fact* by the second Court; and if there is evidence to be considered, the decision of the second Court, however unsatisfactory it might be if examined, must stand final." Now, the findings as to *instances* of usage, as to the genuineness of documents put forward as regards usage and the credibility of witnesses are clearly *findings of fact.* But as pointed out by their Lordships of the Privy Council themselves in *Palaniappa Chetty* v. *Sreemath Deivasikamony Pandara Sannadhi* (14) the Judge's findings as to "what were the things *actually done* in alleged pursuance of custom" may be findings of fact but whether the facts so found satisfy the requirement of the law, is a question of law. The decision in *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (6) is not expressly referred to in *Pankajammal* v. *Secretary of State for India* (12). Mr. T. R. Ramachandra Aiyar who appeared in the latter case assures us that *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (6) was in the minds of the learned Judges who decided the latter case and that it was quoted to them. Of course, I accept his statement. The position laid down in *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (6), namely, that the evidence can be gone into in detail in the High Court in second appeal, is characterised in the judgment in *Pankajammal* v. *Secretary of State for India* (12) as an "extreme contention." The learned Judges proceed to say that "the value to be attached to the evidence let in, its reliability and in a measure, its relevancy are all matters for the Court below." They again indicate their inclination to the view that the usage having the force of law mentioned in section 100 (*a*) of the Civil Procedure Code should be confined to the usages referred to by Petheram, C. J., in *Nivath Singh* v. *Bhikki Singh* (13). While the reliability of evidence let in is for the lower Appellate Court, I think (with the greatest respect) that the value to be attached to the evidence (provided it is not mere "opinion" evidence) supposing it is accepted as true and the relevancy of evidence are questions to be considered by the High Court also. If notwithstanding uncontradicted instances ranging over a long period and recognised judicially in several cases, the lower Appellate Court finds against the existence of a proper custom on the ground that in its opinion the instances are insufficient in number, the High Court is clearly entitled to hold that on the facts found by the lower Appellate Court, the custom is legally established. As regards the observations of Petheram, C.J., in *Nivath Singh* v. *Bhikki Singh* (13), they have been expressly overruled by their Lordships of the Privy Council in *Ramgopal* v. *Shamskhaton* (21). However, as I said already, I feel (though after some hesitation) that I should follow the principles laid down in *Kailas Chandra Dutta* v. *Padma Kishore Roy* (15) in preference to the conclusions in *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (6), as the former decision seems to be more in consonance with the dicta of the Privy Council in *Ramgopal* v. *Shamskhaton* (21) and in *Muhammad Kamil* v. *Imtiaz Fatima* (18) and in *Anant Singh* v. *Durga Singh* (19).

In the present case, accepting the facts as found, I agree with my Lord that they do satisfy the requirements of the law as to the existence and validity of the custom. I am inclined also to hold that we are entitled under section 103 of the Civil Procedure Code to go into the genuineness of the documents in Exhibit C series (except C1), the District Judge, in my opinion, having not given a finding about the genuineness of these documents (except C1) and I would find that they are genuine. They strongly corroborate the other evidence as to custom.

Further, the document Exhibit B executed by the defendant is a clear admission of the existence of the custom in 1905 and of the defendants' liability to pay Thunduwaram according to that custom. Their Lordships of the Privy Council in *Chundra Kunwar* v. *Chaudhri Narpa Singh*

(23) quoting from English cases state: "What a party himself admits to be true may be reasonably presumed to be so." "The express admissions of a party to the suit are evidence, and strong evidence against him." No explanation was given by the defendant from the box as to his admission in Exhibit B and "unless and until he explains such admission" "the fact admitted *must be taken to be established*" (page 195). The lower Courts merely argue in a circle when they find that Exhibit B has no consideration because the liability by custom to pay Thunduwaram is not established. Further the lower Courts have ignored the consideration that as regards the right to Thunduwaram, the Mirasdar has a far less heavy burden to discharge than when he lays claim to Natham Poramboke lands, etc. [See judgments in the Full Bench case in *Seshachala Chetty* v. *Para Chinnasami* (1)].

I, therefore, agree in reversing the lower Court's decrees and allowing the appeal as proposed by my Lord.

KUMARASWAMI SASTRI, J.—I agree with the conclusions arrived at by my learned brother Sadasiva Aiyar, J., and have nothing useful to add.

Appeal allowed.

M. C. P.

(23) 29 A. 184 at pp. 194, 195; 9 Bom. L. R. 267; 2 M. L. T. 109; 17 M. L. J. 103; 5 C. L. J. 115; 11 C. W. N. 321, 4 A. L. J. 102 (P. C.).

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 417 OF 1916.

January 16, 1918.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

KALLU—PLAINTIFF—APPELLANT

versus

SITAL—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), ss. 20, 122—Transfer of occupancy holding, whether permissible—Tenancy acquired by one member of joint family—Profits thrown into common stock, effect of—Hindu Law, whether overridden by Statute Law—Inheritance, rules of, under Hindu Law and Statute Law, conflict between.

A special Statute like the Agra Tenancy Act can and does modify the operation of the ordinary Hindu Law in certain matters. The scheme of inheritance, therefore, laid down by section 22 of the Act, being other than that prescribed by the ordinary rules of Hindu Law does, within the scope of its operation, override and prevail against the ordinary Hindu Law of inheritance. [p. 718, col. 2.]

Where a tenancy is created in favour of one member of a joint Hindu family, his throwing of the profits derived from the tenancy into the common stock of the joint family does not change the tenancy from a tenancy in favour of that member to a tenancy in favour of the entire joint family inasmuch as if that were so, it would mean a transfer of the holding from that member to a body of persons, namely, the members of the joint family in contravention of the provisions of section 20 of the Agra Tenancy Act. [p. 718, col. 2.]

The interest of a non-occupancy tenant or of an occupancy tenant under the Agra Tenancy Act is not transferable except under the restrictions laid down by section 20 of the Act. [p. 718, col. 2.]

Second appeal against the decree of the District Judge, Cawnpore.

Mr. *Peary Lal Banerji*, for the Appellant.

Mr. *Kailas Nath Katju* for the Respondent.

JUDGMENT.

PIGGOTT, J.—In this case the plaintiff Kallu and the defendant Sital are related in this way, that their paternal grandfathers were own borthers. Sital is the recorded tenant of a certain occupancy holding. Kallu is actually cultivating certain plots of land, making up one-half of the area of the holding, and is paying for the use and occupation of these plots approximately one-half of the rent recorded as payable by Sital to the Zamindar. Sital took proceedings in a Revenue Court to eject Kallu on the allegation that the latter was holding as his sub-tenant. Kallu replied that he was a joint tenant with Sital of the entire holding; that they had apportioned the fields between them merely for convenience of enjoyment and that the half share of the rent payable by him was paid to the Zamindar and not to Sital. On this, the Revenue Court directed Kallu to establish his title as co-tenant of the holding by a suit in the Civil Court. This order purports to have been passed under section 199 of the Tenancy Act (No. II of 1901). The propriety of the order is not in question before us, and I merely mention this in order that I may not be regarded as com-

mitted to the view that this section was really applicable to the facts above set forth. Kallu's suit for a declaration of his title as joint tenant of the holding to the extent of an undivided half-share was decreed by the Court of first instance and dismissed by the District Judge in first appeal. On a second appeal filed in this Court by Kallu certain issues of fact were remitted for trial to the lower Appellate Court and findings have been received. The third issue as drafted would seem only to arise in the event of the findings on the first and second issues being other than they were, and, therefore, need not be considered. On the first two issues remitted the findings are that this occupancy holding was acquired by Matola, father of Sital; that Matola was at that time a member of a joint undivided Hindu family along with the descendant or descendants of his paternal uncle Dariyao. The letting was to Matola alone and not to Matola as representing the joint family. On the fourth issue a finding was returned that the tenancy enjoyed by Kallu was the result of a contract between himself and Sital, to which the Zamindar was no party, and that it amounted in law to a sub-letting by Sital in favour of Kallu of the particular plots occupied by the latter. In a petition of objections presented to this Court under Order XLI, rule 26, the plaintiff-appellant has challenged the finding on the second issue, but curiously enough has not challenged the finding upon the fourth issue. In argument before us it has been contended that the reasoning upon which the learned District Judge has arrived at his finding on the second issue remitted to him is defective, that it proceeds upon an error of law and that it has been arrived at by mislaying the burden of proof. With regard to the abstract question of law sought to be raised on this appeal, I can only say that I could wish it had arisen in a case in which its consideration was not complicated by other circumstances. However, the position, as I understand it, taken up by the learned District Judge, seems to me substantially correct. It was proved that the letting of the land in question by the Zamindar to Matola had taken place many years ago. There was a lease granted as long ago as the year 1864, which is one of the exhibits in the case. Matola, according to the District Judge, was at that time living as a member of a joint Hindu family along with his uncle Dariyao, or his first cousin, Ganga, or both. He took this land on lease from the Zamindar and he threw the profits derived from the land into the common stock of the joint family of which he was a member. The District Judge says that no such action on the part of Matola could have the effect in law of changing the tenancy from a tenancy in favour of Matola to a tenancy in favour of the entire joint family of which Matola was a member. The interest of a non-occupancy tenant or of an occupancy tenant is not transferable except under the restrictions laid down by section 20 of the Tenancy Act (No. II of 1901). If it were held that the conduct ascribed by the District Judge to Matola in the present case amounted to throwing his rights as occupancy tenant into the common stock of the joint family, and thereby under the Hindu Law making those rights part of the joint assets of that family, it seems to me that the Court would in effect be sanctioning a transfer of the holding by Matola to a body of persons, namely, the members of the joint family to which Matola at that time belonged. A special Statute like the Local Tenancy Act can and does modify the operation of the ordinary Hindu Law in certain matters. The scheme of inheritance laid down by section 22 of that Act is other than that prescribed by the ordinary rules of Hindu Law and no one denies that, within the scope of its operation, section 22 aforesaid overrides and prevails against the ordinary Hindu Law of inheritance. It seems to me that by a parity of reasoning it follows that, when the Zamindar concerned accepted Matola as his tenant, he could not be compelled by reason of any action taken by Matola to accept the entire joint family as his tenant. Our attention has been drawn in argument to one or two reported decisions of this Court. One of these clearly recognises the fact that a Hindu joint family as such may in its corporate capacity be the tenant of a holding. This proposition I have no desire to dispute. A tenancy of this sort might easily come into existence in favour of the sons of the tenant who originally acquired occupancy rights. And

I see nothing in the Tenancy Act to conflict with the view that, if those sons lived together as members of a joint Hindu family, the family as such could be regarded as in possession of the tenancy. In the present case, apart from the abstract question of law involved, we have to meet this difficulty. The findings returned by the learned District Judge are clear and explicit and the objections taken to them are objections against the train of reasoning by which the District Judge has arrived at those findings. That is what I mean by saying that the question of law involved, arises in this case in a complicated form. For the purpose of deciding this case it seems to me sufficient to say that the finding of the learned District Judge on the second of the two issues remitted to him, is not inconsistent with his finding on any of the other issues, and is not shown to be vitiated by any error of law. There remains also the finding of the District Judge on the fourth issue. I understand the finding to be in substance this. The joint family has now admittedly been broken up and apparently this separation took place between Kallu and Sital. At that time Sital recognised that Kallu had a claim upon him in respect of the profits enjoyed by him from this holding, by reason of the fact that Matola had always thrown those profits into the common stock of the joint family. He, therefore, entered into an arrangement by which he give Kallu the right to cultivate certain specific plots, making up one-half of the area of the holding, and undertook not to demand from Kallu more rent than he would himself have to pay to the Zamindar on account of this one-half of the entire holding. The rent to the Zamindar continued to be paid by Sital and receipts were made out in his name. In the absence of any plea in the appellant's petition before us, presented under Order XLI, rule 26, against the finding on the fourth issue, I am not sure that the appellant is entitled to ask us to hold that that finding proceeds upon an error of law. Assuming that point, however, in his favour, it seems to me that the reasoning of the District Judge is correct. For the sake of argument, take the case of an ordinary creditor of an occupancy tenant. That creditor is pressing for payment and is willing to take in satisfaction of his claim such profits as he may be able to make out of one-half of the occupancy holding. The tenant is forbidden by law to transfer his interests as such tenant; but he can sub-let, or he can make an assignment of the profits from year to year. Suppose that he gives his creditor the right to occupy and cultivate for his own benefit certain specific plots, forming part of his holding, and agrees only to take in the way of rent the same sum which he will himself have to pay to the landlord on account of those plots. The transaction amounts virtually to a sub-letting in favour of the creditor. The creditor thereby acquires no rights as against the Zamindar, and his rights as against the occupancy tenant are limited by the terms of the contract between them. I think, therefore, that the finding of the District Judge on the fourth issue remitted to him is correct in law and is decisive of the appeal now before us. I would, therefore, dismiss the appeal with costs.

WALSH, J.—I agree.

BY THE COURT.—The order of the Court is that the appeal is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2418 OF 1915.

February 11, 1918.

Present:—Mr. Justice Greaves and Justice Sir Syed Shamsul Huda, KT.

PARSURAM MAHAJAN—DEFENDANT—APPELLANT

versus

BHAL CHANDRA SHAHA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 62, 97, applicability of—Suit by vendee to recover purchase money on deprivation of possession—Limitation, commencement of.

Limitation for a suit by a vendee, who has been deprived by his vendor of the land purchased by him, to recover the purchase money paid by him begins to run from the date of the failure of con-

sideration, that is, the date on which the vendee is dispossessed from the land, and the suit is governed by Article 97 and not by Article 62 of the Limitation Act.

Appeal against the decree of the Subordinate Judge, Assam Valley Districts, dated the 21st May 1915, affirming that of the Munsif, Barpeta, dated the 30th March 1914.

Babu *Prokash Chunder Mazumdar*, for the Appellant.

Babus *Dwarka Nath Chuckerberty* and *Gopal Chunder Chuckerberty*, for the Respondents.

JUDGMENT.—This is an appeal from the judgment of the Subordinate Judge of Assam Valley Districts, affirming a decision of the Munsif of Barpeta. The plaintiff sued to recover a sum of Rs. 832 which he had paid to the defendant for the purchase of some land of which he was put in possession by the defendant. The plaintiff, however, obtained no registered conveyance for the land. Afterwards a suit was brought by the defendant and the plaintiff lost possession of land. Under these circumstances, the plaintiff brought the present suit to recover the amount of the purchase money which he had paid to the defendant, namely, the sum of Rs. 832. Two questions arise in this appeal. *First*, it is said that both the lower Courts are wrong in holding that Article 62 of the Limitation Act is not applicable to the case. The lower Appellate Court has found that the Article applicable is Article 97 and the Munsif found that the article applicable was Article 95. It is not necessary for us to consider whether, in fact Article 95 is applicable here because we are of opinion that the decision of the lower Appellate Court that Article 97 and not Article 62 is applicable, is correct. The money was paid by the plaintiff to the defendant on the 10th July 1906. On the 26th August 1912 possession was decreed in the defendant's favour in the suit to which we have clearly referred and on the 27th August 1912 the present suit was commenced. In our opinion it is clear that the time when the limitation commenced to run was the date of the failure of the consideration, that is to say, the time when the plaintiff was deprived of what he had bargained for, namely, possession of the land, or, in other words, limitation began to run from the 26th August 1912. This suit was accordingly brought within time and the proper Article was applied by the lower Appellate Court. So far as the second point is concerned, namely, that there should have been an account taken of the profits made by the plaintiff while in possession of the land, we think the lower Appellate Court has dealt quite rightly with this matter. The defendant was in possession of the purchase-money until the same was returned. The plaintiff paid the Government revenue for the land during the time he was in possession, and we think, therefore, that the lower Appellate Court rightly dismissed the defendant's appeal with regard to this. The result is that the appeal fails and must be dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

CIVIL MISCELLANEOUS REFERENCE No. 285 OF 1917.

February 20, 1918.

Present:—Justice Sir P. C. Banerji, Kt. and Mr. Justice Tudball.

HAR PRASAD—PETITIONER

versus

TAJAMMUL HUSAIN AND OTHERS—OPPOSITE PARTIES.

Agra Tenancy Act (II of 1901), ss. 177, 198—Ejectment, suit for—Tenant denying plaintiff's proprietary title—Appeal, forum of.

In a suit for ejectment in the Court of a 1st Class Assistant Collector, on the allegation that the defendants were the plaintiff's tenants without rights of occupancy, the defendants denied the title of the plaintiff, alleging that they were lessees from other persons and that the plaintiff had no right to sue them. The Court of first instance dismissed the suit:

Held, that the defendants' plea raised a question of proprietary title and as it was in issue in the Court of first instance and was also a matter in issue in appeal, the appeal lay to the District Judge under the provisions of section 177 of the Agra Tenancy Act. [p. 721, col. 1.]

Civil Miscellaneous Reference from the Commissioner, Rohilkhand Division.

Mr. *Surendra Nath Sen*, for the Petitioner.

Mr. *Raza Ali*, for the Opposite Parties.

JUDGMENT.—This is a reference under section 195 of the Agra Tenancy Act. The point for consideration is whether an appeal in the case lay to the District Judge or to the Commissioner. The suit

was one for ejectment on the allegation that the defendants were the plaintiff's tenants without rights of occupancy. The defendants denied the title of the plaintiff and asserted that the relation of landlord and tenant did not subsist between the plaintiff and themselves. The Court of first instance dismissed the suit, holding that the plaintiff was not entitled to maintain it in view of certain orders passed by the Revenue Court. An appeal was preferred to the District Judge, but he was of opinion that the appeal lay to the Commissioner. The petition of appeal was returned and was presented in the Court of the Commissioner. The learned Commissioner has referred the case to this Court for determination of the question whether the appeal lay to the Judge or to the Commissioner. We are clearly of opinion that the appeal lay to the District Judge. Section 177 of the Tenancy Act provides that an appeal shall lie to the District Judge from the decree of an Assistant Collector of the first class in all suits in which a question of proprietary title has been in issue in the Court of first instance, and is a matter in issue in the appeal. There can be no doubt that in this case a question of proprietary title was in issue in the Court of first instance and was also a matter in issue in the appeal. The act itself indicates what is meant by a question of proprietary title. Section 198 occurs under the heading of questions of proprietary title in Revenue Courts, and deals with a case in which the defendant pleads that the relation of landholder and tenant does not exist between the plaintiff and himself on the ground that he actually and in good faith pays the rent of his holding to some third person. In the present case the plea of the defendants was that the relation of landlord and tenant did not exist between the plaintiff and them. They alleged that they were lessees from other persons and that the plaintiff had no right to sue them. This was clearly a question of proprietary title and as it was in issue in the Court of first instance and was also a matter in issue in the appeal, the appeal lay to the District Judge under the provisions of section 177. We express, no opinion on the merits of the case but we think that the appeal ought to have been entertained by the District Judge and the memorandum of appeal ought not to have been returned. We accordingly direct that the District Judge do receive the memorandum of appeal which was originally presented to him by the appellant and dispose of the appeal according to law. The costs of this reference will abide the result.

Order reversed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 164 OF 1915.

January 22, 1918.

Present:—Mr. Justice Richardson and Mr. Justice Beachcroft.

HARAPALI SARKAR AND OTHERS—PRINCIPAL DEFENDANTS—APPELLANTS

versus

Syed RAJABALI MIA AND ANOTHER—PLAINTIFFS AND ANNAPURNA DASSYA—*Pro forma* DEFENDANT—RESPONDENTS.

Landlord and tenant Occupancy holding, mortgage of—Death of tenant, without heirs, effect of.

Where a non-transferable occupancy holding is usufructuarily mortgaged by the tenant without the consent of the landlord, the latter is entitled to eject the mortgagee from the holding on the death of the tenant without heirs. [p. 722, col. 2.]

Appeal against the decree of the Subordinate Judge, Pabna, dated the 18th September 1914, reversing that of the Munsif at Serajgunj, dated the 9th June 1913.

FACTS appear from the judgment.

Babu *Bansari Lall Sircar* for Babu *Kisori Lal Sircar*, for the Appellants.—A transfer by way of mortgage is only a partial transfer, and the landlord is not entitled to eject an usufructuary mortgagee of a non transferable occupancy holding unless he can establish that there has been abandonment, repudiation or relinquishment by the tenant as laid down in the Full Bench case of *Dayamoyi* v. *Ananda Mohan Roy* (1). In

(1) 27 Ind. Cas. 61; 18 C. W. N. 971; 20 C. L. J. 52; 42 C. 172.

this case there is neither any evidence on the record nor any finding that there has been abandonment or repudiation by the tenant. The mere fact of transfer does not entitle the landlord to re-enter even if the transfer be of the whole holding. *See Bhupendra Nath Bose* v. *Bansi Tanti* (2).

The next point is that in his plaint the plaintiff has not, as required by Order VII, rule 4 of the Civil Procedure Code, pointed out the land from which he wants to eject the defendant.

Moulvi *A. S. M. Akram*, for the Respondents:—The whole question is whether there was abandonment by the tenant or not, and the test of abandonment is whether the original tenant or any of his heirs hold the land. In this case it appears from the written statement that the heirs of the original tenant are dead, so that the holding not being in the possession of the original tenant or his heirs there has been complete abandonment entitling the landlord to re-enter. The occupancy right is no longer in existence but has been extinguished by the death of the occupancy *raiyat* and his heirs. If an occupancy *raiyat* after having mortgaged his holding dies without leaving any heir the mortgagee's case becomes hopeless, and he is liable to ejectment by the landlord.

Babu *Bansari Lall Sircar* in reply.

JUDGMENT.

RICHARDSON, J.—The holding to which this appeal relates originally belonged to two brothers Baikunto and Gopal. Gopal died, we are informed, about 20 years ago leaving a widow named Annapurna. Baikunto also died some years later leaving a widow. Before his death Baikunto had mortgaged the entire holding to the predecessor-in-interest of the principal defendants who are the appellants before us. The mortgage was a usufructuary mortgage and the mortgagee obtained possession. Annapurna, however, brought a suit against the mortgagee and succeeded in re-gaining possession of a moiety of the holding as Gopal's widow. The mortgagee or his representative seems to have remained in possession of the remaining moiety of the holding. Then it appears that by an arrangement with the landlord Annapurna's half share of the holding was made a separate tenancy so that she became the sole tenant for that half. The tenant of the remaining half of the original holding would be the heir of Baikunto after the death of his widow. But it is alleged in the plaint, and not denied in the written statement, that Baikunto left no heirs. That being the state of things, the present suit was brought by the plaintiffs (the landlords of the holding) to eject the appellants, on the ground that as mortgagees they had no right to be in possession of a non-transferable occupancy holding, the landlord's consent to the transfer by way of mortgage not having been obtained. The Court of Appeal below has made a decree in favour of the plaintiffs and the principal defendants have appealed.

On their behalf it is contended by the learned Pleader that a transfer by way of mortgage is only a partial transfer and that there is no finding in the judgment of the lower Appellate Court that the tenant has abandoned or surrendered his rights. The question does not seem to have been raised in the Courts below, and the reason is evident. Baikunto having left no heirs, there is now no tenant whom the principal defendants can put forward as a shield to support their possession. That fact explains why it was not thought worth while to raise the point in the Court below on behalf of the appellants. Even if the principal defendants were allowed to raise this question now, it would, on the facts as they appear on the record, be of no avail to them. In the circumstances the appeal must be dismissed with costs.

BEACHCROFT, J.—I agree.

Appeal dismissed.

(2) 22 Ind. Cas. 416; 40 C. 870.

SHARFUNNESSA *v.* NAZNI KHANUM.

PATNA HIGH COURT.

CIVIL REVISION No. 146 OF 1917.

November 15, 1917.

Present:—Mr. Justice Roe and Justice Sir Ali Imam, KT.

SHARFUNNESSA—APPLICANT

versus

NAZNI KHANUM—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIII, rr. 1, 5 (b)—Application for permission to sue as pauper by married woman—Husband's means, whether can be taken into consideration.

Where a married woman applies for permission to sue as a pauper, the real point in issue is whether she herself is a pauper within the meaning of rule 1 of Order XXXIII of the Civil Procedure Code, and the fact that her husband has property is not sufficient proof that the applicant herself has property from which Court-fees in the case can be paid.

Civil Revision against an order of the Subordinate Judge, Muzaffarpur, dated the 24th February 1917.

Mr. *Hasan Jan*, for the Appellant.

Syed *Mohammad Tahir*, for the Respondent.

JUDGMENT.

ROE, J.—In this case the petitioner is aggrieved by an order of the Subordinate Judge of Muzaffarpur refusing her application to sue in *forma pauperis*, on the ground that her husband is a man of means. There has been no finding and indeed no enquiry as to what the means of the applicant herself are. We are of opinion that the fact that the husband has property is not sufficient proof that the lady herself has property from which Court-fees in the case can be paid. We, therefore, remand the case for retrial and direct that the learned Subordinate Judge direct his mind to the real point in issue, whether or not the lady herself is a pauper within the meaning of the Act, and upon the result of that enquiry dispose of the application in accordance with law.

IMAM, J.—I agree.

Case remanded.

NARAYAN *v.* SYED BAHADUR.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 408-B OF 1916.

March 17, 1917.

Present:—Mr. Mittra, A. J. C.

NARAYAN—DEFENDANT—APPELLANT

versus

SYED BAHADUR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Appeal—Judgment containing unfavourable observation against person in whose favour decree passed—Appeal, whether lies—Berar Land Revenue Code, ss. 78, 79—Notice under s. 78, not acted upon for one year, effect of—Fresh notice, whether necessary—Termination of tenancy.

No appeal lies from a decree merely on the ground that certain observations made in the judgment of the Court below are unfavourable to the person in whose favour the decree is passed. An opinion of the Appellate Court in the course of a judgment in such an appeal cannot operate as *res judicata* when, in point of law, no appeal lay and the Court had no power to adjudicate on the rights of the parties on an appeal from such a decree. [p 724, col 1 & 2.]

If a notice has been duly served under section 78 of the Berar Land Revenue Code, then in the absence of waiver the person so served is not entitled to a fresh notice under section 79 merely because more than one year has elapsed since the time when in accordance with the notice the tenant should have vacated the land. [p. 724, col. 2.]

Section 78, sub-sections (4) and (8) are not restricted to the tenancies mentioned in sub-section (2) of that section, but the enhancement contemplated therein can be decreed only if in the judgment of the Court it be just and reasonable. [p. 725, col. 1.]

Maruti v *Jagannath*, 2 Ind. Cas. 996; 5 N. L. R. 100, *Ramya* v. *Krishna*, S. A. No. 22-B of 1916, followed.

A notice to quit under section 79 of the Berar Land Revenue Code unconditionally determines the tenancy, but a notice under section 78 (8), if not complied with, is not intended to have that effect inasmuch as the tenant has a right to appeal to the Court for a decision as to whether in its opinion the enhancement is just and reasonable. [p. 725, col. 2.]

A tenant is to be evicted for not paying the enhanced rent only after it has been determined to be just and reasonable by the Court. [p. 725, col. 2.]

Appeal against the decree of the District Judge, East Berar, Amraoti, confirming that of the Sub Judge, Amraoti, dated the 31st August 1915.

The Hon'ble Mr. *G. P. Dick*, for the Appellants.

The Hon'ble Mr. *S. B. Tambe*, for the Respondents.

JUDGMENT.—This is a suit by the *inam* certificate holder of a Jagir for ejectment of certain tenants, on the ground that notwithstanding a notice issued under

section 78, Berar Land Revenue Code, they have refused to agree to pay the enhanced rent or to vacate the fields. One Tanba was the original tenant of these fields. In this second appeal we are, however, concerned with one of the fields, field No. 18. It appears from the plaint that Tanba held this field from the year 1839. The rent for this field according to the plaintiff was Rs. 39 and it was sought to have it enhanced to Rs. 50. The defendant No. 4, who is the appellant before me, purchased from the original tenant this field on the 10th January 1910, the notice under section 78 of the Land Revenue Code having been served on the original tenant on the 25th September 1909. Various pleas were raised in the case and so far as they are material, they will be apparent from my judgment when I deal with each of the grounds of this second appeal. It is urged that Tanba was an ante-Jagir tenant of field No. 18 and some reference is made to a previous judgment in which an opinion to that effect was expressed by Mr. Obbard, the Civil Judge and Sessions Judge, H. A. D, an opinion which seems to have been confirmed by the then Judicial Commissioner. The plaintiff had fixed a definite time, namely, 1869, as the commencement of Tanba's tenancy. The defendants never pleaded that they were ante-Jagir tenants. All that they said was that the field had been in their possession for 40 or 50 years. The utmost that can be said on that plea is that their possession commenced from 1862, but we find that the Inam investigating officers were making enquiries about the same period and found that the Jagir was in the Jagirdar's family for three generations at least. Under the circumstances, it will be useless allowing the appellant leave to advance a fresh plea of a character inconsistent with the pleas raised in the first Court. I ought to notice that although Mr. Obbard expressed an opinion that this particular field was ante-Jagir yet the decree was entirely in favour of the Jagirdar, for he apparently allowed the entire rent claimed. The Jagirdar had filed a second appeal, though in point of law, no such appeal lay from the decree merely on the ground that certain observations made in the judgment of the Court below were unfavourable to the person in whose favour the decree was passed. The appeal was, however, entertained and the opinion of the lower Court upheld, but I cannot regard the opinion in such a case as operating by way of *res judicata* when in point of law no appeal lay and the Court had no power to adjudicate on the rights of the parties on an appeal from such a decree.

I have already mentioned that the appellant purchased the field a few months after the notice was given to his predecessor under section 78. It is contended before me that the appellant, although bound by the notice under section 78, was entitled to a further notice under section 79 of the same Code. It is urged that the Jagirdar having waited for more than one year must be deemed to have allowed the tenants to hold on. I see, however, no force in this argument. There was no waiver of the notice inasmuch as no rent was accepted, nor was the possession of the transferee in any manner recognized by the Jagirdar. If notice has been duly served under section 78, the person so served or his transferee is not entitled to a fresh notice under section 79 merely because more than a year had elapsed since the time when, in accordance with the notice, the tenants should have vacated the land.

It is next contended that the plaintiff Jagirdar alone cannot sue inasmuch as there are some members of the family who are opposed to the ejectment and the enhancement of rent. All the defendants who are hostile to the Jagirdar are, however, bound by a deed executed by themselves or by their predecessor in title in the year 1887, under which the plaintiff was to have the sole management of the Jagir and the other co sharers are only to receive their share of the profits from the plaintiff. Having entered into a solemn agreement as regards the management of the village, it is not open to any co-sharers arbitrarily to dispute the plaintiff's authority until they can again come to a fresh arrangement for the management of the village. I hold, therefore, that the plaintiff is entitled to maintain the suit.

There remains for me to consider whether the appellant is entitled to be relieved against forfeiture for non-payment of rent.

The way in which the appellant has put his case before me is unsound. Section 114 of the Transfer of Property Act, which now applies to Berar, refers to forfeiture for non payment of rent, that is to say, it refers to a forfeiture already incurred under the terms of a lease. In the present case, there is no such lease providing for forfeiture for non-payment of rent. Moreover, the rent for non-payment of which the forfeiture takes place is a rent already fixed and agreed upon between the parties. Although section 114 of the Transfer of Property Act, therefore, does not apply to the present case, yet I have to consider whether the Courts below are justified in passing an unconditional decree for ejectment against the defendant. The plaintiff issued a notice under sub-section 8 of section 78 of the Berar Land Revenue Code. In *Maruti* v. *Jagannath* (1) and *Ramya* v. *Krishna* (2) the view taken was that section 78, sub-clauses 8 and 4, are not restricted to tenancies mentioned in sub-clause 2 of the said section. This view commends itself to me. Sub-clause 4 says: "Nothing contained in this section shall affect the right of the landlord to enhance the rent, etc."

If it were intended to limit sub-section 4 to cases contemplated by sub section 2, the wording would have been "nothing contained in sub-section 2 shall affect the right of the landlord to enhance the rent." It is, therefore, unnecessary to say whether the appellant's predecessor was a tenant of antiquity within the meaning of sub-section (2). Now the plaintiff's own case is that he was entitled to enhancement of the rent apparently by virtue of usage, and for that purpose, he was entitled to issue a notice through a Revenue Officer under sub section 8. The enhancement, however, can only be decreed if in the judgment of the Court it be just and reasonable [see sub section (4)]. The Berar Land Revenue Code, sub section (1), seems to recognize a customary right to just and reasonable enhancement of rent and lays down a procedure for its enforcement.

(1) 2 Ind. Cas. 936; 8 N. L. R. 100.
(2) S. A. No. 229-B of 1916.

The first Court has found that it is just and reasonable that the former rent of Rs. 39 should be enhanced to Rs. 50. Then comes the question what should have been the nature of the plaintiff's suit and the form of the decree? It cannot be said that the rent was duly enhanced the moment the notice was served through the Tahsildar. It was determined to be just and reasonable only by the decision of the Court. To my mind, the decree contemplated by sub-section 4 is a decree directing the defendant to pay the rent and in default of payment to give up possession.

A notice to quit under section 79 unconditionally determined the tenancy. But the Code does not say that a notice under section 78 (8), if not complied with, has any such effect. Appendix XVII to the rules framed by the Local Government gives a form of notice under section 78 (8). It, no doubt, asks the tenant to vacate the land in the event of his not consenting to pay the enhanced rent. But the tenant has a right to appeal to the Court as to whether in its judgment the enhancement claimed is just and reasonable. Could it have been the intention of the Legislature to determine the tenancy on non-compliance with the notice subject to a future adjudication as to whether the enhancement is just and reasonable? Such a conditional determination of the tenancy is unknown to the ordinary law. In the absence of express words to that effect, I would hesitate to adopt such a construction which leads to manifest injustice, for the tenant is punished for an error of judgment as to what is just and reasonable enhancement. The tenant's silence is consistent with an agreement to pay the enhanced rent, if determined to be just and reasonable by the Court. The conclusion to which I come is that the tenant is to be evicted for not paying the enhanced rent after it has been determined to be just and reasonable by the Court.

I now pass the decree which the lower Court should have passed. The decrees of the Courts below are set aside so far as the defendant-appellant is concerned and in lieu thereof the defendant is directed to pay Rs. 50 as the rent for the year in suit within three months or in default to

deliver possession of field S. No. 18 to the plaintiff. The ejectment of the defendant will not prevent the plaintiff from recovering Rs. 50 from the defendant. The defendant will also pay the plaintiff's costs in all Courts.

Decree set aside.

PATNA HIGH COURT,
FIRST CIVIL APPEAL NOS. 64 AND 75 OF 1916.
July 3, 1917.
Present:—Mr. Justice Sharfuddin and
Mr. Justice Roe.
Rai BENODE BEHARI BOSE—DEFENDANT —APPELLANT
versus
Babu HIRA SINGH AND OTHERS—PLAINTIFFS —RESPONDENTS,

Transfer of Property Act (IV of 1882), s. 52—Lis pendens, doctrine of, applicability of—Mortgage—Subrogation—Mortgagee, decree-holder consenting to grant time to mortgagor for paying off mortgage by loan from third person—Mortgage, whether kept alive—Contract Act (IX of 1872), s. 74—Penalty—Time granted to mortgagor on condition of paying higher rate of interest.

The essence of section 52 of the Transfer of Property Act is that a transaction entered into during the pendency of a suit cannot prejudice the interests of a party to the suit who is not a party to the transaction. [p. 727, col. 1.]

A mortgagee, who held two mortgages on the same property, obtained a decree on his first mortgage and during the execution of that decree consented to the postponement of the sale and the granting of time to the mortgagor to enable him to pay off the mortgage with money borrowed from one *H*:

Held, that *H.* by paying off the first mortgage obtained a lien over the mortgaged property prior to the second mortgage, and that the transaction being acquiesced in by and being presumably for the benefit of the mortgagee, section 52 of the Transfer of Property Act had no application to it. [p. 727, col. 2.]

Where a mortgage-decree provided for the payment of interest at a certain rate, but in execution the Court granted the judgment-debtor time to pay off the decretal amount on condition that he paid interest at a higher rate:

Held (*semble*), that the increase in the rate of interest was in the nature of a penalty. [p. 728, col. 1.]

Appeal against the decision of the Subordinate Judge, First Court, Shahabad, dated the 18th February 1916.

Messrs. *Naresh Chandra Sinha* and *Sisir Kumar Mitter*, for the Appellant.

Messrs. *Kulwant Sahay* and *Achalendra Nath Das*, for the Respondents.

JUDGMENT.—On the 24th of April 1907 Ambika Charan Mitra and Amrita Krishna Mitra, his son, mortgaged certain properties to Kumar Promatha Nath Malia, who obtained a decree on the 9th of August 1909 and transferred it on the 14th January 1911 to Rai Benode Behari Bose Bahadur. Rai Benode Behari Bose being of opinion that the property was worth more than the amount secured under the decree which he had purchased from the former mortgagee decree-holder, advanced further sums upon a second mortgage to the Mitras on the 16th of January 1911 and the 8th of May 1911. In 1913 Rai Benode Behari put the second mortgage into suit; and subsequently obtained a decree and purchased the property himself. The sum realized in execution of this decree exceeded the amount due under the decree by a considerable sum.

Pending the suit upon the second mortgage Rai Benode Behari put up for sale the mortgaged property upon the decree obtained on the 1st mortgage and the proceedings in execution reached the stage of a date being fixed for the sale after due issue of the sale proclamation. Upon the date fixed for the sale the judgment debtor came into Court with a petition asking for time to raise money from Hira Singh to pay off the mortgage decree. Rai Benode Behari himself signed this petition and upon this joint petition of Rai Benode Behari and the judgment-debtor time was granted to borrow money from Hira Singh and to pay off Rai Benode Behari's debt. In due course the debt of Rai Benode Behari upon the first mortgage was extinguished by payment made admittedly from the purse of Hira Singh.

Hira Singh on the 9th of May 1913 took a mortgage for Rs. 7, 000 from the Mitras, wherein it was distinctly stated that the mortgage lien held by Rai Benode Behari was to be kept alive for the benefit of Hira Singh who was paying the money.

Upon the purchase of the property by Rai Benode Behari and possession being taken thereof, Hira Singh has brought the present suit for an account upon the first mortgage and for a declaration that the amount now due upon the mortgage,

which can be traced to the payment of the debt of Rai Benode Behari, should rank as a charge upon the property prior to the charge obtained by Rai Benode Behari by virtue of his purchase under the decree upon the second mortgage. Hira Singh also claims that Rs. 1,000, the amount of rent which was paid from a loan taken from him by the Mitras, should be a charge upon the properties mortgaged.

The learned Subordinate Judge has refused to give the plaintiff a charge in regard to the sum advanced for payment of rent; but has made a decree directing that an account be taken and that all sums now due on account of the payment made in satisfaction of the first mortgage decree of Rai Benode Behari do rank prior to the second mortgage decree of Rai Benode Behari; and that all other sums due under Hira Singh's mortgage shall be postponed to the second mortgage.

Rai Benode Behari appeals against that portion of the decree which gives priority to Hira Singh's charge upon the property; and Hira Singh appeals against the order refusing the charge in connection with the payment made for rent.

The appeal of Hira Singh, First Appeal No. 75 of 1916, is not seriously pressed. We need say with regard to it only that there was no payment of rent made by Hira Singh. There was merely a further loan granted to the mortgagor. Though the money borrowed was actually deposited to set aside the sale of the mortgaged lands, the transaction created no charge. The appeal of Hira Singh is, therefore, dismissed with costs.

The appeal of Rai Benode Behari will also be dismissed. The petition filed for time to be given for borrowing the money from Hira Singh makes it unnecessary for us to discuss the nice question whether in all cases a transaction resulting in subrogation can be held to be covered by section 52 of the Transfer of Property Act. The essence of section 52 is that a transaction entered into during the pendency of a suit cannot prejudice the interests of a party to the suit who is not a party to the transaction. Rai Benode Behari himself consented to the postponement of the sale upon the first mortgage in order that money might be borrowed from Hira Singh. He, therefore, knew that Hira Singh was about to lend money to liquidate the mortgage debt. The passage to be found at page 1046 in Volume X, Indian Law Reports, Calcutta Series [in the case of *Gokaldas Gopaldas* v. *Puranmal Premsukh D s* (1)], which report begins at page 1035, must be taken as conclusive that irrespective of the clause in Hira Singh's document definitely keeping alive the mortgage of Rai Benode Behari, the payment of the mortgage debt by Hira Singh was in itself sufficient to warrant the presumption that the prior mortgage would be kept alive. We must presume that Rai Benode Behari was, when the petition for time was filed, within reach of legal advice. He must have been aware that the entry of a third party would create a lien prior to his second charge. He nevertheless acquiesced in the granting of time for the entry of that third party with the deliberate intention of realizing his money as rapidly as possible. We must presume that the transaction as a whole was for his benefit as he thought at the time, and was not a transaction calculated to prejudice his interests as contemplated in section 52. We hold that this part of the case was rightly decided by the learned Subordinate Judge and that Hira Singh, the plaintiff, is entitled to ask for an account upon his prior charge and to recover the sum advanced for the payment of the first mortgage debt of Rai Benode Bhari.

The learned Subordinate Judge has, however, given no indication in his judgment as to the rate at which interest should run. The interest due under the mortgage document was Rs. 1-8 per cent. per mensem. At the time that Rai Benode Behari's debt was paid a decree had been made and the property was up for sale. The terms of the decree were that interest should run after the 10th of February 1910 at 6 per cent. per annum. We are informed that one of the conditions of the granting of time to pay the decretal amount was that the rate of interest should be increased to 12 per cent per annum. This appears to have received the sanction of the Court

(1) 10 C. 1035; 11 I. A. 126; 8 Ind. Jur. 396; 4 Sar. P. C. J. 543; 5 Ind. Dec. (N. s.) 692 (P. C.).

on the 18th of January 1911. The increase of the rate of interest from 6 per cent. to 12 per cent. seems to us suspiciously like a penalty; and indeed the debt having been extinguished, so far as Rai Benode Behari was concerned, on the date of the payment made by Hira Singh, interest should not be calculated at more than 6 per cent. per annum in making up Hira Singh's account. We modify the learned Subordinate Judge's decree to this extent; that in taking that account interest be calculated at six per cent.

The appeal of Rai Binode Behari will be decreed in part with costs to the extent of success and failure on both sides.

Decree modified.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 616 OF 1916.
January 24, 1918.
Present:—Mr. Justice Piggott
and Mr. Justice Walsh.
HAMID HUSAIN—PLAINTIFF—APPELLANT
versus
KUBRA BEGAM—DEFENDANT—RESPONDENT.

Restitution of conjugal rights, suit for—Cruelty—Defence.

In a suit for restitution of conjugal rights it appeared that the parties had been on bad terms for a considerable period, that the husband suspected the wife's fidelity and that he had been bringing civil and criminal cases against her:

Held, that the wife had reasonable grounds for believing that her health and safety would be endangered if she returned to her husband's custody and that the plaintiff was not, therefore, entitled to a decree. [p. 731, col. 1.]

Second appeal from a decree of the District Judge, Saharanpur.

ORDER.—This was a suit for restitution of conjugal rights by a Muhammadan husband. It was decreed by the Court of first instance; but has been dismissed by the learned District Judge of Saharanpur in appeal, on the ground that the plaintiff "had treated his wife in such a way that he has lost all right to claim restitution of conjugal rights."

We are of opinion that the findings of fact recorded by the lower Appellate Court are not specific enough to dispose of the suit. The principles of law applicable to a defence of "legal cruelty" raised in a case of this sort were laid down by their Lordships of the Privy Council in *Moonshee Buzloor Ruheem* v. *Shumsoonissa Begum* (1). We may refer also to two decisions of this Court, *viz. Husaini Begam* v. *Muhammad Rustam Ali Khan* (2) and *Khurshedi Begam* v. *Khurshed Ali* (3). We remit the following issues for determination by the Court below, on the evidence already on the record:—

(*i*) Is it proved that the defendant has in the past been subjected to ill-treatment, physical or mental, by the plaintiff?

The finding on this issue should be as specific as possible as regards time, circumstances and the nature of the ill-treatment found.

(*ii*) On the case as a whole, is the Court of opinion that the defendant has reasonable grounds for believing that her health and safety would be endangered if she returned to her husband's custody?

Ten days will be allowed for objections after the return of findings.

The lower Appellate Court submitted the following

FINDINGS.—The issues remitted here are:

(1) Is it proved that the defendant has in the past been subjected to ill treatment, physical or mental, by the plaintiff?

(2) On the case as a whole, is the Court of opinion that the defendant has reasonable grounds for believing that her health and safety would be endangered if she returned to her husband's custody?

The story which the defendant put forward in an application sent by her to the Collector of Muzaffarnagar and Saharanpur was that the plaintiff was really only her agent, but that by some cunning he had made himself out to be her husband; that he wanted her money and with the assistance of a Vakil named Liaqat Husain tried to induce her to transfer her property to the plaintiff's name; and that when she

(1) 11 M. I. A. 551 at pp. 609, 611; 8 W. R. P. C. 3; 2 Suth. P. C. J. 57; 2 Sar. P. C. J. 59; 20 E. R. 208.
(2) 29 A. 222; 4 A. L. J. 63; A. W. N. (1907) 27.
(3) 25 Ind. Cas. 213; 12 A. L. J. 1065.

refused to comply took her to Kasba Kairana and kept her a prisoner for 1½ years in the Vakil's house, after pretending that he was taking her to Meerut to have false teeth made; that in order to extort property from her he prevented her relations from coming to her; that she was beaten by Liaqat Husain, and treated in a manner in which prisoners in jail are probably not treated. The result, she said, was that she suffered from facial paralysis and palpitation of the heart. She went on to say that plaintiff and Liaqat Husain compelled her by deception to transfer property in their favour, and had got her thumb impression on some paper. That the plaintiff told her that the house at Kairana was that of a robber and knifer. "That Jawad Husain (son of the other defendant Zahid Husain) her sister's daughter's son came and called out her name. She ran to see him, but Liaqat Husain scolded his servants for letting him in. That Jawad Husain told her that the house (in which she was imprisoned) was Liaqat Husain's and not that of a robber, that Liaqat Husain did not allow her to say anything more. That plaintiff then took her from Kairana to Sarsena, and then from Sarsena to Kalear, where she was made to execute a sale-deed in favour of the wife of one Ashiq Husain and register it before the Sub-Registrar. That this document was for Rs. 20,000 or 21,000 of which Rs. 7,000 were paid before the Sub-Registrar. Of this plaintiff deposited Rs. 6,000 with the banker Jagmandar Das and kept Rs. 500 himself. Rs. 500 had been taken by him previously as earnest money. That plaintiff then put her in the train with his servant to take her back to Kairana. He did not, however, tell her where she was to go. When the train arrived at Saharanpur, she saw Jawad Husain on the platform, jumped out and embraced him, and asked him what station it was. On his telling her she went home with him.

She said also that she had fever when she executed the sale-deed and that in addition to the Rs. 7,000 above mentioned, plaintiff took from her, her boxes containing ornaments to the value of Rs. 2,000. That plaintiff was a pauper, he used violence to her and robbed her of her money.

Jawad Husain corroborates this story as far as his going to Kairana is concerned, and says that he received a letter from the defendant complaining of ill-treatment; he, however, met her at Saharanpur by chance. Sabir Husain, who went with him to Kairana, also corroborated.

Examined in Court, defendant added that when she was at Saharanpur with him (before she was taken to Kairana) plaintiff beat her very much, that sometimes she aches even now from the wounds. After marriage, he sometimes used to dine out, and was always quarrelling with her, and abusing her and her parents, saying that she was of loose behaviour, demanded money of her, sometimes Rs. 2,000 and sometimes Rs. 3,000.

She adds that she has transferred her property to Jawad Husain, her child, who is now owner of the property.

When defendant took up her residence in Zahid Husain's house, plaintiff made an application to the Magistrate under section 552 of the Code of Criminal Procedure asking that the Police should order the release of his wife. Then he brought a complaint under section 498 of the Indian Penal Code against Zahid Husain saying that he had enticed her away, and was keeping her as his wife. The Joint Magistrate dismissed this on the 18th March 1915, and it was absurd enough complaint, defendant is about 50 years of age, and is said to have lost all her teeth. Plaintiff then filed the present suit.

The plaintiff's evidence shows him to be probably without property, although he says that property entered in Liaqat Husain's name belongs to him, he has had no residential house for ten years; Liaqat Husain is helping him in this suit by "money and advice", he now lives in Liaqat Husain's house. He admits having kept the defendant "aloof" so that no relations might carry her off.

The plaintiff has called witnesses to prove that though they live close to where he lives, they never heard any sounds as if plaintiff was ill-treating the defendant. So far as direct evidence is concerned, the case is really one of taking the wife's word against the husband or *vice versa*.

The defendant's married life has been peculiar. In 1902, or 1903, she appears to have run away with one Diwan Shah,

HAMID HUSAIN *v.* KUBRA BEGAM.

The plaintiff lodged a complaint under section 522, and lost it. In 1904 he instituted a suit for restitution of conjugal rights and appears to have been supported in that suit by Zahid Husain, the present second defendant. In her defence in the suit she totally denied having been married to the plaintiff, and further charged Zahid Husain with the intention of taking away her property in favour of his son. The suit was decreed, and as defendant declined to submit to the decree, she was put into jail for some months. She had sued the plaintiff unsuccessfully for dower, and had executed a deed of gift of all her property in favour of Diwan Shah. When she got out of jail and joined the plaintiff the latter caused her to bring a suit against Diwan Shah to cancel the deed of gift in his favour and for possession of her property. In this suit she was successful, and in 1906 she conferred upon the plaintiff the rights to manage her property though not to alienate it or raise money upon it. After that she seems to have lived with the plaintiff to outward appearance peacefully until the year 1914, when the execution of the sale-deed of the 18th May was immediately followed by her leaving her husband.

According to the written statement in this case she has now transferred the whole of her property to Jawad Husain, but in her evidence she alleges that it is still hers. It is in Jawad Husain's name but she maintains that her son has no interest in it during her lifetime. Jawad Husain, of course, contends that according to the deed of gift he is owner of the house.

As I have intimated, both plaintiff and defendant are well stricken in years, and it seems clear that the defendant is in the unfortunate position of a woman with property which is desired by a needy husband on the one hand and needy relations on the other. The learned Subordinate Judge thinks that plaintiff at one time beat her, but he says that any husband would do that to a wife whose fidelity he suspected. On the whole the evidence that plaintiff has ill-treated the defendant physically, except if it be an exception to this extent, is not satisfactory. When giving her evidence she alleged merely that he abused her, and the allegations in her written petitions appear hardly to be made out. That she has been ill-treated by him in other ways, that is to say, mentally is, however, reasonably likely; he admits having prevented her relations from having access to her, he did not hesitate to keep her for months in jail and she selected to stay in jail rather than return to him; and it is not likely that she voluntarily suffered him to deal with her property. Similarly there appears to be reasonable ground for supposing that her health and safety would be endangered if she were compelled to return to him. He and she are on the worst possible terms, and there can be no natural love or affection between them, and in his house she would be completely in his power. There is too much reason for supposing that the plaintiff's desire in pressing the suit is to get hold of defendant's property rather than to have her to live with him, and as she has executed a deed disposing of this property it is more than likely that he would subject her to distress to induce her to cancel the deed in his favour. It is contended on plaintiff's behalf that defendant is really an unwilling tool in the hands of her relations, and is being opposed by them. That is, of course, a possibility, but there is no evidence to enable me to say that it is in fact the case.

There is every reason to suppose that she left the plaintiff voluntarily and that so far at any rate she was in no way coerced by her relations. If she is ill-treated by them in future, she will have only herself to thank. It seems to me that it could not be safe, having regard to all that has happened, to order her to be delivered over to the plaintiff.

Dr. *S. M. Sulaiman*, for the Appellant.

The Hon'ble Dr. *Tej Bahadur Sapru* and Mr. *Kailas Nath Katju*, for the Respondent.

JUDGMENT.—This was a suit by a Muhammadan husband for restitution of conjugal rights in which, by our order of the 8th of August last, we thought it necessary to remit certain issues for more specific findings by the lower Appellate Court. Those findings have now been returned and we are satisfied that they cannot be successfully assailed on the

grounds taken in the petition of objections filed by the plaintiff-appellant. We desire to refer to the case of *Armour* v. *Armour* (4) as laying down sound principles of law, which we accept and propose to apply to the facts found in this case by the learned District Judge. We think the findings of the learned District Judge proceed upon evidence and are not vitiated by any erroneous view of the law. We must accept his finding that the defendant has reasonable grounds for believing that her health and safety would be endangered if she returned to her husband's custody and in our opinion this finding disposes of the appeal. We dismiss the appeal accordingly with costs.

Appeal dismissed.

(4) 1 A. L. J. 318.

PATNA HIGH COURT.

APPLICATION IN PRIVY COUNCIL APPEAL No. 72 OF 1917.

November 16, 1917.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Chapman.

RAMKISHEN LAL—APPLICANT

versus

MANNA KUMRI—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 109, 110, 111, 112, *O. XLIV, r.* 1—*Appeal to His Majesty in Council—Leave to appeal in* forma pauperis—*Jurisdiction—High Court, power of, to grant leave.*

The High Court has no jurisdiction to grant an application for leave to appeal to His Majesty in Council in *forma pauperis*. [p. 731, col. 2.]

Order XLIV of the Civil Procedure Code does not apply to appeals to His Majesty in Council. Rule 1 of the Order contemplates an Appellate Court perusing the judgment of a subordinate Court, and not the Court whose judgment is appealed from perusing its own judgment; the very fact that Order XLIV requires an investigation into the merits of the appeal before allowing the application introduces an element inconsistent with the principle underlying sections 109 and 110 of the Code. [p. 732, col. 1.]

Application for appeal from the decision of Mr. Justice Chapman and Mr. Justice Jwala Prasad, dated the 4th April 1917, in First Appeal No. 272 of 1915.

Mr. *Lal Mohan Ganguli*, for the Applicant.

JUDGMENT.

MILLER, C J.—This is an application in the form of a petition praying for leave to file and prosecute an appeal to His Majesty in Council in *forma pauperis*. The original suit was instituted by the present applicants as plaintiffs in the Court of the Subordinate Judge of Bhagalpur. The suit was dismissed and an appeal to this Court proved equally unsuccessful. In the original suit and in the appeal leave to proceed as paupers was granted. The applicants being aggrieved with the decree of this Court desire to appeal to His Majesty in Council and have lodged a petition asking for a certificate under section 110 of the Code of Civil Procedure. They now pray the Court to allow them to file and prosecute that appeal as paupers, and the question arises whether this Court has jurisdiction to grant such an application. We have not been referred to nor am I aware of any provision in the Code of the Civil Procedure or the rules made thereunder, or in the rules of this Court, which in terms gives jurisdiction to this Court to grant the relief asked for, and in my opinion the Court has no such jurisdiction. As the question has been raised in an appeal to His Majesty in Council, we think it desirable to state our reasons for the decision arrived at. The Code of Civil Procedure deals with appeals to the King in Council in sections 109 to 112. Sections 109 and 110 give a right of appeal to His Majesty in Council from any decree or final order passed on appeal by the High Court or any other Court in British India of final appellate jurisdiction where the subject matter in dispute, or the property in respect to which the claim is made, is of a certain value, provided that where the decree or final order affirms the decision of the Court immediately below the appeal must involve some substantial question of law. They also give a right of appeal from any decree or order where the case is certified to be a fit one. The machinery for obtaining such certificate is found in Order XLV and must be applied for by petition to the Court whose decree is complained of. Section 111 bars appeals from the High Court in certain cases and section 112 saves the royal prerogative to receive or reject appeals at His Majesty's pleasure. The effect of granting a certificate under Order XLV that the case fulfils the requirements of the sections of the Code

mentioned is, *inter alia*, to oblige the applicant to furnish security for costs and to deposit a sum to meet the expenses of preparing and forwarding the record of the suit. The effect of allowing the suit to be filed and prosecuted in *forma pauperis* would be to excuse the appellant in that suit from finding security or depositing the usual fees, and where no express power is given to the Court to make an order involving the consequences referred to, I see no reason why we should infer such power to exist by implication.

It is contended, however, that Order XLIV, rule 1, applies to appeals to His Majesty in Council. I am unable to accept this view. There are two Orders in the rules which deal with proceedings by paupers. The first is Order XXXIII which relates to original suits and has clearly no application to appeals, and the other is Order XLIV which relates to appeals and is relied upon. Rule 1 of the latter Order provides that the Court shall reject the application to be allowed to appeal as a pauper unless upon perusal thereof, and of the judgment and decree, it sees reason to think that the decree is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust. The rule, in my opinion, clearly contemplates an Appellate Court perusing the judgment of a subordinate Court and not, as would be the case if the applicant's contention is accepted, the Court whose judgment is appealed from perusing its own judgment. It would be very difficult and well nigh impossible for anyone to obtain the order contemplated in the rule, if one of the conditions were that he should first persuade the Court which made the decree that its own decree was contrary to law or erroneous or unjust. Further the very fact that Order XLIV requires an investigation into the merits of the appeal before allowing the application, introduces an element inconsistent with the principle underlying sections 109 and 110 of the Code of which they form a part. In the sections mentioned no such restrictions on the right of appeal are found. Moreover, it would appear that the Judicial Committee itself in considering the propriety of allowing special leave to appeal in *forma pauperis* is by no means so exacting [see rule 8 of the Judicial Committee's Rules, 1908]. There are other reasons appearing from the wording of Order XLIV itself which seem to me clearly to indicate that it was not intended to apply to appeals to His Majesty in Council.

The Calcutta High Court in 1912 in the case of *Jugadananda Asram* v. *Rajendra Roy* (1) had to decide a similar question, the only difference between that case and the present being that there leave to appeal had already been granted before the application was made to prosecute the appeal in *forma pauperis*. The Chief Justice and Sir Richard Harington decided that the Court had no jurisdiction and dismissed the application, and with that judgment and the reasons given therein I entirely concur. This application will be dismissed. This, however, will not prevent the applicants from petitioning His Majesty in Council for special leave, if they should be so advised.

CHAPMAN, J.—I agree.

Application rejected.

(1) 18 Ind. Cas. 129; 17 C. L. J. 381.

PUNJAB CHIEF COURT.

CIVIL REVISION No. 94 OF 1916.

February 7, 1917.

Present:—Mr. Justice Scott-Smith.

SARUP SINGH—PLAINTIFF—PETITIONER

versus

Musammat JOWAHRI AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Courts Act (III of 1914), ss 41 (3), 44—Lower Appellate Court, refusing certificate—Revision, whether lies

Where in a case in which a question of custom was in issue the lower Appellate Court refused to grant a certificate under section 41 (3) of the Punjab Courts Act, on the ground that no question of custom arose:

Held, that the lower Appellate Court had failed to exercise the jurisdiction vested in it and the order was, therefore, open to revision under section 44 of the Act. [p. 733, col 1.]

Application for revision of the order of the District Judge, Ambala, dated the 11th May 1915.

Mr. *Ganpat Rai*, for the Petitioner.

Pir *Taj-ud-Din*, for the Respondents.

ALICE THORP *v.* SHAMAT LAL.

JUDGMENT.—This is an application for revision of an order of the District Judge of Ambala refusing to grant a certificate for second appeal under section 41 (3) of the Punjab Courts Act. The question for decision in the case was whether the applicant, a *lohar* by caste, followed Hindu Law or custom. Both the Courts below held that he followed Hindu Law and that the disputed gift by a widow to her daughter's son was valid. The District Judge refused the certificate on the ground that no question of custom really arose. Pir Taj-ud-Din, on behalf of the respondents, raises a preliminary objection that no revision lies from the order refusing to grant a certificate, and he cites *Sher* v. *Allah Dad* (1) as an authority in support of his contention. In that case it was certainly held that the Chief Court could not on the revision side consider whether the action of the lower Appellate Court in refusing a certificate was reasonable or not. It appears, however, that in that case the lower Appellate Court in consideration of the merits refused to grant a certificate. The present case is in my opinion distinguishable. The District Judge refused a certificate because he considered that no question of custom arose; in other words, he held that this was a case to which sub-section (3) of section 41 of the Punjab Courts Act did not apply.

The case reported as *Sahab Din* v. *Daswandhi Beg* (2) is an authority for the proposition that revision is competent where the lower Appellate Court has wrongly held that it had no power to grant a certificate. In the present case it is clear that a question of custom was in issue, namely, whether the parties followed a custom by which a gift by a widow to her daughter's son was invalid. I, therefore, hold that the lower Appellate Court has failed to exercise the jurisdiction vested in it, and the order is open to revision under section 44 of the Punjab Courts Act.

I, therefore, allow the revision and, setting aside the order of the District Judge, remand the case to him that he may decide on the merits whether to grant a certificate or not. Costs will follow the event.

Revision accepted.

(1) 39 Ind. Cas. 96; 6 P. R. 1917.

(2) 27 Ind. Cas. 722; 23 P. W. R. 1915; 86 P. L. R. 1915.

PATNA HIGH COURT.

CIVIL REVISIONS NOS. 60, 61 AND 65 - 71 OF 1917.

November 8, 1917.

Present:—Mr. Justice Roe and Justice Sir Ali Imam, KT.

ALICE THORP—APPLICANT

versus

SHAMAT LAL - RESPONDENT.

Succession Certificate Act (VII of 1889), s. 4—Suit by heir of deceased against debtor, whether maintainable without certificate

What is barred under section 4 of the Succession Certificate Act is the passing of a decree in favour of a person, claiming to be entitled to the effects of a deceased person against a debtor of the latter for payment of the debt, without the production of a certificate as required by the section The section is no bar to the maintainability of such a suit. [p. 734, col. 1.]

Civil revisions against an order of the Small Cause Court Judge, Motihari, dated the 19th December 1916.

Mr. *Soroshi Charan Mitter*, for the Appellant.

Mr. *Khurshed Hasnain*, for the Respondent.

JUDGMENT.

IMAM, J.—Civil Revisions Nos. 60, 61, and 65—71 of 1917 arise from a decision of the Small Cause Court Judge of Motihari. The facts of these cases shortly are that the appellant, Mrs. Alice Thorp, instituted a certain number of rent suits against Shamat Lal and others who are defendants in these cases. The Court below, exercising powers under the Small Causes Courts Act, dealt with these cases together, and has dismissed them on the ground that the status of the plaintiff to prosecute her suits is not established. The Court below at the end of the judgment deals with this aspect of the plaintiff's suits in these words:—(1) "The suits are not maintainable under section 4 of the Succession Certificate Act." The reason

why he has so worded his judgment is given a few sentences above the passage quoted. In that he refers to the fact that although the plaintiff Mrs. Thorp was said to have succeeded to the estate of her husband and Probate had been taken, yet neither a certificate of succession nor the original Probate or copies thereof had been filed. Reading this part of the judgment of the learned Small Cause Court Judge we cannot but hold that he is under the impression that the suits under notice could not be maintained by the plaintiff unless and until she produced either the certificate or the Probate papers. We think the learned Judge has fallen into an error, which is an error of law. The learned Judge has relied for his view of the case on section 4 of the Succession Certificate Act. A reference to that section shows that there is no bar to the maintenance of a suit under the circumstances referred to above, but what is barred is the passing of a decree in such circumstances. It appears to us, therefore, that the Small Cause Court Judge misdirected himself on the question of the maintenance of these suits. The suits are perfectly maintainable and section 4 of the Succession Certificate Act was by no means a bar to their maintenance. The question of the decree on the other hand is a question which is altogether separate from the question of the maintenance of suits, and it appears to us that if this view of the law had been presented to the mind of the learned Judge he might well have, in a case like this, allowed time to the plaintiff to produce these papers before he gave her a decree. Evidently he did not consider the question as to whether time should or should not have been given to the plaintiff to produce these papers. In the circumstances we set aside the order passed by the learned Judge and now that we are satisfied that the plaintiff Mrs. Thorp had as a matter of fact obtained Probate of the Will of her husband and that as such had the status to proceed with those cases and ask for decrees being passed in her favour, we think in this case we should not only reverse the order passed by the learned Judge but decree the suits in question. We pass no orders as regards costs.

ROE, J.—I concur. I entirely agree that a marked distinction should be made between an error of law and an exercise of discretion. In the case before us it seems to me that there was not merely a refusal to grant a postponement of the case to admit of the production of the Probate but rather a refusal to allow it to be produced after the case had been commenced.

Suits decreed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1503 OF 1915.

December 18, 1917.

Present:—Justice Sir Charles Chitty, KT., and Mr. Justice Smither.

Sheikh SAMIRUDDIN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Sheikh ABDUL SYED AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 58, 100—Mortgage and charge, distinction between—Sale in execution of decree without attachment, validity of—Consent decree, whether can affect properties not subject-matter of suit.

In a suit on a mortgage a compromise was effected, by which the mortgagor consented to a decree being passed against him on condition that if the decretal amount were not paid according to the instalments specified in the decree, the mortgagee would be entitled to recover it by sale of the mortgaged properties and in case of a deficiency in the sale-proceeds by sale of certain other properties (lot No. 2 specified in the schedule to the compromise petition). Payments not having been made in accordance with the decree, the mortgaged properties as also the other properties (in lot No. 2) were put up to auction-sale and were purchased by the mortgagee himself, who was put in possession by the Court. The mortgagor applied for setting aside the sale, and again a compromise was made under which the sale was to be set aside on the mortgagor paying the full amount of the decree within two months. The mortgagor failed to carry out this compromise and the sale to the mortgagee was confirmed. In the meantime the mortgagor had mortgaged lot No. 2 to the plaintiff for the express purpose of paying off the decretal amount due to the mortgagee:

Held, (1) that, inasmuch as before the mortgage to the plaintiff lot No. 2 had been auction-purchased

by the mortgagee, the mortgagor had no subsisting title, right or interest in those properties which he could pass to the plaintiff by the mortgage; [p. 736, col. 2.]

(2 that, as the auction-sale in execution of the mortgage decree was with the consent and at the request of the mortgagor, it was immaterial whether there was a formal attachment of lot No. 2 or not. [p. 736, col 2.]

Semble.—Though the consent decree could not affect the properties comprised in lot No. 2 which were not the subject-matter of the suit, yet a valid charge was created thereon outside the suit by the compromise petition of the mortgagor. [p. 736, cols. 1 & 2.]

The distinction between a mortgage and a charge under section 100 of the Transfer of Property Act is that in the case of the former there is a transfer of the property to the creditor which requires registration, while in the case of the latter there is no such transfer the debtor only agreeing that the property shall be security for the re-payment of the debt. [p. 736, col. 1.]

Appeal against the decree of the Subordinate Judge, 2nd Court, Hooghly, dated the 24th of March 1915, reversing that of the Munsif, 1st Court, Serampore, dated the 30th January 1914.

Dr. *Jadu Nath Kanjilal*, for the Appellants.

Babus *Shib Chander Palit*, *Nani Lal Dey* and *Biraj Mohan Majumdar*, for the Respondents.

JUDGMENT.

CHITTY, J.—The plaintiff brought this suit to establish his right under a Kat Kobala, dated 22nd February 1906, executed by Abdul Hakim, predecessor-in-interest of defendants Nos. 1 to 4. Defendants Nos. 5 and 6 were added as claiming the mortgaged property under a prior title. The suit was decreed by the Munsif, but on appeal the decree was set aside and the suit dismissed. The plaintiff has appealed to this Court. The facts found are as follows:—On 15th October 1895 Abdul Hakim and Abdul Sobhan mortgaged certain properties to Baroda Prosad De and Sasil Kumar De, defendants Nos. 5 and 6. The mortgagees brought a suit (No. 161 of 1902) to enforce their mortgage. On 27th January 1903 a petition of compromise was filed and the suit decreed in accordance therewith (Exhibits A and C). By that the decretal amount was fixed at Rs. 447 and arrangement made for payment by instalment with the usual default clause. It was further provided that if the whole amount should not be recovered by sale of the mortgaged properties, the plaintiffs would be entitled to recover it by sale of certain other properties specified in the schedule to that petition. The mortgagors declared that they had created no other charge on those properties, and the petition went on to say: "The aforesaid decretal amount Rs. 447 or any portion thereof shall be a charge on the mortgaged properties mentioned in the plaint and the properties described in the schedule to this petition, and the aforesaid Rs. 447 shall be recovered according to the instalments mentioned before and in default of payment it shall be recovered at once from the mortgaged property and the properties mentioned in the schedule to this petition. The money shall be recovered according to the terms mentioned above and so long as the whole amount is not realised it shall remain a charge thereon." The instalments were not paid and the decree-holders, defendants Nos. 5 and 6, brought Execution Case No. 361 of 1903 to enforce payment. The properties comprised in the mortgage and also those which purported to be charged under the compromise were brought to sale on 12th January 1904 and purchased by the decree-holders themselves. The sale certificate was made out on 22nd February 1904 and possession was given to them by the Court on 26th July 1905. On 19th September 1905 Abdul Hakim applied to set aside the sale (Miscellaneous Case No. 177 of 1905). In that case a Solenama was filed on 17th March 1906 (Exhibit B). By that it was agreed that if Abdul Hakim paid to the decree-holders the full amount of the decree within two months, the sale of the mortgaged properties and of the other properties under the terms of the previous compromise should be set aside. If he failed to pay then the sale of the mortgaged properties (lot No. 1) should be confirmed, and for the balance due in excess of the sale-proceeds the properties included in the compromise (*i.e.*, lot No. 2) should be put to sale again. It would appear from the order sheet of Execution Case No. 361 of 1903 that the Court allowed an adjournment of two months, presumably for the compromise to be carried out by payment by the judgment-debtors. It is stated in the written statement of defendants Nos. 5 and 6 that the judgment-

debtor having failed to pay, the sale of the mortgaged properties remained confirmed and that of the remaining properties was cancelled. We adjourned the hearing of this appeal for the production of the order-sheet in Miscellaneous Case No. 177 of 1905 that we might see exactly what orders the Court passed in that matter. It was apparent that the sale of the properties charged having been effected by the Court could only be set aside by an order of Court. The appellant, however, failed to produce the document required. It appears, however, also from the written statement of defendants Nos. 5 and 6 that they again took out execution of the decree (Execution Case No. 191 of 1906) and brought the properties charged and other properties to sale and purchased them themselves on 16th January 1907. That sale was confirmed by the Court on 4th March 1907 and possession given to the decree-holders by the Court on 1st May 1907. The present suit was filed 5 years later on 27th May 1912. It is to be noted that the mortgage, which the plaintiff is now seeking to enforce, was executed on 22nd February 1906, about a month before the compromise petition in Miscellaneous Case No. 177 of 1905. It is expressed to be made, and the money borrowed for the purpose of paying off defendants Nos. 5 and 6 the decree-holders in Suit No. 161 of 1902. The plaintiff must, therefore, be taken to have had notice of the then existing state of facts. What then was the legal position of the parties at that time? It has been argued before us for the plaintiff appellant that no valid charge was created upon the properties, lot No. 2 by the Solenama (Exhibit A) and the decree (Exhibit C). It was urged that to create a valid charge registration of the document creating it was necessary. That is clearly not so. The distinction between a mortgage and a charge under section 100 of the Transfer of Property Act is that in the case of the former there is transfer of the property to the creditor, which requires registration, in the case of the latter there is no such transfer. The debtor only agrees that the property shall be security for the repayment of the debt. It may be conceded that the consent decree of 27th January 1903 could not affect the properties now in question, which were not the subject-matter of that suit, No. 161 of 1902. But there was nothing to prevent the judgment-debtors by agreement from creating a valid charge upon properties outside the suit, and that they undoubtedly purported to do by the petition Exhibit A. It is not, however, necessary to decide as to the validity of the charge. These properties (lot No. 2) were undoubtedly brought to sale by the Court in execution of that decree and sold to the decree-holders. Whether there was a formal attachment or not does not matter, as the sale was with the consent and at the request of the judgment-debtors. This being so, it is clear that all right, title and interest of the judgment-debtors to and in those properties were extinguished on 12th January 1904. When, therefore, Abdul Hakim purported to mortgage these properties to the present plaintiff on 22nd February 1906, it is clear that he had no subsisting interest in them which he could transfer to the plaintiff. If the sale of these properties was subsequently set aside, and Abdul Hakim thus again acquired some interest in those properties, the plaintiff might have claimed that his mortgage should operate on that interest (see section 43, Transfer of Property Act). It is not, however, suggested that he even exercised any such option, and without his having done so the properties were again sold in execution of the decree in Suit No. 161 of 1902 as above stated. Further, defendants Nos. 5 and 6 were undoubtedly transferees in good faith for consideration without notice of the existence of the said option, for it is not suggested that they were at all aware of the plaintiff or of his mortgage. Their rights could not, therefore, in any way have been impaired. I am of opinion that in any view of the case the plaintiff cannot possibly succeed against defendants Nos. 5 and 6. I would accordingly dismiss the appeal with costs, one gold *mohur* extra being allowed for the second hearing caused by the adjournment.

SMITHER, J.—I agree.

Appeal dismissed.

ARJUN SUIE v. EMPEROR.

PATNA HIGH COURT.
CUTTACK CIRCUIT.
CRIMINAL REVISION No. 14 OF 1917.
July 17, 1917.
Present:—Mr. Justice Mullick and Mr. Justice Atkinson.
ARJUN SUIE—ACCUSED—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXI, r. 32—'Injunction', meaning of—Order to furnish accounts, whether injunction—Failure to obey order, consequences of.

An injunction is in its essence the grant of a mode of relief consequential upon an infringement of a legal right. It forms part of a decree made at a hearing upon the merits, whereby the defendant is perpetually inhibited from the assertion of a right, or perpetually restrained from the commission of an act contrary to equity and good conscience. [p. 738, cols. 1 & 2.]

A preliminary decree in a suit for accounts directing the defendant to furnish and render accounts is not an "injunction" within the meaning of rule 32 of Order XXI of the Code of Civil Procedure and the failure of the defendant to furnish accounts does not entitle the Court to take proceedings under that section. [p 738, col. 2]

Criminal revision against an order of the Sessions Judge, Cuttack, dated the 12th April 1917, confirming that of the Sub-Divisional Magistrate, Kendrapara, dated the 14th March 1917.

Mr. *Brojoraj Choudhury*, for the Petitioners.

Mr. *Durga Prasanna Das*, for the Crown.

JUDGMENT.

ATKINSON, J.—The petitioners before us were charged with offences under sections 186 and 225B of the Indian Penal Code and they have each been convicted of offences under these sections and sentenced, petitioner No. 3 to two months' and petitioners Nos. 1 and 2 to one month's rigorous imprisonment each.

The facts of the case are very short and may be briefly stated as follows:—

A Zamindar, by name Srimati Pramada Devi, was the plaintiff in a suit in which the petitioner No. 3 was the defendant. The petitioner No. 3 was the Tahsildar of the plaintiff in that suit, which was numbered Suit No. 1 of 1916 The suit was for account as between a principal and an agent and a preliminary decree was granted in that suit on the 10th of June 1916, and by that preliminary decree petitioner No. 3, who was the defendant in the suit, was required within one month from the date of the preliminary decree to furnish and render accounts. The defendant failed within the time specified in the decree to furnish the accounts and consequently it is contended that he was guilty of disobeying the "injunction" granted by the Court and that, therefore, the Court was entitled under Order XXI, rule 32, to take proceedings against the defendant as if the defendant, petitioner No. 3, had been guilty of committing a breach of an "injunction." Everything in the case touching the guilt of the accused depends upon the validity of the order directing the attachment of the petitioner No. 3. If the Court had no power to direct the attachment of the petitioner No. 3, then no offence would have been committed under sections 186 and 225B.

Order XXI, rule 32, re enacts in a revised form section 260 of the old Code of Civil Procedure. The old Code provided that where a party to a decree for specific performance or restitution of conjugal rights or for an order requiring the performance of, or abstention from, any other particular act disobeys or refuses to comply with the order, having had a reasonable opportunity of obeying the decree, then such person would be liable to detention of his person or attachment of his property. Under the old Code it has been held in two cases [*Degamber Mozumdar* v. *Kallynath Roy* (1) and *Rajhunath* v. *Ganpati* (2)] that under the words "performance of, or abstention from, any other particular act," a party who has been ordered to file accounts and did not do so might be proceeded against under section 260 of the old Civil Procedure Code. But the words "performance of, or abstention from, any other particular act" have been completely eliminated from Order XXI, rule 32, and in lieu thereof the word "injunction" has been substituted. Now it is admitted that the word 'injunction' is not to be used in the narrow sense defined in the Specific Relief Act, but that under the Order and rule cited it has a more extended meaning. The learned

(1) 7 C. 654; 9 C. L. R. 265; 3 Ind. Dec. (N. S.) 970.
(2) 27 A. 374; A. W. N. (1905) 3.

Vakil who appears on behalf of the prosecution contends that the word is to be used in its ordinary, general and popular sense as if meaning to "order" or "enjoin." I do not think that the learned authors who revised the Code of 1908 used the word "injunction" without a very positive and express intention, or that they did not know that the word injunction had a specific legal meaning, and I think that they intentionally used the word in order to remove the ambiguity which existed by the use of the general term "performance of, or abstention from, any other particular act." No doubt these words were held, in the decisions cited above, to have a very wide general meaning and if the words used in the old section 260 of the Civil Procedure Code had been left unrepealed they might, having regard to the authorities cited, be considered to apply to this case; but I think that it was the intention of the authors of the Code of 1908 to restrict the meaning of the words as used in the old section to the legal term "injunction" as generally known and legally understood. In effect I think it was the intention of the framers of the Code of 1908 to amend the old section 260 so as to overrule the effect of the decisions in *Degambar Mozumdar* v. *Kallynath Roy* (1) and *Rajhunath* v. *Ganpati* (2), which seemed out of harmony with the general scope and intendment of that section.

It has been contended on behalf of the prosecution before us that every order of a Court requiring a person to do a certain act is an injunction. I cannot for one moment yield to that argument. An injunction has been recognized throughout legal history to have a defined meaning. It is, in its essence, the grant of a mode of relief consequential upon an infringement of a legal right. Where a party has had a right invaded then the Court would interfere; and consequential to a declaration that the party injured has had his right infringed, the Court grants relief by way of injunction restraining the invader from causing further injury. No better definition of the word injunction could be found than that given in Wharton's Law Lexicon, where it is stated that an injunction "forms part of a decree made at a hearing upon the merits, whereby the defendant is perpetually inhibited from the assertion of a right, or perpetually restrained from commission of an act contrary to equity and good conscience." Now we are unable to hold that the order embodied in the decree of the 10th of June 1916 was an order by way of consequential relief following from any declaration of a right that the plaintiff was entitled to in the suit. It was a mere order passed by the Court itself requiring the defendant to do an act to enable the Court to carry out its preliminary decree and do justice between the parties. In no sense was that an order consequential upon the right of the plaintiff to have an account rendered as between himself and the defendant, petitioner No. 3. We cannot give to the word "injunction" the very loose and general meaning which has been contended for by the learned Vakil for the prosecution and which has been sanctioned by the lower Courts. Consequently it appears to us that there was no refusal by the petitioner to obey an injunction issued by the Court within the meaning of Order XXI, rule 32, and no order could, therefore, legally have been passed by reason of the decree of the 10th of June to justify the arrest of the petitioner No. 3. Consequently his arrest was unlawful and illegal and he was not liable to be prosecuted jointly with the other accused, petitioners Nos. 1 and 2, for offences under sections 186 and 225 B of the Indian Penal Code. I, therefore, consider we are bound to set aside the conviction and sentence passed upon the petitioners; and the petitioners, being on bail, are discharged from their bail.

MULLICK, J.—I agree. In my opinion an injunction is a just and convenient remedy for the purpose of protecting or enforcing the legal rights of the parties either as enacted by law or allowed by equity. In the present case the preliminary decree for account was not an injunction in this view of the meaning of the word; and, therefore, the conviction and sentence in my opinion are unsustainable.

Rule made absolute.

TILAK RAM *v.* DALIP SINGH.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 1022 OF 1917.

January 25, 1918.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

TILAK RAM—APPLICANT

versus

Chaudhri DALIP SINGH—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 195—Sanction, when can be said to be "given"—Duration of sanction Period of six months, commencement of.

A sanction granted under section 195 of the Criminal Procedure Code is "given" by the Court which first grants it, and not by the Court which subsequently refuses to revoke it. Hence the period of six months mentioned in section 195, clause (6), for which the sanction is to remain in force, must be computed from the day on which it is "given" by the Court which first grants it, and not from the date of the refusal of a superior Court to revoke it. [p. 739, col. 2; p. 740, col. 1.]

Criminal revision from an order of the Additional Sessions Judge, Meerut, dated the 3rd November 1917.

Mr. *A. H. O. Hamilton*, for the Applicant.

Mr. *Nehal Chand*, for the Opposite Party.

JUDGMENT.—In this case it appears that sanction was granted to a litigant in the Revenue Court to prosecute the opposite party for alleged offences under section 471 and other sections of the Indian Penal Code. The sanction was granted on the 1st of November 1915 by an Assistant Collector. On the 11th of May 1916 this sanction was set aside, on the technical ground that the Assistant Collector who had granted sanction had no jurisdiction to do so. The High Court held that the Additional District Judge was wrong and sent the case back, with the result that the Additional District Judge held that a *prima facie* case had been made out why the opposite party should be prosecuted and he accordingly refused the application to revoke the sanction given by the Assistant Collector. A considerable time had elapsed in the meantime, and in July 1917 a criminal complaint was lodged. This was met with the objection that the sanction was out of date and that, therefore, the Court could not take cognizance of the offence. This objection found favour with the Court before which the complaint was filed, but the Sessions Judge held that the sanction was still in force—whereupon the opposite party applied in revision to this Court. A learned Judge considering the matter of some importance has referred the question to a Bench of two Judges.

Section 195 of the Code of Criminal Procedure provides that no Court shall take cognizance of certain offences committed under certain circumstances without the previous sanction therein referred to. Clause (6) is as follows:—"Any sanction given or refused under this section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate and no sanction shall remain in force for more than six months from the date on which it was given, provided that the High Court may, for good cause shown, extend the time." In the present case the High Court has never been asked, nor has it granted, any extension of time. The question which we have to decide is whether under the circumstances of the present case it can be said that the sanction was still in force. If we hold that the sanction was "given" on the 1st of November 1915, it is clearly long since out of date. On the other hand if we hold that the sanction was "given" after the case had gone back to the Additional District Judge and he had refused the application to revoke the sanction granted by the Assistant Collector, then the prosecution was begun within time. We think it is impossible to hold on the clear meaning of the words of clause (6) of section 195 that the sanction can possibly be said to have been "given" by the Additional District Judge. The application before him simply was an application to revoke sanction which had been previously granted, and his order was to refuse to revoke that sanction. It may be said that the opposite party by taking proceedings can always use up the whole six months in applications to the Court and thus make the sanction of no avail. There are two answers to this. In the first place, if a party to whom sanction has been given chooses to take advantage of that sanction and lodges his complaint, then he will be able to continue the prosecution notwithstanding any applications that the other side may make. It is possible that the Court might stay the prosecution pending the decision of an application to revoke the sanction, but the prosecution would nevertheless have been begun within time. In the second place, there is

an express power given to the High Court to extend the time for good cause shown. Our attention has been called to two cases of the Madras High Court. In *In re Muthukudam Pillai* (1) a Bench of two Judges expressly held that the sanction in a case like the present is "given" by the Court who first granted it, and not by the Court who subsequently refused to revoke the sanction. A different view was taken by a Bench of the same High Court in *Muthuswami Mudali* v. *Veeni Chetti* (2) and in a more recent case, *Public Prosecutor* v. *Eaver Unithiri* (3). We prefer to follow the earlier ruling of two Judges. The result is that we allow the application, set aside the order of the Sessions Judge and restore that of the Court of first instance.

Application allowed.

(1) 26 M. 190; 2 Weir 200.
(2) 30 M. 382; 17 M. L. J. 266 (F. B.); 2 M. L. T. 239; 6 Cr. L. J. 102.
(3) 24 Ind. Cas. 145; 26 M. L. J. 511; 15 M. L. T. 403; 15 Cr. L. J. 409.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 3 OF 1918.

February 8, 1918.

Present:—Justice Sir Charles Chitty, KT., and Mr. Justice Smither.

ABDUL HAKIM KHAN—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 403—Acquittal on charge under s. 465 of the Penal Code, whether prevents subsequent trial for offence under s 467—Penal Code Act XLV of 1860, ss 465, 467.

A person tried and acquitted on a charge under section 465, Indian Penal Code, may on the same facts be committed to the Court of Session for trial for an offence under section 467 on the allegation of the prosecution that the document said to have been forged is a valuable security Such a case clearly falls within the purview of section 403, clause 4, Criminal Procedure Code [p. 740, col. 2.]

Rule against an order of the District Magistrate.

FACTS of the case appear from the judgment.

Mr. *Orr*, Deputy Legal Remembrancer, for the Crown.—Section 403 (4), Criminal Procedure Code, shows that a person acquitted of any particular offence may, in circumstances like this, be charged with and tried for any other offence. The petitioner can, therefore, be tried for an offence under section 467, Indian Penal Code, although he was previously tried by the Magistrate under section 465, Indian Penal Code, and acquitted.

Moulvi *A. K. Fazlal Huq* (with him Babus *Atindra Nath Mukerjee* and *Gagan Chand Boral*), for the Petitioner.—The trial of the accused upon exactly the same facts upon which he was acquitted in a previous trial is bad in law, and so the commitment by the Magistrate to the Court of Session cannot be made on the same facts on which the accused was tried on a previous occasion and acquitted. The words "any other offence" in section 403, Criminal Procedure Code, mean any other distinct offence, and not merely an aggravated form of the same offence. The case, therefore, does not fall within the purview of section 403 (4), Criminal Procedure Code. Referred to *King-Emperor* v. *Ayyan* (1), *Ganapathi Bhatta* v. *Emperor* (2), *Queen-Empress* v. *Gundya* (3).

JUDGMENT.—This Rule was granted to the petitioner calling on the District Magistrate to show cause why the commitment of the petitioner should not be set aside, on the ground that the trial of the accused upon exactly the same facts upon which he was acquitted in a previous trial was bad in law. We asked the Deputy Legal Remembrancer to assist us in this matter and he has shown cause. After hearing the parties we think that the case clearly falls within the purview of section 403 (4), Criminal Procedure Code. The petitioner was tried by the Magistrate under section 465, Indian Penal Code, and acquitted. He was there charged on exactly the same facts, namely, with the same forgery of the same document which is now alleged by the prosecution to be a valuable security and the offence with regard to which will fall under section 467, Indian Penal Code. The illustrations to section 403 show that a

(1) 24 M. 675; 2 Weir 699.
(2) 19 Ind. Cas 310; 36 M. 308; 24 M. L. J. 463; 13 M. L. T. 360; 14 Cr. L. J. 214.
(3) 13 B. 502; 13 Ind. Jur. 469; 7 Ind. Dec. (N. S.) 333.

person acquitted or convicted in such circumstances may be charged with and tried for the other offence. The case of *King-Emperor* v. *Ayyan* (1) does not really assist the petitioner in any way; on the contrary, it is against him. It is unnecessary for us to decide whether the first trial was wholly void or not, or whether the document is in fact, a valuable security falling within section 467 Indian Penal Code. As to this it is sufficient to say that the prosecution allege it to be so, and that is the offence for which the petitioner will now be tried. We accordingly discharge the Rule.

Rule discharged.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 759 OF 1917.

November 13, 1917.

Present:—Mr. Saunders, J. C.

NGA CHIT—APPLICANT

versus

NGA YA AND OTHERS RESPONDENTS.

Criminal Procedure Code (Act V of 1898), ss 145, 435 (3), 503—Proceedings under s. 145—Revision—High Court, power of interference of—Previous trial, whether bar to proceedings.

An order passed under the provisions of section 145 and proceedings under Chapter XII of the Code of Criminal Procedure is not subject to revision in view of the terms of section 435 (3) of the Code. But that section does not deprive the High Court of jurisdiction unless the proceedings are in fact, and not merely in name, proceedings under Chapter XII of the Code. [p. 741, col. 2.]

Proceedings under section 145 do not constitute a trial and are not in the nature of a trial. They are in the nature of Police proceedings in order to prevent the commission of offences, and the fact that there have been criminal charges brought by one or other of the parties against each other so far from being a bar to action under Chapter XII constitutes evidence which may possibly prove the danger of disputes which it is desired to prevent. [p. 741, col. 2, p. 742, col. 1.]

Where it was found that one of the parties to a proceeding under section 145 of the Code of Criminal Procedure had already been prosecuted and acquitted under section 447 of the Penal Code:

Held, that this was no bar to the proceedings. [p. 741, col. 2.]

Mr. *Vasudevan*, for the Applicant.

Mr. *Mitter*, for the Respondents.

JUDGMENT.—This is an application to revise an order of the Sub-Divisional Magistrate, Madaya, passed, or purporting to be passed, under section 145 of the Code of Criminal Procedure.

It is objected that an order passed under the provisions of that section and proceedings under Chapter XII of the Code of Criminal Procedure are not subject to revision in view of the terms of section 435, clause 3, of the Code. This is no doubt the case, but that section does not deprive the High Court of jurisdiction, unless the proceedings are in fact, and not merely in name, proceedings under Chapter XII of the Code of Criminal Procedure. There is a very general consensus of opinion of the High Courts in India on this point, see, for instance, *Jhingai Singh* v. *Ram Pratap* (1) and *In re Pandurang Govind Pujari* (2). Here there was an application by a person alleging possession of certain land, that his possession was being interfered with by certain persons and that there was likely to be a breach of the peace. The Magistrate upon this in the diary recorded an order: "I think I should take action under section 145, Criminal Procedure Code. Issue notices to respondents to put in written statements." A written statement was put in and the Magistrate, then without further enquiry, held that one of the respondents and one other person having been prosecuted and acquitted under section 447 of the Indian Penal Code, under section 403 of the Code of Criminal Procedure he and the other respondents were not liable to be tried again in respect of the same subject-matter, and he dismissed the application.

The order was clearly wrong. Proceedings under section 145 do not constitute a trial and are not in the nature of a trial. They are in the nature of Police proceedings in order to prevent the commission of offences, and the fact that there have been criminal charges brought by one or other of the parties against each other, so far from being a bar to action under

(1) 1 Ind. Cas. 762; 31 A. 150; 6 A. L. J. 113; 9 Cr. L. J. 382.

(2) 25 B. 179; 2 Bom. L. R. 755.

Chapter XII, constitutes evidence which may possibly prove the danger of disputes which it is desired to prevent.

The order of the Magistrate is set aside and he is directed to proceed according to law, that is to say, to follow the procedure laid down in section 145 of the Code of Criminal Procedure and pass orders.

Order set aside.

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 702 OF 1917.

November 12, 1917.

Present:—Mr. Justice Broadway.

ATTAR SINGH AND OTHERS—PETITIONERS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss 99, 147—Right of private defence, against public servant—Rioting—Warrant, defective execution of—Assault on Police—Offence.

Two persons were accused under section 498 of the Penal Code of the abduction of one *K*. The Magistrate, intending to act under section 90 of the Code of Criminal Procedure, ordered the issue of a warrant for the arrest of *K*. By mistake, however, the warrant stated that *K*. herself was charged with an offence under section 498. The officer, to whom the warrant was made over for execution, went with some constables to the village of *K*. and on her failure to furnish bail arrested her and had taken her a short distance from the village, when the accused rescued *K*. and inflicted injuries on the Police:

Held, that the accused were guilty of an offence under section 147 of the Penal Code, the common object being to rescue *K*., the causing of hurt to the Police being a necessary incident of the rescue and, therefore, a part of the common object. [p. 742, col. 2; p. 743, col. 1.]

Petition for revision of the order of the Sessions Judge, Amritsar, dated the 26th April 1917.

Messrs. *Beechey* and *Jai Gopal Sethi*, for the Petitioners.

Mr. *Dalip Singh*, for the Crown.

JUDGMENT.—The facts out of which this revision has arisen are briefly as follows:—

One Attar Singh lodged a complaint against Chatar Singh and another under section 498, alleging that *Musammat* Karmon, his daughter-in-law, had been abducted from his custody by the two persons named. The Magistrate before whom the case was pending ordered the issue of a warrant for the arrest of *Musammat* Karmon, apparently intending to act under section 90 of the Criminal Procedure Code. By an error in the office the warrant was drawn up in the wrong form and stated that *Musammat* Karmon herself was charged with an offence under section 498, Indian Penal Code. This warrant was made over to Dil Muhammad, Head Constable, who went with other constables to Mauza Koharka to execute it. The story as told by Dil Muhammad is that he showed the warrant to *Musammat* Karmon and told her that it was a bailable one. Bail was not furnished and certain of the petitioners, who were present, advised the woman to run away. Whereupon Dil Muhammad arrested her and with his posse of Police had taken her to a distance of about 200 *kadams* from the village when a large concourse of people assembled, amongst whom were the present petitioners, who took away the woman from their custody inflicting certain injuries on the Police. The petitioners were sent up for trial under sections 147, 332 and 225, Indian Penal Code, and were convicted and sentenced under those sections. On appeal the learned Sessions Judge held that sections 332 and 225, Indian Penal Code, were inapplicable inasmuch as the warrant was defective, but held that section 147, Indian Penal Code, applied, the common object of the appellants being to rescue *Musammat* Karmon and the causing of hurt to the constables being a necessary incident of the forcible taking away of the woman from the custody of the Police. Relying on *Emperor* v. *Gaman* (1) he, therefore, maintained the convictions and sentences under section 147, Indian Penal Code. The petitioners have now moved this Court on the revision side through Mr. Beechey who has addressed me on their behalf, and I have heard Mr. Dalip Singh on behalf of the Crown.

For the petitioners Mr. Beechey urged that inasmuch as the warrant was not only defective but was beyond the jurisdiction of the Magistrate altogether, the

(1) 18 Ind. Cas. 894; 16 P. R. 1913 Cr.; 155 P. L. R. 1913; 20 P. W. R. 1913 Cr.; 14 Cr. L. J. 142.

petitioners were not guilty of any offence whatever and were perfectly within their rights in rescuing *Musammat* Karmon from the custody of the Police. In support of his contention he has referred me to various rulings, the most important of which is the one reported as *Binu Haldar* v. *Probhat Chunder* (2). In this case a person had applied under section 100, Criminal Procedure Code, for a search warrant and the Magistrate issued a warrant under section 96, Criminal Procedure Code. The Police acting under that warrant were resisted by the petitioners in that case, who used force and violence. It was held that the issue of the warrant under section 96 of the Code was wholly illegal and, therefore, the warrant was invalid, and further that the words "not strictly justifiable by law" under section 99, Indian Penal Code, referred to cases where there is an excess of jurisdiction as distinct from a complete absence of jurisdiction and that, therefore, the resistance offered did not come within the terms of the first paragraph of section 99, Indian Penal Code.

On the other hand Mr. Dalip Singh has laid stress on the ruling of this Court relied on by the learned Sessions Judge, *Emperor* v. *Gaman* (1), in which the facts were as follows:—One Fateh Ali, alleging that his wife had been concealed and wrongfully confined in the house of one Gama, applied to a Magistrate for the issue of a search warrant under section 100, Criminal Procedure Code. The application was granted and a warrant was issued, but was defective in that the name and designation of the Police Officer who was to execute the warrant was inadvertently omitted. When the warrant reached the Police Station, the Sub-Inspector to whom it had been endorsed was absent and the Head Constable who was for the time being in charge proceeded to Gama's house to execute the warrant accompanied by a constable and others. In exection of the warrant the woman was found and apprehended with a view to her being produced in Court. Gama raised a cry for help, whereupon fourteen persons went to his assistance and took the woman away by force. The Police Officer received injuries. It was held that although no conviction could be had under section 225 (*b*) and section 332, Indian Penal Code, if the prosecution could establish that hurt was caused and that the causing of hurt was the common object of the rescuers, the rescuers would be liable to punishment under section 147 if there were more than five persons, and under section 323 if there were less than that number. Mr. Beechey has on the strength of the Calcutta ruling referred to above sought to differentiate this ruling from the facts of the present case, by urging that in *Emperor* v. *Gaman* (1) the Magistrate had been acting within his jurisdiction in issuing the warrant and that that was merely defective, whereas in the present case the Magistrate had no jurisdiction to issue the warrant at all. It seems to me, however, that the Calcutta ruling is not quite on all fours with the present case, for in that case the execution of the warrant had been *resisted* whereas in the present case the warrant had, as a matter of fact, been executed and *Musammat* Karmon was being taken away by the Police in order to her production before the Magistrate and the question, therefore, arises whether the present petitioners were justified in using criminal force to remove her from the custody of the Police. In my opinion the protection afforded by section 99, Indian Penal Code, to a public servant refers to the public servant actually doing a specific act and that so long as he is acting in good faith under colour of his office, he is protected from assault though the act may not be strictly justifiable by law. In the present case the Police were possessed of a warrant under which they were acting and, therefore, although resistance to the execution of that warrant was not unjustifiable, I do not think that the petitioners can be held to be entitled to assault and injure the Police in the manner they have done in this case. In rescuing *Musammat* Karmon every one of these concerned must have been perfectly well aware that violence would have to be used and that hurt would in all probability be caused before they could attain their object. I, therefore, think that the learned Sessions Judge is right in holding that the causing of hurt was a necessary incident of the rescue and, therefore, formed

(2) 6 C. L. J. 127; 11 C. W. N. 836; 6 Cr. L. J. 38.

a part of the common object. I, therefore, maintain the convictions but in the circumstances reduce the sentences passed on the petitioners to that already undergone. Petitioners will be discharged from their bail bond.

Sentences reduced.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 101-B OF 1916.

November 29, 1916.

Present:—Mr. Mittra, A. J. C.

RADHAKISAN—APPLICANT

versus

THE SECRETARY, MUNICIPAL COMMITTEE, AMRAOTI—NON APPLICANT.

Berar Municipal Law of 1886, *ss.* 85, 86, 116, 130, 133, 138, 151—*Application for permission to build, no order passed on, effect of—Steps and balcony projecting over street—Encroachment—Notice to remove obstruction, necessity of—Notice to show cause, whether notice to remove—Daily fine, when can be imposed—Rules* 10 *and* 30 *framed under s.* 116, *whether* ultra vires

Accused applied to the Municipal Committee, Amraoti, for sanction to build a house, but no order was passed on the application within one month by the Committee. The applicant built steps over a road-side drain and a balcony eleven feet high projecting over it without the written permission of the Committee. The latter issued a notice to the former to show cause why the balcony and steps should not be removed and why he should not be prosecuted. The applicant was then prosecuted on a complaint made by the Secretary duly authorised by a resolution of the Committee and was convicted of two offences, one in respect of the steps and the other in respect of the balcony, under rule 10 read with rule 30 of the rules framed under section 16 of the Berar Municipal Law and fined Rs. 25 on each count The steps and the balcony were ordered to be removed within eight days, on failure of which he was ordered to pay a continuing daily fine of Re. 1:

Held, that the notice to show cause was not a notice to remove the obstruction as required by section 86 (2) of the Berar Municipal Law. [p. 746, col 1.]

Section 86, sub-section (2) contemplates a notice issued personally to an individual. [p. 746, col. 1.]

Section 85 of the Berar Municipal Law merely requires a person intending to erect or re-erect any building to give written notice of his intention to the Committee, but the mere fact that such a permission was applied for and no order prohibiting the errection was passed within one month does not place the applicant in the same position as if written permission was accorded to him by the Committee as required by section 86. So far as the encroachments dealt with by section 86 are concerned, they are not in themselves punishable though declared unlawful by that section, but it is the disobedience to the order of the Committee for their removal under section 130 which has been made punishable. [p. 745, cols. 1 & 2; p. 746, col. 1.]

A balcony eleven feet above the level of a street is not an encroachment within the meaning of section 132 of the Berar Municipal Law. [p. 746, col. 1.]

Section 133 of the Berar Municipal Law makes an encroachment punishable without a notice of removal being issued to the offender. That section does not, however, justify a daily fine but only allows a fine which may extend to Rs. 50. [p 746, col. 1.]

The policy of the Berar Municipal Law is not to authorise a daily fine except in cases of contumacy, that is, disobedience of a lawful order. [p. 747, col. 1.]

All that section 151 of the Berar Municipal Law lays down is that a Court shall not take cognizance of an offence under the Berar Municipal Law, except on the complaint of the Committee or of some person authorised by the Committee in their behalf. The complaint need not specify the section or rule of the Berar Municipal Law which has been broken It need only state the facts and it is for the Court to decide under what section or rule an offence has been committed. [p. 746, cols. 1 & 2.]

When a Statute expressly deals with any matter and lays down certain procedure, it is not competent to a Corporation to repeal any of the provisions of the Act under which power to make rules has been given. [p. 748. col. 1]

The rules framed under section 116 of the Berar Municipal Law must be consistent with the Act. The effect of rule 10 framed under section 116 of the Berar Municipal Law is to do away with the notice required by section 138, and the rule is, therefore, *ultra vires*. [p. 748, col. 1.]

Revision against the order of the First Class Magistrate, Amraoti, dated the 12th September 1916, in Criminal Appeal No. 51 of 1916, dated the 12th September 1916.

The Hon'ble Mr. *M. V. Joshi*, for the Applicant.

Mr. *G V. Deshmukh*, for the Non Applicant.

ORDER.—The applicant has been convicted of two offences under rule 10 read with rule 30 of the rules framed under section 116 of the Berar Municipal Law, 1886. On the 7th July 1915 he applied for sanction for building and submitted the usual plans with specifications. No orders were passed within one month by the Municipal Committee, Amraoti. It is admitted that the applicant has built steps

over a roadside drain and a balcony projecting over it without the written permission of the Committe. On the 25th of September 1915 a notice was issued to the applicant to show cause why the balcony and the steps shall not be removed and why he shall not be prosecuted. What happened on the date fixed for the appearance of the applicant before the Committee is not clear from the record. No further notice was sent to the applicant. and the prosecution has been started upon a complaint made by the Secretary who was duly authorised by a resolution of the Committee, dated the 31st of October 1915, Exhibit P 3. This resolution sets out the facts of the case and recites that the applicant cannot be successfully prosecuted so far as section 85 was concerned, as no orders were passed by the Committee within one month. But as regards the steps and balcony projecting over the drain, his prosecution under rule 10 read with rule 30 of the building rules was sanctioned. A Bench of Honorary Magistrates convicted him of two offences, one in respect of the steps and fined him Rs. 25, and one in respect of the balcony for which there was a fine of Rs. 25. The steps and the balcony have been ordered to be removed within eight days, and if he fails to do so he is to pay a continuing daily fine of Re. 1. He appealed to the First Class Magistrate of Amraoti invested with appellate powers. His appeal has been dismissed, and this application for revision has been filed by him.

It is argued that, as the applicant gave a notice as required by section 85 of the Berar Municipal Law, 1886, and as no objection was raised by the Committee within one month, he is not guilty of any offence at all under section 86. Section 85 merely requires a person intending to erect or re-erect any building to give written notice of his intention to the Committee. Every owner of land has a right to build over his own land, but in a Municipal town he must comply with the regulations for building. Section 85 merely requires a communication of an intention to build. The mere fact that the applicant asked for permission to build with steps over the drain and a projecting balcony and no order prohibiting the erection was passed within one month, does not place him in the same position as if he had obtained the written permission of the Committee. Section 86 says: "(1) It shall not be lawful, unless with the written permission of the Committee, for the owner or occupier of any building in a street to add to, or place against or in front of, the building any projection or structure overhanging, projecting into, or encroaching on the street, or into, or on any drain, sewer or aqueduct therein. (2) The Committee may, by notice, require the owner or occupier of any building to remove or alter any projection, encroachment or obstruction built or placed against, or in front thereof, if the same overhangs or projects into, or encroaches on any street, or projects into, or encroaches on any drain, aqueduct or sewer in the street." It is urged that section 86 refers to existing buildings and not to proposed buildings. But I can see no ground for making any such distinction. The acts of the applicant in erecting the steps over the drain and erecting a balcony, were, therefore, not lawful.

The sub-section (2) of section 86 says that the Committee may, by notice, require the owner or occupier of any building to remove the encroachment. I am using the word to include the various kinds of tort prohibited by section 86 (1). It is urged on behalf of the Committee that this merely authorises it to issue notice for the removal of the encroachment, but the Committee is not bound to do so. This is perfectly correct. But although section 86 declares the act to be not lawful, yet a person cannot be punished unless his case comes under section 188, which lays down that whoever disobeys any lawful directions given by the Committee by public notice lawfully issued by it under the powers conferred upon it by Chapter VI, or any written notice lawfully issued by it under the powers so conferred, or fails to comply with the conditions subject to which any permission was given by the Committee to him under those powers shall, if the disobedience or omission is not an offence punishable under any other section, be punished with fine, which may extend to fifty rupees and, in the case of a continuing breach, with a further fine which may extend to five rupees for every day after the first during which the breach continues. It is clear that, so far as the encroachments

dealt with by section 86 are concerned, they are not in themselves punishable; but it is the disobedience to orders of the Committee for their removal which has been made punishable.

I have now to consider whether any notice such as is contemplated by section 138 was issued. The only notice on the record is that contained in Exhibit P-1, dated the 25th of September 1915. It does not ask for the removal of the encroachment, but only calls upon the applicant to show cause why the encroachment shall not be removed. The disobedience to the notice to show cause is not punishable. I hold that there was no such notice as is contemplated by section 86 (2). The first part of section 138 refers to lawful directions given by the Committee by public notice under the powers conferred upon it by Chapter VI, and it is suggested on behalf of the Municipality that the rules framed by the Committee amount to a public notice. I cannot agree with this contention. It is clear that this part of section 138 refers to such matters as are dealt with in sections 87, 91, 92 and so forth. It has nothing to do with a notice such as is contemplated by section 86, sub-section (2), that is, a notice issued personally to an individual.

So far as the steps over the drain are concerned, the applicant is, in my opinion, guilty of an offence under section 133. I hold that such an erection amounts to an encroachment upon a street or drain. But a balcony eleven feet above the level of the street is not an encroachment on it within the meaning of section 133. Section 133 makes an encroachment punishable without a notice of removal being issued to the offender. This section does not, however, justify a daily fine of Re. 1, but only allows a fine which may extend to Rs. 50.

It is urged that the prosecution was not sanctioned under section 133 and that, therefore, the applicant cannot be convicted under that section. Reliance is placed upon section 151 of the Berar Municipal Law. All that that section lays down is that a Court shall not take cognisance of an offence under the Berar Municipal Law, except on the complaint of the Committee or of some person authorised by the Committee in this behalf. The complaint need not specify the section or rule of the Berar Municipal Law which has been broken. It need only state the facts, and it is for the Court to decide under what section or rule an offence has been committed. It is true that the Committee has in the present case, in addition to stating the acts complained of, specified certain rules under which, in its opinion, an offence has been committed. The law does not require the Committee to give its opinion on this point. Any such opinion on a question of law may be ignored.

There remains for me to consider whether an offence has been committed under rule 10 read with rule 30 of the rules framed under section 116, published in the Central Provinces Gazette Notification No. 1253, dated the 3rd December 1910. It is urged that rule 10 is *ultra vires*. Rule 10 lays down that no steps or projections shall be built over the roadside drains without the special permission in writing of the Committee. It is merely a paraphrase in popular language of what has been laid down by section 86 of the Berar Municipal Law. This rule cannot obviously restrict the operation of section 86. Rule 10 read with rule 30 makes this class of encroachments punishable on conviction before a Magistrate with a fine not exceeding Rs. 50, and when the breach is a continuing breach with a further fine, which may extend to Rs. 5 for every day upto the last during which the breach continues. The effect of rule 10 is to do away with the notice required by section 138 for the punishment of an act declared to be not lawful by section 86, sub-clause (1).

In this connection I may refer to the case of *Nokes* v. *Islington Borough Council* (1). A bye-law made by the London County Council was held unreasonable and bad, because it contained no provision for giving any notice to the person complained against before the commencement of proceedings. In *Nokes* v. *Islington Borough Council* (1), Lord Alverstone is reported to have said: "I think that a bye-law which does not provide that a notice shall be given to a person before such a penalty can be enforced against him is bad." A perusal, however, of the judgment, as reported in

(1) (1904) 1 K. B. 610; 73 L J K. B. 100; 90 L. T. 22; 52 W. R. 399; 2 L. G. R. 334; 68 J P. 95; 20 T. L. R. 95.

the authorised law report, will shew that the Lord Chief Justice was not laying down a rule of universal application, but was only thinking of the particular bye-law before him. In *Ramantar Sahu* v. *Arrah Municipal Board* (2) the point might have been raised, but was not.

Since the decision of the Privy Council in *Slattery* v. *Naylor* (3) the Courts in England have been somewhat reluctant to interfere with bye-laws passed by local authorities. In *Kruse* v. *Johnson* (4), which was the decision of a Special Court composed of seven Judges (Methew, J., dissenting), Lord Russell of Killowen says: "Surely it is not too much to say that, in matters which directly and mainly concern the people of the County, who have the right to choose those whom they think best fitted to represent them in their local Government bodies, such representatives may be trusted to understand their own requirements better than Judges" (page 786 of the L. J. Report). I may, therefore, concede that it is not necessarily unreasonable to punish without notice a person who commits trespass over public property. There is a safeguard in the rule that a Magistrate's jurisdiction is ousted where there is a *bona fide* claim of right and there is a further safeguard in the provisions of section 151, which lays down that no prosecution for such an offence shall be instituted except on the complaint of the Committee.

An examination of Chapter VII shows that certain offences are made punishable without notice. Section 133 is an example. The maximum punishment in no case exceeds Rs. 50. A continuing daily fine is only allowed by section 125 when a notice has been issued, and by section 126 when there is a disregard of any orders which the Committee may have given. The policy of the Act is not to authorise a daily fine except in cases of contumacy, that is, disobedience of a lawful order. To quote again from Lord Russell of Killowen: "I do not mean to say that there may not be cases in which it would be the duty of the Court to condemn bye-laws made under such authority as these were made as invalid, because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes, if they were manifestly unjust, if they disclosed bad faith, if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*. But it is in this sense and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded."

The lower Courts are wrong in interpreting rule 30 and section 138 of the Berar Act. The words are the same as in section 122 of Act XVIII of 1889 as pointed out by Stivens, J. C., in *Empress* v. *Gangaram* (5) and *Municipal Committee* v. *Dadu Halwai* (6), the continuing breach contemplated is a past breach and not a possible future breach, which cannot be the subject matter of a charge and conviction [*In re Limbaji Tulsiram* (7)]. As there is no period of limitation fixed for the prosecution of such offences, an offender's fine would depend upon the date on which he first committed the trespass and the power of the Magistrate in the matter of fines.

In the present Central Provinces Municipal Act, it is not the continuance of the breach but the *persistence* in it, which has been made punishable by a continuing daily fine [*vide* sections 105 (2), 139 of Act XVI of 1903]. Such examination of the Municipal Acts in other parts of India as I have been able to make confirms my view that the Legislature meant to reserve the punishment of a daily fine for cases of what may be called contumacy. A bye-law imposing a continuing daily fine in the absence of a notice or warning appears to me to be so oppressive and so opposed to the policy of the Act that

(2) 11 C. W. N. 1099; 6 Cr. L. J. 319.
(3) (1888) 13 A. C. 446; 57 L. J. P. C. 73; 59 L. T. 41; 36 W. R. 897.
(4) (1898) 2 Q. B. 91; 67 L. J. Q. B. 782; 78 L. T. 647; 46 W. R. 630; 62 J. P. 469; 14 T. L. R. 416; 19 Cox C. C. 103.
(5) 6 C. P. L. R. Cr. 32.
(6) 7 C. P. L. R. Cr. 4.
(7) 22 B. 766; 11 Ind. Dec. (N. S.) 1094.

rule 33, in this respect, can scarcely be regarded as *intra vires*.

As regards rule 10, I have come to the conclusion that it is *ultra vires*. When a Statute expressly deals with any matter and lays down certain procedure, it is not competent to a Corporation to repeal any of the provisions of the Act under which power to make rules has been given. The rules framed under section 116 must be consistent with the Act. The power to repeal any of the provisions of the Act cannot be said to have been authorised by the Act. I have already pointed out that rule 10 dispenses with the giving of a notice prior to proceedings being taken against the offender and is, therefore, inconsistent with the express provisions of the Act.

As pointed out by Channell, J., in *Gentel* v. *Rapps* (8): "If, for example, a Statute provided that it should be an offence to travel without a railway ticket with intent to defraud, a bye-law which reiterated that provision with a similar penalty but omitted the words 'with intent to defraud' would no doubt be repugnant to the Statute." Here the Municipal Act says that disobedience to the orders of the Committee for the removal of an encroachment should be punished, but the bye-law makes the trespass itself punishable, and that too with a daily fine for the period during which it has continued.

The result is, the conviction of the applicant for the offence in respect of the balcony is set aside. The conviction in respect of the steps over the drain is altered to one under section 133, and the fine of Rs. 25 maintained. The orders for the removal of the encroachment and the future daily fine of one rupee are set aside.

Conviction altered.

(8) (1902) 1 K. B. 160; 71 L. J. K. B. 105; 85 L. T. 683; 50 W. R. 216; 66 J. P. 117; 20 Cox C. C. 104; 18 T. L. R. 72.

PATNA HIGH COURT.

CRIMINAL REVISION No. 34 OF 1918.

February 8, 1918.

Present:—Justice Sir Ali Imam, KT.

CHADHARI AHIR AND ANOTHER—SECOND PARTY—PETITIONERS

versus

RAJA RAM SINGH—FIRST PARTY—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898) ss. 145 (3), 148 (3)—Proceedings under s. 145 started in presence of parties—Notice, whether necessary—Costs, order as to Delay in making order, effect of.

During the course of proceedings under section 144 of the Code of Criminal Procedure, the Magistrate intimated to the parties his intention to draw up proceedings under section 145 of the Code. On the following day he drew up proceedings under the latter section in the presence of the parties, who thereafter filed their written statements and adduced evidence in support of their respective cases:

Held, that the Magistrate was not guilty of any irregularity in proceeding with the case as he did and that the proceedings were not vitiated by want of formal notice to the parties. [p. 750, col. 1.]

An order for costs under section 148 (3) of the Criminal Procedure Code, made ten days after an order under section 145 (6) of the Code, is not illegal by reason of the delay in passing it. [p. 750, col. 2.]

Criminal revision from an order of the Magistrate, First Class, Arrah (Shahabad), dated the 18th December 1917.

FACTS.—On the 3rd of August 1917 the first party filed an application in the Court of the Sub-Divisional Officer at Arrah, alleging that his master had purchased the land in dispute in execution of a rent decree and that the second party had got their names registered in the survey proceeding in 1911 with regard to the land and that they were ready to commit a breach of the peace. The Sub-Divisional Officer ordered the Police to enquire and report. On receipt of the Police report the Magistrate issued notice to the parties under section 144 of the Criminal Procedure Code. On the 14th of September 1917 the Magistrate ordered in the presence of both parties that a proceeding under section 145 should be drawn up and attached the subject-matter of dispute pending the decision of the matter. The proceeding under section 145 was drawn up, but was not actually served on the parties. The parties, however, appeared, filed written statements, and

adduced witnesses on the date of hearing. On the 8th of December 1917 the learned Magistrate delivered judgment, declaring the first party to be in possession of the land in dispute. On 14th December 1917 the first party applied for costs. After giving due notice to the opposite party the Magistrate awarded costs to the first party on the 18th of December 1917. The second party moved the High Court in revision.

Mr. *Akbari* (with him Mr. *S. N. Palit*), for the Petitioners, contended that the entire proceeding was void as the provisions of sub-clause 3 of section 145 had not been complied with. The Magistrate should have served the proceeding drawn up on the applicants. No service having been effected the proceeding was vitiated for want of proper notice. He further contended that the order of the Magistrate awarding costs to the first party was without jurisdiction. He should have passed the order on the date of passing the order as to possession in this case. The order as to costs having been passed on a subsequent date was illegal and without jurisdiction.

Mr. *Parmeshwor Dyal* (with him Mr. *Shiveswar Dayal*), for the Opposite Party, contended that the proceeding under section 145 having been drawn up in the presence of the parties, no notice of the proceeding was required to be formally served. The parties were not only cognisant of the proceeding drawn up, but on subsequent dates they actually appeared, filed written statements and produced witnesses in support of the case on the date of hearing. The object of giving notice of the proceeding under clause 3 of the section was to enable the parties to appear in the Court and place their case before it. The parties in the present case having appeared and conducted their case, the object of the section was fulfilled. The want of formal service of notice was a mere irregularity which did not vitiate the proceeding as *ultra vires*. He relied on *Sukh Lal Sheikh* v. *Tara Chand Ta* (1), *Khosh Mahomed Sirkar* v. *Nazir Mahomed* (2), *Chinnappudayan, In the matter of* (3).

(1) 33 C. 68; 2 C. L. J. 241; 9 C. W. N. 1046; 2 Cr. L. J. 618 (F. B).

(2) 33 C. 352; 9 C. W. N. 1065; 2 C. L. J. 259; 2 Cr. L. J. 637 (F. B)

(3) 30 M. 548; 3 M. L. T. 18; 7 Cr. L. J. 28.

It was not necessary for the Magistrate to pass an order as to costs on the date of passing the order as to possession. The Magistrate was competent to pass the order as to costs on some subsequent date. The order as to possession was passed on the 8th of December and that of costs on the 18th. The delay of 10 days was not unreasonable. He relied on *Binoda Sundari Chowdhurani* v. *Kali Kristo Pal Chowdhury* (4), *Dowlat Koer* v. *Siva Pershad* (5), *Bansi Singh* v. *Mahammad Akbar Ali* (6), *Vythianada Tambiran* v. *Mayandi Chetty* (7).

Mr. *Akbari* replied.

JUDGMENT.—The petitioners, who are the second party in this case, assail the jurisdiction exercised by the Magistrate who dealt with this case on three grounds.

The first ground is that the proceedings were void because the provisions of sub-clause 3 of section 145 of the Code of Criminal Procedure were not complied with.

The second ground is that it was not open to the Trying Magistrate to rely upon the delivery of possession given to the first party two years before he passed his order.

The third ground refers only to costs, the objection taken with reference to this being that the order as to costs was not passed at the time that the decision regarding possession was given in this case, but that on a subsequent date the order for costs having been passed was an illegal one.

In regard to the first point it appears that the proceedings were originally initiated in this case under section 144 of the Code and that after the matter under this section had proceeded for a time, the learned Magistrate on the 19th of September 1917 intimated to the

(4) 22 C. 387; 11 Ind. Dec. (N. S.) 259.

(5) 10 Ind. Cas. 615; 15 C. L. J. 267; 12 Cr. L. J. 319.

(6) 11 Ind. Cas. 144; 15 C. W. N. 811; 12 Cr. L. J. 376.

(7) 29 M. 373; 4 Cr. L. J. 232.

parties his intention to draw up proceedings under section 145 of the Code. On the 20th, that is the day following, the Magistrate drew up proceedings in the presence of the parties.

It is contended by the learned Counsel appearing on behalf of the petitioners that this was not sufficient; that the Magistrate should have served the proceedings upon his clients in the manner provided for in Chapter VI of the Code of Criminal Procedure. Sections 68 and 69 of that Code are germane to this point raised by the learned Counsel. There is nothing in these two sections to show that the action taken by the learned Magistrate in drawing up proceedings under section 145 in the presence of the parties was *ultra vires* of the provisions contained in them. I am, therefore, of opinion that no legal ground exists for the contention that the service of the proceedings on the parties was not effected in a legal manner. Moreover, the parties had due and sufficient cognizance of the contents of the proceedings, not only because they were present before the Magistrate, but also because on the next day when the case was taken up they were present and because on the date subsequent to that, they actually filed their written statements in the case. In fact they were present right through and had hotly contested the case before the Magistrate. On the authority, therefore, of *Sukh Lal Sheikh* v. *Tara Chand Tu* (1), as well as other rulings that have been referred to before me, the irregularity, even if it was so, would be regarded not as an illegality committed by the Magistrate; but I hold in this case that in fact the Magistrate was not guilty of any irregularity in proceeding with the case as he did.

The next question regarding the value of the delivery of possession requires an examination of some dates. It appears that one Sureba Kuer was the registered tenant of the holding which is the subject of this case. Her landlord proceeded against her and obtained a rent-decree. The first party are the auction-purchasers in the execution of the decree that was passed on the 21st February 1908. The delivery of possession took place in 1915. It appears that after the passing of the decree *Musammat* Sureba Kuer, the registered tenant, apprehended the sale of the holding and the consequent dispossession. In 1912 the Record of Rights was published and it appears that the name of her grandson was entered as a tenant. Mr. Akbari appearing on behalf of the second party contends that the presumption arising out of the Record of Rights should have been sufficient for the Magistrate to hold that the possession of the grandson continued. I find from the order of the learned Magistrate that the question had engaged his attention. He rightly holds in his judgment that with a view to avoid the rent-decree Sureba Kuer got the name of her grandson entered in the survey papers. The presumption on which the learned Counsel relies is a presumption which must be considerably negatived by the delivery of possession, which took place subsequent to the publication of the Record of Rights; but it is contended that this delivery of possession was only a symbolical delivery of possession. Regard being had to the fact that the sale was in execution of a rent-decree, regard being had to the fact that nothing has been shown before me as to how I am to hold that that delivery of possession was a mere symbolical possession and not actual and regard being had to the fact that there is a distinct finding by the Magistrate that it was through the Civil Court that the first party got possession of the land in dispute, I am unable to hold that the presumption arising from the Record of Rights has not been completely disestablished. The Magistrate has come to the distinct finding that the delivery of possession was not a paper transaction as has been contended by the second party. I am, therefore, unable to accept the proposition that it has been proved that this delivery of possession was a symbolical one.

On the question of costs the point seems to be concluded by authority. In the present instance the order for costs was passed only 10 days after the order recording possession was given. This delay is not by any means a delay which is not permitted by the provisions of the Code of Criminal Procedure. This view has received acceptance in various

cases. Among them are *Doulut Koer* v. *Siva Pershad* (5) and *Vythinada Tambiran* v. *Mayandi Chetty* (7).

In the circumstances of the case nothing has been placed before me to show that the exercise of jurisdiction by the Magistrate in this case was not a proper one. The petition is rejected.

Petition rejected.

PATNA HIGH COURT.

CRIMINAL REFERENCE No. 2 OF 1918.

February 6, 1918.

Present:—Justice Sir Ali Imam, KT.

RAMBAHAL RAI AND OTHERS—ACCUSED—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 437—Further enquiry - Notice to accused, whether necessary—Procedure.

A District Magistrate is not bound in law to issue any notice on the accused before ordering a further enquiry under section 437 of the Criminal Procedure Code, but the exercise of discretion in favour of issuing a notice is considered to be the right and proper action to take.

Criminal reference from a decision of the District Magistrate, Champaran.

JUDGMENT.—Two points arise in this reference. The first is whether the District Magistrate of Champaran, while ordering a further enquiry under section 437 of the Code of Criminal Procedure in a case in which the accused is discharged under section 253 of that Code, should have passed this order of enquiry without notice to the accused. The point is concluded by the authority to which reference has been made in the letter of Mr. Lewis, the Sub-Divisional Officer of Bettiah, attached to the letter of reference under consideration. It is true that the District Magistrate was not bound in law to issue any notice on the accused, but it was held in the Full Bench case of *Hari Das Sanyal* v. *Saritulla* (1) that the exercise of discretion in favour of issuing a notice like this would be considered the right and proper action to take. I, therefore, direct that the District Magistrate of Chapra should issue a notice to the accused before passing an order under section 437 of the Code.

The second point on which this reference is made must be left to the discretion of the Magistrate to be exercised on an appreciation of the facts and circumstances of the case. He would, therefore, be free to order a further enquiry or take such action as he may deem fit.

Reference accepted.

(1) 15 C. 608; 13 Ind. Jur. 55; 7 Ind. Dec. (N.S.) 989 (F. B.).

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 855 OF 1917.

November 10, 1917.

Present:—Mr. Justice Shadi Lal.

EMPEROR—COMPLAINANT

versus

THAMMAN AND OTHERS—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 195—Sanction to prosecute—Trying Magistrate, whether can question legality of sanction—Procedure—Penal Code (Act XLV of 1860), s. 188.

A Magistrate trying an accused person for an offence for which sanction is required under section 195 of the Criminal Procedure Code, has no right to go behind the order of sanction and to question its propriety or legality. If he thinks that the sanction is bad for any reason he cannot refuse to recognise it; all that he can do is to stay proceedings in order to allow the accused to get the sanction revoked by some Court to which the Court granting the sanction is subordinate. [p. 752, col. 2.]

Case reported by the District Magistrate, Ludhiana, with his No. 1387 of 24th May 1917.

FACTS of this case are as follows:—

On 8th June 1916 Nand Singh and others applied to the Assistant Collector, 1st grade, Ludhiana, under section 150, Land Revenue Act, that certain persons had made encroachments on common land and that they be ejected. On 19th August 1916 the Assistant Collector passed an order that notice be issued against those persons to remove the encroachments within a month.

On 26th February 1917 Nand Singh and others applied to the Assistant Collector, stating that his orders had not been com-

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plied with, *i.e.*, encroachments had not been removed, and prayed that sanction to prosecute the men under section 188, Indian Penal Code, be granted (section 195, Criminal Procedure Code).

The sanction was granted on 17th March 1917 and a complaint was filed on 28th March 1917.

The proceedings are forwarded for revision on the following

GROUNDS.—The Revenue Assistant had passed an order under section 150 of the Land Revenue Act against some eleven men. They did not comply with that order and, on application of the petitioners, in the section 150, Land Revenue Act case the Revenue Assistant sanctioned the prosecution of the eleven men under section 188, Indian Penal Code, on 17th March 1917.

In the complaint under section 188, ten out of the eleven men are mentioned, and a few more have been added.

The lower Court has dismissed the complaint on the ground that the Court and the place where the offence was committed were not specified in the order granting the sanction.

I do not think it was necessary to do so. The order of sanction read with the order under section 150, Land Revenue Act, left no doubt on that score. Moreover, I do not think the Court was competent to object to the sanction: *Empress* v. *Bhola* (1).

If others joined in the encroachment after the order under section 150 and the order of sanction had been passed, they could also be prosecuted for the same offence. The order of the Magistrate was "*Istighasa kharij kiya jata hai, hazirin rukhsat*" ("the complaint is dismissed, those present may go"). Both the complainants and the accused were present. The order was passed on the technical ground of the insufficiency of the sanction. The offence was a summons case.

There could be no order of discharge and the stage for action under section 203, Criminal Procedure Code, had passed, as the accused had been summoned and were present.

The only other order that could be passed was one of acquittal. But the Magistrate did not pass it.

(1) 2 P. R. 1888 Cr.

I refer the case to the Chief Court under section 438, Criminal Procedure Code, with the recommendation that the lower Court's order, which amounts to no legal order at all, be set aside and a re-trial ordered.

Mr. *Jai Gopal Sethi*, for the Complainant.

Mr. *Tarlochan Das*, for the Accused.

JUDGMENT.—There can be no manner of doubt that the Magistrate trying the case had no right to go behind the order of sanction and to question its propriety or legality. His view, that the sanction is bad on the ground that it does not specify the Court and the place where the offence was committed, may or may not be correct, but it is quite clear that it is not for him to raise this objection. It has been repeatedly held that the Magistrate cannot refuse to recognise the sanction, and that all that he can do is to stay proceedings in order to allow the accused to get the sanction revoked by some Court to which the Court granting the sanction is subordinate, *vide*, *inter alia*, *Empress* v. *Bhola* (1).

The learned Counsel for the accused contends that the order of the Magistrate amounts to an acquittal, and that as no appeal has been preferred by the Local Government against that order, this Court should decline to exercise its revisional jurisdiction. Now, I recognise that the Court of revision is reluctant to interfere with an order of acquittal, but that rule is generally applicable to cases when the order of acquittal proceeds upon a consideration of the evidence adduced by the parties. Indeed, it has been repeatedly laid down that an application for revision against an order of acquittal may appropriately be allowed, when legal points alone are involved; *vide Empress* v. *Lalji* (2) and *Saunderson* v. *Wilson* (3). And in the present case it is perfectly clear that the order of the Magistrate is based upon an entire misapprehension of the law.

For the aforesaid reasons I set aside the order of the Magistrate and direct a re-trial, but only of those persons for whose prosecution sanction has been granted. This order shall not affect those accused against whom no sanction has been obtained.

Order set aside.

(2) 18 P. R. 1883 Cr.
(3) 10 P. R. 1900 Cr.

LOWER BURMA CHIEF COURT.
CIVIL REGULAR No. 75 OF 1916.
March 21, 1917.
Present:—Mr. Justice Robinson.
MATHURABAN—PLAINTIFF
versus
D. TEWARY—DEFENDANT.

Guardians and Wards Act (VIII of 1890), ss. 12, 25—Suit by father for custody of child, maintainability of.

A suit by a father for the custody of his child is maintainable where no remedy under the Guardians and Wards Act exists that he can apply for.

Mr. *Dhar*, for the Plaintiff.

Mr. *Bose*, for the Defendant.

ORDER.—This is a suit by the plaintiff asking for the custody of his illegitimate child. The mother of the child was the illegitimate daughter of the defendant. In August 1913 the mother left plaintiff's protection taking the child with her. The mother was the natural guardian of the illegitimate child. She died in December 1915, and the plaintiff then became the natural guardian. Plaintiff has been maintaining the child since the mother left him. The first question is whether the suit lies. The Guardians and Wards Act makes certain provisions for obtaining custody, under section 12 when an application for the appointment of a guardian is pending, and under section 25 when the ward leaves or is removed from the custody of the guardian. Neither of these provisions applies here as the plaintiff never has had custody of the child.

It is urged that their Lordships of the Privy Council held in *Mrs. Annie Besant* v. *Narayaniah* (1) that a suit will not lie, but that action must be taken under the Act. This was the view taken in *Arunachallam Pillay* v. *Iyama* (2). In both these cases the suit had been launched in the District Court though the former was transferred to the High Court, and it was held that its powers were limited to those that the District Court possessed. The contrary view of the Privy Council decision has been taken in *Achratlal Jekisendas* v. *Chimanlal Parbhudas* (3). The Bombay High Court in *Sharifa* v. *Mune Khan* (4) and this Court in *Ma Shwe Ge* v. *Maung Shwe Pan* (5) have held that such a suit would lie, and in *Achratlal's case* (3) the Bombay High Court said: "We are not prepared to hold that the dictum of the Privy Council in *Mrs. Annie Besant* v. *Narayaniah* (1), to the effect that a suit *inter partes* is not the proper proceeding, was intended to be of such general application as virtually to overrule the decision of this Court in *Sharifa* v. *Mune Khan* (4)." In my opinion this view is correct and the decision of this Court in *Ma Shwe Ge's case* (5) cannot be taken to be overruled. No remedy under the Guardians and Wards Act exists that the plaintiff can apply for.

I must, therefore, follow the decision of the Full Bench in *Ma Shwe Ge's case* (5) and hold that the suit lies.

(1) 24 Ind. Cas. 290; 38 M. 807; 18 C. W. N. 1039; 27 M. L. J. 30; 16 Bom. L. R. 625; (1914) M. W. N. 585; 16 M. L. T. 165; 20 C. L. J. 253; 12 A. L. J. 1155; 1 L. W. 520 (P. C.)

(2) 29 Ind. Cas. 763; 8 Bur. L. T. 128; 8 L. B. R. 211.

(3) 37 Ind. Cas. 215; 40 B. 600; 18 Bom. L. R. 582.

(4) 25 B. 574; 3 Bom. L. R. 167.

(5) 2 L. B. R. 140.

MADRAS HIGH COURT.
CIVIL APPEAL No. 398 OF 1914.
November 14, 1917.
Present:—Mr. Justice Abdur Rahim, Mr. Justice Oldfield and Mr. Justice Srinivasa Aiyangar.
MUTHAMMAL—PLAINTIFF—APPELLANT
versus
RAZU PILLAI *alias* SUBBARAYA PILLAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Prior and puisne encumbrancers—Decree for sale in first mortgagee's suit—Puisne mortgagee not impleaded—Purchaser at auction sale, rights of—Accounts of profits, enquiry as to, after date of sale—Revivor of mortgage, nature and extent of—Subrogation, principles relating to—Improvements, right to, by transferee from purchaser—Transfer of Property Act (IV of 1882), s. 51.

Defendants Nos. 1 to 3 mortgaged some houses to the Hindu Permanent Fund on 29th March 1899. On 26th September 1899 they mortgaged the same houses and certain lands to *S*. On 9th February 1901 they again mortgaged the houses to plaintiff's husband. *S*. sued on his mortgage, obtained a decree

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for sale, purchased the lands and houses and soon afterwards obtained possession. His decree was satisfied except for a small sum of Rs. 95. *S.* then redeemed the mortgage to the Fund. In 1906 plaintiff's husband, who was not a party to *S.'s* suit, claimed to redeem *S.* but did not prosecute his suit. After his death plaintiff sued on her mortgage, offering to redeem *S.* or his assignees, but she claimed to do so only on what would be found due on the prior mortgage up to the date of delivery of possession to *S.* In the meantime *S.* had sold the properties to 6th defendant:

Held, (1) that *S.* and his assignees were entitled to the principal and interest due on foot of the two mortgages dated March and September 1899, but were bound to account for the rents and profits of the properties from the respective dates on which *S.* obtained possession through Court, the account being carried up to the date fixed for payment; [p. 756, cols. 1 & 2.]

(2) that 6th defendant was not entitled to the value of the improvements effected by him after his purchase. [p. 761, col. 2.]

If the owner of an equity of redemption is a party to a suit to enforce a mortgage, but a puisne encumbrancer is not, the purchaser becomes the assignee of the mortgage sued on, as well as the transferee of the equity of redemption, subject to the mesne mortgage, and if the purchaser obtains possession on sale from the owner, he must account for the profits at least in cases where the price he pays is not more than sufficient to pay the mortgage sued on; for in such a case the purchaser pays nothing for the equity of redemption and the profits of the land are to be considered as the money of the mortgagor placed in the hands of the purchaser to discharge the mortgage *pro tanto*. [p. 756, col. 1.]

Principles affecting the doctrine of subrogation and revivor of discharged mortgages discussed.

Appeal against the decree of the Court of the Temporary Subordinate Judge, Ramnad, at Madura, in Original Suit No. 54 of 1914 (Original Suit No. 108 of 1912 on the file of the Court of the Subordinate Judge, Madura).

Messrs. *M. D. Devadoss*, *T. V. Gopalaswami Mudaliar* and *A. Ganesa Aiyar*, for the Appellant.

Messrs. *K. Bashyam Aiyangar* and *A. Krishnaswami Aiyar*, for the Respondents.

The appeal and the memoranda of cross-objections filed by respondents Nos. 4 and and 6 coming on for hearing on the 19th and 22nd February 1917, and having stood over for consideration till the 29th March 1917, the Court (Abdur Rahim and Srinivasa Aiyangar, JJ.) delivered the following

JUDGMENT.—This is an appeal by the plaintiff from the decree of the Temporary Subordinate Judge of Ramnad, dated 21st September 1914, in a suit to enforce a mortgage. The question is what amount is due to the 4th defendant on two prior mortgages which, it is agreed, should be deemed to be still outstanding against the plaintiff. On March 29, 1899, defendants Nos. 1 to 3, the owners of certain houses in the town of Madura, mortgaged them to the Hindu Permanent Fund of that town to secure the repayment of the sum of Rs. 1,500 and interest. On the 26th September of the same year they again mortgaged the same houses and certain lands of theirs to Sevugan Chetty, the 4th defendant to secure the repayment of Rs. 1,000 and interest. On February 9, 1901, they again mortgaged the houses alone to the plaintiff's husband (deceased) to secure the repayment of Rs. 500 and interest. Sevugan Chetty sued on his mortgage in the Madura Munsif's Court, obtained a decree for Rs. 1,265-10-0 and further interest till payment, and for sale of the mortgaged properties, brought them to sale and purchased the houses on the 15th April 1904 for Rs. 1,100 and the lands on the 21st August 1905 for Rs. 500, and soon after obtained possession. His decree was satisfied except for a small sum of about Rs. 95. As the Fund had a first mortgage on the houses, Sevugan Chetty after his purchase paid to the Fund Rs. 2,537-6-11 on June 15, 1906, that being the sum then due for principal and interest, and redeemed the mortgage. Plaintiff's husband was not a party to Sevugan Chetty's suit, and was not bound by the proceedings therein. He, in September 1906, claimed to redeem Sevugan Chetty, unless he was himself redeemed; Sevugan Chetty was quite willing to be redeemed on payment of the sum due on foot of both his mortgages, but nothing was done as plaintiff's husband probably found that the properties were not worth more than the value of the prior mortgages. Sevugan Chetty has subsequently sold the properties and the purchasers of the houses are parties to this suit. Plaintiff's husband died in August 1912 without taking any steps to enforce his mortgage. In the meantime house property in Madura had risen considerably in value and the plaintiff instituted this suit in December 1912, claiming over Rs. 5,000

on her mortgage offering to redeem Sevugan Chetty or his assignees, but claims to do so on payment of what would be found due on the prior mortgages up to the date of delivery of possession to Sevugan Chetty. Savugan Chetty and his assignees on the other hand claim the whole amount that would be found due according to the terms of the deeds of mortgage up to the date of payment, without taking into account the profits or the income which they have received from the lands and houses. The learned Judge in the Court below has substantially accepted the contention of Sevugan Chetty, and allowed the amount due up to the date of the written statement in this suit—why that particular date was fixed is not clear—though in calculating the sum due he made a mistake. The question then is, on what basis is to be calculated the amount due on the prior mortgages which must be deemed to be still outstanding as against the plaintiff.

A number of cases were referred to in which the question has come up for decision, but before we deal with them let us first consider how the matter stands on principle. A mortgagee who sues for foreclosure of the equity of redemption or for the sale of the secured properties, if he succeeds, gets the title of the mortgagor as it stood on the date of his mortgage or transfers that title to the purchaser, free from all interests or liens subsequently created by the mortgagor, provided he makes the owners of such interests or liens parties to the suit; but if he omits to make any of them parties, their rights or liabilities are not affected, but the purchaser (we are concerned in this case only with sales, though the same principle would apply to foreclosure also) would acquire the rights in the mortgaged properties of all the persons who were parties, just as if he had obtained an assignment from all of them, without, however, a merger of the interests or extinction of the liens so acquired. It is immaterial whether the purchaser is the mortgagee who sued, or another person except that the latter would be subrogated to the rights of the mortgagee only to the extent to which the debt was paid out of the price. It must, however, be remembered that the several interests or liens so acquired are kept distinct or kept alive only against the excluded party; for example, the purchaser at a first mortgagee's sale in a suit against the mortgagor to which the puisne incumbrancer is not a party, cannot by subrogation claim to keep alive the first mortgage debt against the mortgagor. This is a matter of substantive rights and no mere conveyancing device can give a larger right; and the same result would follow if instead of a purchase in a Court sale, the purchaser had obtained by private treaty a transfer of the first mortgage and the equity of redemption subject to that mortgage. In such a case as between himself and the mortgagor, the purchaser assumes the payment of the mortgage and whether on payment he extinguishes the debt or takes a transfer, cannot in any way affect the mortgagor. Further, if a purchaser agrees with the mortgagor to pay all the encumbrances, he cannot by paying an earlier mortgage keep it alive as against a puisne encumbrance, for he has got all he bargained for, and by merely performing his own obligation cannot get a larger right. The matter may also be viewed in another aspect which brings it closer to the present question. The mortgagor having given money's worth to the purchaser to pay all the encumbrances, when the purchaser pays them or any of them, he does so really with the money of the mortgagor and the mortgage is extinguished in just the same way as if it had been paid by the mortgagor himself, provided that the purchaser is not deprived of the property given to him. If, before he is deprived of the property given to him by the mortgagor, he has derived any benefit from it, to that extent it is the mortgagor's money in his hands for which he must account in a suit to redeem him. It follows, therefore, that if the mortgagor or the owner of the final equity of redemption is not made a party to the suit, the purchaser at the sale at the best acquires only the interest of the mortgagee and he can be redeemed on payment of whatever is due on the mortgage at the time of payment, on taking accounts, as if such purchaser was a legal assignee of the mortgage. *Sivathi Odayan* v. *Ramasubbayyar* (1), *Dadoba Arjunji* v. *Damodar Raghu*.

(1) 21 M. 64; 8 M. L. J. 21; 7 Ind. Dec. (N. S.) 402.

nath (2). If the mortgage was a simple mortgage the purchaser would be entitled to the whole of the principal and interest then due. If, however, such a purchaser takes possession claiming to do so as purchaser of the equity of redemption, though he did not obtain the title, he would be accountable for the profits derived from the property, for such profits would be money of the mortgagor in his hands. If after such purchase he does not get possession as purchaser of the equity of redemption, but by subrogation by paying a mortgagee with possession, he can only be called on to account on foot of the mortgage with possession when that mortgage is sought to be redeemed. If the owner of the equity of redemption is a party to the suit, but a puisne encumbrancer is not, the purchaser becomes the assignee of the mortgage sued on, as well as the transferee of the equity of redemption subject to the mesne mortgage, and if the purchaser obtains possession on sale from the owner, he must account for the profits at least in cases where the price he pays is not more than sufficient to pay the mortgage sued on; for in such a case the purchaser pays nothing for the equity of redemption and the profits of the land are to be considered as the money of the mortgagor placed in the hands of the purchaser to discharge the mortgage *pro tanto*. If beyond the value of the mortgages a price is paid for the equity of redemption and the purchaser gets possession from the owner of the equity of redemption who is and who is entitled to be in possession, it may be the purchaser would not be bound to account for the profits (Jones on Mortgages, Volume II, section 1118a); but we think justice requires that there should be an apportionment of the profits between the value of the mortgage and of the equity of redemption.

In this case all the three mortgages are simple mortgages and the mortgagees as mortgagees were not entitled to possession either before or after default. The price paid at the Court sale was not sufficient even to pay the mortgage sued on. The 4th defendant and his assignees would, therefore, be entitled to the principal and interest due on foot of the two mortgages dated March and September 1899 and be bound to account for the rents and profits of the properties from the respective dates on which the 4th defendant obtained possession through Court, the account being carried up to the date fixed for payment.

This view is consistent with and, we think, supported by the authority of the cases binding on us. In *Umes Chunder Sircar* v. *Zahur Fatima* (3) Zahur Fatima sued on a mortgage dated the 29th July 1873 executed to her predecessor-in-title, obtained a decree in 1875, brought the mortgaged property to sale, purchased it herself in 1879 and soon after obtained possession. She did not join, as parties to her suit, the owners of the encumbrances created before the institution of her suit. The plaintiff became the assignee of these mortgages and sued to enforce them. Zahur's mortgage carried 24 per cent. interest, which was reduced to 6 per cent. per annum after it had passed into a decree. The Trial Judge held that her mortgage was not extinguished by the decree and she was entitled to the amount due under it irrespective of the price paid at the sale, but was entitled to interest only at 6 per cent. per annum, the rate fixed in the decree after its date, and that no interest was to be calculated after the date of the purchase, as the profits of the land were to be considered a *fair* equivalent for further interest. Their Lordships in the Privy Council altered the rate of interest to that provided in the bond, and the reason given by their Lordships for their alteration is this: "The Court's power to regulate interest is given by section 10 of Act XXIII of 1861, which answers to the 209th section of the present Civil Procedure Code. That power is given when a plaintiff sues for money due to him, and it is a discretionary power to give such rate as the Court may think proper by decree. The decree can only operate between the parties to the suit and those who claim under them. The plaintiff getting the security of a decree has his interest reduced in the generality of cases. But the plaintiff in this case comes to take away from Zahur the benefit of the decree. It would be unjust if he could use the decree to cut down her interest, while he deprives her of the whole advantage of the

(2) 16 B. 486; 8 Ind. Doc. (N s.) 803.

(3) 17 I. A. 201; 18 C. 164; 5 Sar. P. C. J. 507; 9 Ind. Doc. (N. s.) 110.

decree. His case is, that as to him Zahur is still but a mortgagee, and if so, she would be allowed such benefit as her mortgage gives her. If Zahur had not got a decree, and the plaintiff had come to redeem her mortgage, he must have paid whatever interest her contract entitled her to, and the Court would have had no jurisdiction to cut it down; and that is the position in which the parties are placed by the decree in this suit." That to our minds is conclusive to show that the mortgage which is revived against the puisne mortgagee, though extinguished against the mortgagor, is kept alive to the fullest extent as if no action had ever been brought on it. The price of redemption must be the same, whether it is the puisne incumbrancer or the mortgagor who redeems. It is on this principle that the purchaser in the prior mortgagee's execution sale is required to account for the profits. On the same principle if the purchase was for a sum less than the amount due on the mortgage sued on and if the mortgagor paid the balance, the puisne mortgagee would be entitled to redeem on payment of the price, *i.e.*, the amount due on the mortgage less the amount paid by the mortgagor. [See *Bradley* v. *Snyder* (4).] As to the other rule, *viz.*, that the profits should be taken as equivalent to the interest, their Lordships observe that the rule appears just and convenient and *is not objected to by either party*, will relieve Zahur from giving an account of her receipts and will deprive her of interest from the time she took possession. We understand that observation to mean that in that particular case, the profits and the interest were taken to be fairly equal as a matter of fact—that obviously must be the reason for the parties not objecting to it—and we do not think their Lordships meant to lay down, as a matter of law, that even if either party insisted, there should be no account of profits or allowance of interest. This was the view taken in two cases in this Court after discussion [*Thenappa Chettiar* v. *Marimuthu Nadan* (5), *Ponnambala Chetti* v. *Muthuswami Pillai* (6)] and it is materially strengthened by what happened in *Ganga Pershad Sahu* v. *Land Mortgage Bank* (7), a decision of the Privy Council after *Umes Chunder Sircar* v. *Zahur Fatima* (3). There also the rights of the parties as finally settled by the decision were exactly the same as those in the previous case. The decree of the High Court directed accounts of profits to be taken and allowed interest up to the date of redemption at the rate fixed in a previous decree against the mortgagor. (See the decree set out at page 370 of the report in 21 Calcutta.) The Privy Council altered the rate of interest to that in the bond and confirmed the rest of the decree, namely, that portion which directed the taking of accounts. The judgment in both the cases was delivered by Lord Hobhouse. It is to be observed that the amount of profits is to go in reduction of the amount due for principal and interest and not to be set off against the interest alone. The same principle appears to have been adopted in Calcutta, *Girish Chunder Nandi* v. *Kedar Nath Kundu* (8), *Sat Narain* v. *Sheobaran Singh* (9).

Counsel for the appellant, however, relied on a later case in this Court, in which the learned Judges apparently adopted the rule of disallowing interest after the date of purchase [*Ibrahim Sahib* v. *Armugathayee* (10)]. There the plaintiff's father had a first and second mortgage of which the first was a usufructuary mortgage, the profits being taken in lieu of interest. He purchased the property from the mortgagor, the price settled being Rs. 900, of which Rs. 830 was the amount due till then for the principal of the two mortgages and interest on the simple mortgage, Rs. 55, due to the mortgagee for certain taxes and other small sums lent to the mortgagor; the balance Rs. 15 was paid in cash. Before the sale the mortgagor had mortgaged the same property to the defendant, who sued the plaintiff who had succeeded to her father, brought the properties to sale and purchased them himself subject to the previous encumbrances of the plaintiff.

(4) 58 Am. Dec 564; 14 Ill. 263.
(5) 31 M. 258; 18 M. L. J. 344; 4 M. L. T. 293.
(6) 17 Ind. Cas. 291; 23 M. L. J. 284; (1912) M. W. N. 1199.
(7) 21 I. A. 1; 21 C. 366; 6 Sar. P. C. J. 383; 10 Ind. Dec. (N. S.) 874.
(8) 33 C. 590; 10 C. W. N. 592.
(9) 11 Ind. Cas. 649; 14 C. L. J. 500.
(10) 16 Ind. Cas. 877; 38 M. 18.

The plaintiff in her turn sued to recover the amount due on her mortgages and claimed interest till payment on the simple mortgage at the rate fixed in the bond. The learned Judges held that during the period the plaintiff or her father was in possession as vendee, interest should cease. The reasons given for this conclusion are (1) that as the mortgagee and mortgagor agreed that after the sale the property should be enjoyed for the price settled, the mortgagee is not entitled to any compensation in the shape of interest for his money so long as he had the enjoyment; (2) that the prior mortgage is kept alive only to a limited extent, and in each case the Court is to determine how far it is kept alive for doing justice. We very respectfully differ from both these propositions. It is to be observed that it is because the agreement is not binding on the mesne incumbrancer, that he is entitled to ignore it, and it is difficult to see why he should have any benefit out of it. It often happens that a person is willing to pay much more to obtain an absolute title than what he would be willing to lend on the same property as usufructuary mortgagee. The mortgagee may pay a large price for the equity of redemption which he may wholly lose by the action of the puisne encumbrancer. On principle we do not think that it is possible to sustain the doctrine of partial revivor against the puisne mortgagee and the illustration given by the learned Judges, *viz.*, a stipulation for lower rate of interest, does not support it. Such a stipulation operates to extinguish or release a portion of the debt and there is no question of merger against the mortgagor and no merger against the mesne encumbrancers. The puisne mortgagee pays the same price for redemption as the mortgagor and that, as we have said already, is the test, namely, what amount the mortgagor could have to pay if there had been no sale. If for instance in the case under reference the mortgagee had the transfer of the equity of redemption made to a trustee for him, there can be no merger in law and there would apparently be nothing to prevent the mortgagee from recovering the whole amount due on the mortgages if a subsequent mortgagee brings the equity of redemption to sale. So long then as the prior mortgage is kept alive, the senior mortgagee is entitled to the rights and is subject to the liabilities under his mortgage against the puisne encumbrancer. We, therefore, think that in that case the plaintiff was entitled to the interest on the simple mortgage, as she was entitled to take the profits in lieu of interest on the usufructuary mortgage, and there was no money of the mortgagors in her hands for which she was bound to account. The attention of the learned Judges does not appear to have been drawn to *Thenappa Chettiar* v. *Marimuthu Nadan* (5) and *Ponnambala Chetti* v. *Muthuswami Pillai* (6), the latter decision had not then been reported. They however refer to certain decisions which we shall consider now. The first is the decision of the Privy Council in *Umes Chunder Sircar* v. *Zahur Fatima* (3) to which we have already drawn attention. In *Gangadhara* v. *Sivarama* (11) the mortgagor borrowed Rs. 3,500 in May 1878 on the security of certain lands and paid Rs. 1,900 out of it to discharge a mortgage decree on a mortgage of 1866 on some of the lands. Plaintiff in the suit was an intermediate mortgagee. It was held that the later mortgagee had priority over the plaintiff to the extent of Rs. 1,900, the sum paid to discharge the previous mortgage. Apparently no subsequent interest was allowed. It does not appear from the report whether the subsequent mortgagee or the mortgagor had possession. If the former had possession the interest on his mortgage was being discharged from the usufruct and as he was not entitled to interest against the mortgagor, he was not entitled to it against the puisne mortgagee. If the mortgagor was in possession, then even according to the decision in *Ibrahim Sahib* v. *Armugathayee* (10), interest should have been allowed, for the decision in *Syamalarayudu* v. *Subbarayudu* (12), where interest was allowed, is distinguished on that very ground. In *Seetharama* v. *Venkatakrishna* (13) the suit was, as finally decided, by

(11) 8 M. 246; 9 Ind. Jur. 146; 3 Ind. Dec. (N. S.) 170.

(12) 21 M. 143; 7 Ind. Dec. (N. S.) 457.

(13) 16 M. 94; 5 Ind. Dec. (N. S.) 773.

a prior simple mortgagee against the mortgagor and the puisne encumbrancer who had sued on his mortgage and purchased the property without making the first mortgagee a party. There was a remand for a finding as to the amount due and the finding was that the plaintiff was entitled to Rs. 300 for principal and interest thereon at 9 per cent, and this finding was accepted. In the report no mention is made of the interest. Curiously enough the decree as drafted here omits mention of interest, though apparently the judgment allowed it. In *Vanamikalinga Mudali* v. *Chidambara Chetty* (14) the mortgagee who claimed priority by subrogation had a usufructuary mortgage. Under the bond there was no interest payable and the usufruct was to be taken in lieu of it. It is to be observed that in this last case as well as in *Chetwynd* v. *Allen* (15) and in other cases where a mortgage was executed in renewal of or to pay off a previous mortgage, the mortgage was in force against the mortgagor himself and the agreement charging a lower rate of interest or no interest accrued to the benefit of the mortgagor, as well as the puisne mortgagee. The mesne incumbrancer in such cases does not repudiate the subsequent transaction between the mortgagor and the mortgagee but seeks to avail himself of it as a discharge or extinguishment of the *debt*, while such is not its effect as between the parties to the transaction.

A number of decisions of the Allahabad High Court were cited, in which it appears to have been held that the profits should be taken in lieu of interest after purchase. In the first of these cases, *Dip Narain Singh* v. *Hira Singh* (16), Banerji and Aikman, JJ., held that the puisne mortgagee can only redeem on payment of the full amount due on the prior mortgage, just the same amount as the mortgagor himself would have to pay if a suit had not been brought against him, and refer as authority to the judgment of the Calcutta High Court in *Ganga Pershad Sahu* v. *Land Mortgage Bank* (7) and of the Bombay High Court in *Dadoba Arjunji* v. *Damodar Raghunath* (2); in the former interest was allowed at the bond rate and accounts were directed of the profits, and in the latter interest was allowed at the bond rate till decree without accounts as the mortgagee had no possession. In answer to the contention that the profits should be accounted for, the learned Judges say that considering the amount of profits arising from the property it would be *fair* not to take the profits into consideration at the same time not to allow interest on the mortgage money, *i.e*, not, as we understand it, as a rule of law, but as being fair in that case. In a later case of *Sri Ram* v. *Kesri Mal* (17) it was ruled that the prior mortgagee cannot claim interest after the purchase, giving credit for the profits realised; the reason given being the same as that given in *Ibrahim Sahib* v. *Armugathayee* (10) *viz.*, that every person who purchases property for a certain value must be presumed to pay such value as would yield to him a sufficient return for the money invested by him in the property. In this case there were three mortgages. An intermediate mortgagee purchased the property by private sale for a price enough to pay all the three mortgages, the price being reserved with the vendee for that purpose. The vendee paid the first mortgagee and paid himself the amount due on his. He did not pay the third mortgagee who sued to enforce his security. We do not understand how the vendee was allowed to set up the prior mortgages which were extinguished by payment of the money belonging to the mortgagor, the party primarily liable to pay, and how by merely performing his duty the vendee obtained an advantage. The third mortgage under the circumstances became the first. It is not a case of a person who did not get what he bargained for and the vendee was not entitled to even the principal of the mortgages which he paid, much less to interest. This case, however, was followed in *Jugal Kishore* v. *Bahal Rai* (18) in the same Court and the learned Judges held, setting aside the accounts taken by the

(14) 29 M. 37.

(15) (1899) 1 Ch. 353; 68 L. J. Ch. 160; 80 L. T. 110; 47 W. R. 200.

(16) 19 A. 527 at p. 534; A. W. N. (1897) 147; 9 Ind. Dec. (N. S.) 341.

(17) 26 A. 185; A. W. N. (1903) 219

(18) 21 Ind. Cas. 593.

lower Court, that the profits and interest must be deemed equal. But in the latest case in that Court, *Phul Chand* v. *Roshan Lal* (19), under circumstances precisely similar to those in *Ibrahim Sahib* v. *Armugathayee* (10), the learned Judges, one of whom was Banerji, J., came to just the opposite conclusion, and held that a purchaser at a senior mortgagee's execution sale, who obtains possession from a prior usufructuary mortgagee whom he redeemed after his purchase, was entitled to the whole of the principal and interest at the contract rate till the date of the suit. The purchaser in this case, who knew of the previous usufructuary mortgage subject to which he bought, must on the reasoning in *Sri Ram* v. *Kesri Mal*(17) be presumed to have paid such value for the property, *i. e.*, the equity of redemption and the first mortgage, as would yield a sufficient return for his money, in which case he should not get any interest after the date of the purchase. We do not propose to deal with the other cases as they follow one or other of the cases mentioned above.

The conclusion then we come to, which is supported by preponderance of authority, is that if either party insists, accounts of the profits must be taken, allowing interest on the mortgage as provided in the bond. It is, however, unnecessary to express dissent from *Ibrahim Sahib* v. *Armugathayee* (10), as the learned Judges do not lay down an inflexible rule, but say that each case should be dealt with on the merits. The circumstances here strongly support the suggestion of the learned Judge in the Court below that owing to the considerable increase in the value of house property in Madura, the plaintiff in this suit is now attempting to revive a claim which was practically abandoned by her husband. The 4th defendant and his assignees have made considerable improvements in the property and it would not be fair to them not to allow interest on the prior mortgages, as it is fairly certain that the income from the properties even in the improved condition would be wholly insufficient to meet the interest. We are, therefore, unable to accept the contention of the appellant. We are equally unable to accept the contention of the 4th defendant, who claims the whole of the principal and interest due on the mortgages without accounting for the profits. The learned Judge in the Court below misunderstood the decision in *Ponnambala Chetti* v. *Muthuswami Pillai* (6) which he purported to follow, but the learned Pleader for the 4th defendant argues that as his client was entitled to and obtained possession of the mortgaged properties only as purchaser of the equity of redemption (for which, however, he paid nothing), he was entitled to the enjoyment of the properties as the transferee of the mortgagor; and inasmuch as the mortgagor if he had remained in possession would not be accountable for the profits, similarly he too should not be obliged to account for them. He relied on a passage in section 1118 (*a*) of Jones on Mortgages, Volume II, and a similar passage in Dr. Ghose's book which appears to be really based on Jone's book. He was not able to refer us to any report. It is to be remembered that in some States, the English theory of mortgages as a conditional transfer of the fee with an equitable right to redeem is adopted, in others, probably the largest number, a mortgage is considered to be merely a security though for certain purposes, as between the parties, it is considered to be a conveyance of the property and in yet others a mortgage is only a lien, the mortgagee not being entitled to foreclosure under any circumstances. [See *Brobost* v. *Brock* (20), *McMillan* v. *Richards* (21), *Goodenow* v. *Ewer* (22) and *Frische* v. *Kramer's Lessee* (23).] It would, therefore, be necessary to examine with care any particular decision which may be relied on as supporting an incident of the mortgage relation in India, as our Statute recognises different kinds of mortgages. In *Moulton* v. *Cornish* (24) from New York, where sale is the ordinary remedy, in a case similar to the present, it was held that the purchaser was bound to account, though he obtained possession from the owner of the equity of redemption after sale. To the same effect is the decision in *Anson* v. *Anson* (25) from another

(19) 36 Ind. Cas. 703; 14 A. L. J. 337.

(20) (1870) 10 Wallace 519; 77 U. S., XIX, 1002.
(21) (1858) 70 Am. Dec. 655 at p. 658; 9 Cali. 365.
(22) (1860) 76 Am. Dec. 540; 16 Cali. 461.
(23) (1847) 57 Am. Dec. 368; 16 Ohio 125.
(24) (1893) 20 L. R. A. 370; 138 N. Y. 133.
(25) (1865) 89 Am. Dec. 514; 20 Iowa 55.

State. In *Harrison* v. *Wyse* (26) the mortgagee had first entered on the property and then purchased the equity of redemption It was held he was bound to account as mortgagee in possession, though the mortgagor would not be if he was in possession. It would, therefore, appear that there is no authority in support of such a broad contention as that raised here by the respondent. However that may be, the decision of the Privy Council and the decisions of this Court to which we have already referred are conclusive on this point and there is no need to speculate on the theoretical basis of this doctrine, though we have ventured to point out that on principle the purchaser may justly be held liable to account for the profits in cases like the present.

Two further points were raised, one by the appellant and the other by the 6th respondent. As we have already stated, the purchase by the 4th defendant included the lands on which the plaintiff has no lien. In these lands the 4th defendant acquired absolute rights and he has sold them to persons who are not parties now. The plaintiff claims that the mortgage money due to the fourth defendant on his mortgage should be apportioned among the several properties according to their value and the plaintiff allowed to redeem on payment of that portion of the mortgage-debt that is chargeable on the houses on such apportionment. He has not laid any basis in his plaint or evidence to claim marshalling, and he has not made the owners of the lands parties to the suit so as to claim contribution. We have tried to see if the plaintiff cannot be allowed to redeem a portion of the mortgage, on the ground that the mortgage has been split by the mortgagee purchasing the equity of redemption in a part of the secured property (see last clause of section 60 of the Transfer of Property Act) but on consideration we think the plaintiff is not entitled to a decree for partial redemption. As she sues to redeem ignoring the purchase, she cannot be allowed to treat it as good in part against the prior mortgagee-purchaser.

The 6th respondent, the transferee of the houses from the 4th respondent, claims the value of improvements. According to the decision in *Ibrahim Sahib* v. *Armugathayee* (10) she is not entitled to them. [See also *RangayyaChettiar* v. *ParthasarathiNaickar* (27).] It is argued that she is entitled to them as a *bona fide* purchaser for value under section 51 of the Transfer of Property Act. Assuming that that section applies to this case, the 6th respondent cannot be considered to be a *bona fide* purchaser, as the sale certificate to the 4th defendant, of which the 6th defendant had notice before her sale, distinctly mentions the encumbrance to the plaintiff's husband as a subsisting lien. In determining the amount due to the 4th defendant on the mortgage to the Fund, the learned Judge in the Court below allowed compound interest at 2 per cent. per annum. The bond provides only for simple interest after the period fixed for repayment and the amount due to the 4th defendant should be calculated on that basis. Before passing a final decree it would be necessary to have a finding on the amount due to the 4th defendant on taking accounts on the basis above set out. New evidence may be allowed as to the amount of profits. Time for the submission of the findings will be till the re-opening of this Court after summer recess and 7 days will be allowed for objections.

The memorandum of cross-objections filed by the 6th respondent will be dismissed with costs.

In compliance with the order contained in the above judgment, the Temporary Subordinate Judge of Ramnad submitted the following

FINDING.— * * * * * * * * * *

The amount paid by the 4th defendant on the mortgage to the Fund is Rs. 2,537-6-11 on 18th June 1906, from that date interest up to the 31st August 1917 at two pies per rupee is Rs. 3,553-4-9. So the total is Rs. 6,090-11-8. The total of the amounts due under both heads is Rs. 12,389-10-11. I find the amount due to the 4th defendant to be Rs. 12,400 —in round figures.

This appeal and the memorandum of cross-objections filed by the 4th respondent coming on for final hearing after the return of the finding of the lower Appellate Court

(26) (1853) 63 Am. Dec. 151 at p. 152; 24 Connecticut 1.

(27) 20 M. 120; 7 Ind. Dec. (N. S.) 84.

upon the points referred to it for trial, the Court delivered the following

JUDGMENT.—The first objection to the finding is as to the calculation of compound interest on the bond of Rs. 1,000. It is argued that that is a penal provision and ought to be relieved against. But no such question was raised before one of us and Srinivasa Aiyangar, J., when the appeal was first heard and it cannot be gone into now.

The second objection relates to the question whether interest ought to be allowed on that portion of the amount paid by the 4th defendant to the chit fund which consisted of interest on the original bond. There is nothing in our judgment to show that the 4th defendant who paid the amount due was to be deprived of interest on any portion of the money paid by him. That objection also fails.

Then Mr. Devadoss argued that some of the properties had been sold, and so the amount of the sale-proceeds must be debited against the respondents. But that is quite a mistake. The plaintiff is seeking to redeem the properties on the ground that the sales are invalid. He cannot get the properties as well as the sale-proceeds.

We confirm the finding of the Subordinate Judge and there will be a decree in accordance with that finding. Time for redemption will be extended to three months from this date and the accounts will be continued on the basis of the finding of the Subordinate Judge up to the date of redemption. As regards costs, the ordinary rule will be followed for we do not see why the appellant should be made personally liable for the costs of the 4th respondent.

Decree modified.

M. C. P.

PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 112 OF 1917.

November 8, 1917.

Present:—Mr. Justice Roe and Justice Sir Ali Imam, KT.

MAHENDRA KOER—APPELLANT

versus

SAT NARAIN LAL—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 4—Mortgage suit—Appeal by one of several defendants—Appellate decree, effect of.

In a case in which one only of several defendants appeals, the result of the appeal will enure to the benefit of the other defendants only if the interests of the other defendants are inseparable from the interests of the defendant-appellant. [p. 763, col. 1.]

A decree in a mortgage suit made several properties liable for the satisfaction of the mortgage debt. One of the defendants appealed and was released from liability under the mortgage, on the ground that by a revenue sale the property claimed by him had passed to him free of all incumbrances:

Held, that the result of the appeal was to free only the property in which the defendant-appellant had an interest, leaving untouched the decree of the original Court in so far as the interests of the other defendants were concerned. [p. 763, col. 1.]

Miscellaneous appeal from an order of the Subordinate Judge, Saran, dated the 3rd February 1917, reversing that of the Munsif, Chapra, dated the 6th September 1916.

Messrs. *Baikuntha Nath Mitter*, *Panchanan Banerjee* and *Bankim Chandra De*, for the Appellant.

Messrs. *Rajendra Prasad* and *Shambhu Saran*, for the Respondent.

JUDGMENT.

ROE, J.—The appellant in this case is aggrieved by an order of the District Judge of Saran, setting aside an order of the 3rd Munsif of Chapra directing the sale of mortgaged properties in the following circumstances: Defendants Nos. 1 and 2 to the suit out of which these proceedings arise were the mortgagors of three properties. The defendants Nos. 3 and 4 were subsequent mortgagees of the same properties and defendant No. 5 was the auction-purchaser at the revenue sale of 16-annas share in the 2nd property mortgaged. The decree in the first instance made all the three properties liable for the satisfaction of the mortgage debt. The defendants Nos. 1 to 4 accepted this decision. Defendant No. 5 only appealed, and on his appeal he was released from liability under the

mortgage on the ground that by the revenue sale the property No. 2 passed to him free of all incumbrances. The date of the original decree was the 4th May 1911, and of the Appellate Court decree was the 5th September 1911. In the year 1912 the decree-holder applied for and obtained an order absolute on the original decree. On putting the order absolute into execution the decree-holder was met by a petition on the part of defendant No. 1 to the effect that the preliminary decree having been set aside upon the appeal of defendant No. 5, the whole decree was void and inasmuch as there was in the decree of the Appellate Court no mention of any mortgage lien subsistent upon the property it must be taken that the mortgage lien had been destroyed by the Appellate Court's decree, and that, therefore, defendants Nos. 1 and 2 were liable only for a money decree and defendants Nos. 3 and 4 should escape scott-free. The learned Munsif accepted this suggestion. It was at once exploded in the District Court. The order of the District Court is that the properties Nos. 1 and 3 be sold as mortgaged properties. The grounds taken in the District Court are again urged before us. It is suggested that the only decree which can be executed is the Appellate Court decree and that there is in the Appellate Court decree no security upon the mortgaged properties. With this contention we cannot agree. It is well settled that in any case in which one only of several defendants appeals, the result of the appeal will enure to the benefit of the other defendants only if the interests of the other defendants are inseparable from the interests of the defendant-appellant. In the case before us the interest of the defendants Nos. 1 to 4 was clearly distinguishable from the interest of the defendant No. 5. The result of the appeal by defendant No. 5 was to free only the property in which defendant No. 5 had interest, leaving untouched the decree of the original Court in so far as the interests of defendants Nos. 1 to 4 were concerned. On this ground the appeal must clearly fail.

A further ground taken is that inasmuch as the decree-holder has not filed the decree absolute we must assume that the decree absolute has no existence and that the proceedings in execution are, therefore, void. This ground was not taken in the lower Appellate Court. We have before us a certified copy of the order making the decree absolute and we must presume that the preliminary decree was made absolute and was, therefore, capable of execution as a mortgage decree. The appeal fails and is dismissed with costs. Hearing fee in accordance with the prescribed scale.

IMAM, J.—I concur.

Appeal dismissed.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 5 OF 1916.

August 28, 1917.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, Mr. Justice Teunon and Mr. Justice Walmsley.

KUMAR CHANDRA KISHORE ROY CHOWDHURY—AUCTION-PURCHASER—OPPOSITE PARTY—APPELLANT

versus

BASAT ALI CHOWDHURY—JUDGMENT-DEBTOR—PETITIONER AND *Nawab Syed* ABDUL SOBHAN CHAUDHURY—DECREE-HOLDER—OPPOSITE PARTY—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115 (c)—Revision—Power of superintendence of High Court, when to be exercised—High Courts Act, 1861 (24 & 25 Vict. C. 104), s. 15—Letters Patent (Cal.), Art. 15—'Judgment,' meaning of—Decision of single Judge setting aside order of District Judge and remanding case, whether judgment.

A decision of a single Judge of the High Court, by which an order of a District Judge reversing in appeal an order of a Munsif cancelling a sale is set aside and the case is remanded to the District Judge for re-hearing, is a 'judgment' within the meaning of Article 15 of the Letters Patent. [p. 767, col. 2; p. 769, col. 1.]

Per *Sanderson, C.J., and Walmsley, J.*—The High Court cannot, by exercising its powers of superintendence under section 15 of the High Courts Act, 1861, interfere with the decision of a subordinate Court from which no appeal or revision under section 115, Civil Procedure Code, lies to the High Court. [p. 767, col. 2; p. 769, col. 2.]

Where a District Judge reversed in appeal an order of a Munsif setting aside a sale under Order XXI, rule 92, Civil Procedure Code, on erroneously holding that the property sold was a ⅓rd share in a *patni* whereas it was the undisputed ⅓rd share that was sold, and that the auction-purchaser was a

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'new comer' whereas in fact he was a co-sharer in the property, and without coming to any definite conclusion as to the publication of the sale proclamation:

Held, per *Curiam* (*Teunon, J.* dissenting).—that the decision of the District Judge was not subject to revision under section 115, clause (*c*), Civil Procedure Code, as the mistakes upon which he based his judgment, though grave mistakes of fact, were in regard to questions which he had jurisdiction to decide. [p. 767, col. 1; p. 769, col. 2.]

Per *Teunon, J.* (*contra*).—As the property sold was clearly specified in the sale proclamation as the judgment-debtor's ⅗rd share in the *patni* and as there was no dispute between the parties as to that share, the decision of the District Judge, based as it was on the imaginary finding that the property sold was a ½rd share, was open to revision by the High Court under section 115 (*c*), Civil Procedure Code, as it was the duty of the District Judge to decide *secundum allegata et probata*; although if the parties had been in dispute as to the judgment-debtor's interest in the *patni*, and if, however erroneously, the District Judge had decided that his interest was not ⅗rds but ½rd, that would have been merely an erroneous decision on a question of fact with which the High Court acting under section 115, Civil Procedure Code, could not interfere. [p. 768, col. 2.]

Appeal against the decree of Mr. Justice N. R. Chatterjea and Mr. Justice Mullick, the said Judges differing in opinion on the 9th of April 1915, in Civil Rule No. 1145 of 1914.

FACTS appear from the judgment.

Babu *Mohini Mohan Chakravarty*, for the Respondents, raised a preliminary objection that no appeal lay under section 15 of the Indian High Courts Act against the decision of Mr. Justice Chatterjea passed in revision under section 115 of the Code of Civil Procedure, by which his Lordship ordered a re-hearing of the case by the District Judge. *Justices of the Peace for Calcutta* v. *Oriental Gas Company* (1).

Babu *Mohendra Nath Roy* (with him Babu *Romesh Chandra Sen*), for the Appellant.—The decision of Mr. Justice Chatterjea has affected the merits of the case between the parties and is, therefore, a judgment within the meaning of section 15 of the Indian High Courts Act. The case of *Justices of the Peace for Calcutta* v. *Oriental Gas Company* (1) supports my contention. See also the case of *Chandi Charan Saha* v. *Jnanendranath Bhattacharjee* (2).

The judgment-debtor made an application under Order XXI, rule 90, of the Civil Procedure Code to set aside the sale on the ground of fraud and material irregularity and the sale was set aside by the Munsif. On appeal, the District Judge reversing the decision of the primary Court confirmed the sale. Against the order of the District Judge there was an application to this Court under section 115 of the Civil Procedure Code and section 15 of the Indian High Courts Act, and the case was heard by Mr. Justice Chatterjea and Mr. Justice Mullick. Mr. Justice Chatterjea, holding that the decision of the District Judge is open to revision under section 115 (*c*) of the Civil Procedure Code or under section 15 of the Indian High Courts Act, set aside the order of the District Judge and remanded the case, on the ground that his decision was based on misconception as regards some fundamental points and that he had omitted to consider certain matters which he should have considered in an application under Order XXI, rule 90, Civil Procedure Code. Mr. Justice Mullick on the other hand declined to interfere on the ground that clause (*c*) of section 115, Civil Procedure Code, did not apply to the case. The present appeal is against the order of remand made by Mr. Justice Chatterjea.

Section 115 (*c*) contemplates a case where the Court acts in a way which affects its jurisdiction. Here no case has been made out which justifies the interference of the High Court under section 115 of the Code of Civil Procedure. It has been pointed out that the learned District Judge did not come to any clear finding and definite conclusion as regards the misstatement of value given in the proclamation, and the publication of the sale proclamation. But in deciding the question whether the sale should be set aside the Judge had to consider whether there was a material irregularity and whether there was substantial injury or loss to the judgment-debtor, and after applying his judicial mind to the facts and circumstances of the case the learned Judge came to the conclusion that the sale should not be set aside, inasmuch as he considered that there was no material irregularity and that the price obtained at the sale was adequate. No doubt, he made a mistake as to the auction-purchaser's relation to the property and also as regards the question of the property sold. The Judge had jurisdiction to decide the questions involved in the case, and if in deciding those questions he made

(1) 8 B. L. R. 433 at p. 452; 17 W. R. 364.
(2) 41 Ind. Cas. 250; 21 C. W. N. 921.

a mistake as to law or fact which might affect the correctness of his decision, this Court cannot interfere by way of revision under section 115 (*c*), Civil Procedure Code. Having regard to the cases decided under section 115, clause (*c*), it cannot be said that the lower Court in this case acted in the exercise of its jurisdiction illegally or with material irregularity merely because its decision is erroneous on a point of law or fact. Refers to *Amir Hassan Khan* v. *Sheo Bakhsh Singh* (3), *Krishna Mohini Dossee* v. *Kedarnath Chuckerbutty* (4), *Shew Prosad Bungshidhur* v. *Ram Chunder Haribux* (5), *Malkarjun* v. *Narhari* (6). In a case like this, where the judgment of the lower Court is impeached on the ground that it is vitiated by an error of fact, the proper remedy is to apply for a review of judgment under Order XLVII, rule 1 of the Code, because the mistake or error complained of is apparent on the face of the record. Where no such application for review is made, the petitioner cannot ask the High Court to exercise its general power of superintendence under section 15 of the High Courts Act.

Babu *Mohini Mohan Chakravarty*, for the Respondents.—The learned Judge decided a case which is entirely different from the real case between the parties which he had to decide, and did not apply his judicial mind to the facts and circumstances of the present case. It is not merely a case in which the lower Court has committed an error of fact or law in the exercise of its jurisdiction, but it is a case in which there has been no proper trial of the real case between the parties, inasmuch as there were some imaginary facts before the learned Judge's mind's eye.

[SANDERSON, C. J.—What is the defect of procedure involved in the case?]

The learned Judge has disposed of the case illegally in relying upon imaginary facts. There had been no proper investigation of the judgment-debtor's case. The questions for decision before the learned Judge were, (1) what was the value of the 2/3rds share of the property belonging to the judgment-debtor? (2) Was the property properly valued in the proclamation? (3) Was the sale proclamation duly published? The learned Judge did not come to any clear finding as to the last two questions, and as regards the first question the learned Judge decided the value of the ⅓rd share of the property, which was the case of neither party. If the learned Judge decides a case which is quite different from the case of the parties and if he omits to deal with and decide the material questions raised in and decided by the first Court, the High Court has got jurisdiction to interfere in revision under section 115 of the Civil Procedure Code, or, at least, it can in the exercise of its general power of superintendence, under section 15 of the High Courts Act, revise an order which has been passed without a proper trial of the case. It is for that reason that the High Court revises orders under section 145 of the Criminal Procedure Code. Refers to *Gorakh Babaji* v. *Vithal Narayan Joshi* (7), *Venkubai* v. *Lakshman Venkoba Khot* (8).

Babu *Mohendra Nath Roy* in reply.

JUDGMENT.

SANDERSON, C. J.—This is an appeal under section 15 of the Letters Patent arising from a difference of opinion between Chaterjea, J., and Mullick, J.

The facts are as follows:—

The landlord of the jugment-debtor obtained a decree for rent against him, and in execution thereof, the judgment-debtor's interest in a Patni tenure was sold. His interest was a 2/3rds share. At the sale the debtor's interest was bought for Rs. 2,755 by Kumar Chandra Kishore Roy Chowdhury, who was the owner of the remaining 1/3rd share. The judgment-debtor applied under Order XXI, rule 90, to have the sale set aside: the Munsif in the Court of first instance set aside the sale on the ground that he was not satisfied that the sale proclamation was duly published, and on the further ground that the price was deliberately understated in the proclamation and that the disputed property was a valuable one and might be worth Rs. 6,000, as alleged by the judgment-debtor.

(3) 11 C. 6; 11 I. A. 237; 4 Sar. P. C. J. 559; Rafique & Jackson's P. C. No. 83; 5 Ind. Dec. (N. S.) 760.

(4) 15 C. 446 at p. 449; 7 Ind. Dec. (N. S.) 882.

(5) 23 Ind. Cas. 977; 41 C. 323 at p. 338.

(6) 25 B. 337; 5 C. W. N. 10; 2 Bom. L. R. 927; 27 I. A. 216; 10 M. L. J. 368; 7 Sar. P. C. J. 739 (P. C.).

(7) 11 B. 435; 6 Ind. Dec. (N. S.) 285.

(8) 12 B. 617; 13 Ind. Jur. 270; 6 Ind. Dec. (N. S.) 895.

The auction-purchaser appealed from the order of the Court of first instance and the District Judge allowed the appeal. On the motion of the judgment-debtor, a Rule was issued by the High Court which came on for hearing before Chatterjea, J., and Mullick, J. Chatterjea, J., held that the Court had power to interfere under clause (*c*) of section 115 of the Civil Procedure Code or under section 15 of the Indian High Courts Act, 1861. On the other hand, Mullick, J., came to the conclusion that having regard to the limited operation of section 115, the Court had no jurisdiction to interfere: he expressed no opinion as to section 15 of the Indian High Courts Act.

The opinion of the Senior Judge prevailing, an order remanding the case was made and a re-hearing was directed: hence this appeal by the auction-purchaser.

The grounds upon which Chatterjea, J., based his judgment were :—

(1) That the learned District Judge did not come to any finding, (*a*) as to whether there was a deliberate misstatement as to value in the sale proclamation; or (*b*) as to the publication of the proclamation.

(2) That the learned District Judge started with a misconception on a fundamental point, in that he based his judgment upon the assumption that what was sold was one-third share of the Panti Taluk, whereas in fact it was a two-thirds share.

(3) That the learned District Judge assumed that the purchaser was a 'new comer', whereas he was himself a co-sharer in the Patni tenure to the extent of one-third.

The question is, whether under the above circumstances the case comes within clause (*c*) of section 115 of the Civil Procedure Code.

The clause provides as follows:—115. "The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears..... (*c*) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit."

This clause has been the subject of judicial decision in this Court, *e. g.*, in *Shew Prosad Bungshidhur* v. *Ram Chunder Haribux* (5), Jenkins, C. J., said: "It appears to me that section 115 can only be called in aid when the failure of justice (if any) has been due to one or other of the faults of procedure indicated in that section."

In *Krishna Mohini Dossee* v. *Kedarnath Chuckerbutty* (4) Petheram, C. J., speaking of section 622 of the Code of Civil Procedure of 1882, which was in terms similar to the section now under discussion, said :—

"But then comes a very different and more difficult question, and that is the question whether this order can be revised by the Court under section 622 of the Code of Civil Procedure. This is a section which has been a good deal enquired into."

In our opinion it is a section of very limited operation. What the section says is that the High Court may revise a decision of the Court by which the case was decided if the Court appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally or with material irregularity.

Now, it seems to us, that the meaning of this section is that, whenever a Court has jurisdiction to decide a question, whether it is a question of law or a question of fact, its decision on that question is not revisable by this Court.

Both of these decisions were based upon the decision of the Judicial Committee of the Privy Council in *Amir Hossan Khan* v. *Sheo Bakhsh Singh* (3).

The question therefore is, can it be said that the District Judge acted in the exercise of his jurisdiction illegally or with material irregularity, and having regard to the construction put on clause (*c*) of section 115, was the failure of justice due to such a fault of procedure as is indicated in this clause.

As regards the misstatement of value in the proclamation, as I read the District Judge's judgment, he assumed that there was such a misstatement but he thought it was not a material irregularity.

As regards the alleged want of finding with reference to the publication of the proclamation, I think that the learned District Judge should have arrived at a definite conclusion on this point, but in view of his finding that the price obtained for the property was adequate, this matter was apparently considered by him as of no

material importance to his judgment. As regards his misconception as to what was sold, and as to the position of the auction-purchaser, the learned Judge made a grave mistake of fact.

The learned Judge, however, had jurisdiction to decide all these questions, and if he made a mistake as to law or fact, this Court cannot interfere by way of revision. He had to decide whether the price obtained for the property was adequate. To arrive at a conclusion thereon he would naturally first have to decide what was the plaintiff's interest in the Patni Taluk and whether the purchaser was a person who would pay a fair price. He stated that the property sold was a $\frac{1}{3}$rd share, and therein he made a grave mistake, as the plaintiff's interest was a $\frac{2}{3}$rds share he also considered the purchaser to be a "new comer" whereas he was himself a co-sharer.

These are questions which in my judgment the learned Judge had jurisdiction to decide, and although he made grave mistakes of fact, upon which he based his judgment with respect to these matters, in view of the construction placed upon the section in the above-mentioned cases, with which I agree, his decision is not revisable by this Court. It may be noted that the judgment-debtor was not without a remedy; he could have applied to the learned District Judge for a review and if the attention of the learned Judge had been drawn to the serious mistake of fact which he had made, it is almost impossible to believe that the application for review would have been refused.

As regards the contention that this Court has power to interfere under section 15 of the Indian High Courts Act, 1861. Having regard to the circumstances of this case, in my judgment this Court has no such power.

There was no right of appeal from the order of the District Judge, and in my opinion, as already stated, under the circumstances of the case, this Court has no jurisdiction under section 115 of the Civil Procedure Code to revise the judgment of the District Judge; if this Court were to interfere, basing its interference upon the powers conferred by section 15 of the Indian High Courts Act, it would in my judgment be straining the meaning of the word "superintendence" unduly. It would mean that although there was no right of appeal and no power to revise under section 115 of the Code, this Court could by exercising its power of "superintendence" in effect hear an appeal, or act in revision. I am not prepared so to hold, and indeed it is not necessary to put upon the section in question any such strained meaning, because, as already stated, there was an obvious remedy available to the judgment-debtor, *viz.*, by way of review, by means of which the unfortunate mistake could have been put right.

A preliminary point was taken that there was no right of appeal. In my judgment an appeal lies on the ground that Chatterjea, J.'s judgment was one which deprived the auction-purchaser of the benefit of the District Judge's judgment, which confirmed the sale, and consequently it was a judgment which materially affected the merits of the question between the parties.

For these reasons, in my judgment, the appeal should be allowed with costs both in this Court and before Chatterjee and Mullick, JJ., the Rule should be discharged and the order directing a re-hearing should be set aside.

We assess the hearing fee at two gold *mohurs* for each hearing in this Court.

TEUNON, J.—This is an appeal under Article 15 of the Letters Patent against the decision of Mr. Justice Nalini Ranjan Chatterjea.

By his decision he sets aside an order of the District Judge of Dinajpur and remands the case in which the order was made for re-hearing.

A preliminary objection was taken that against the decision of Mr. Justice Chatterjea no further appeal lay under Article 15 of the Letters Patent. On this point I agree with the decision of this Court in *Chandi Charan Saha* v. *Jnanendranath Bhattacharjee* (2) (though that was an appeal against a judgment in second appeal) and, therefore, this objection in my opinion, cannot be sustained.

The appeal arises out of an application made by the judgment-debtor under the provisions of the Code of Civil Procedure, Order XXI, rule 90, for the setting aside of a sale in execution.

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The property sold was the judgment-debtor's $\frac{2}{3}$rd share in a certain Patni Taluk. The trial Court held that in the sale proclamation the value of the property had been deliberately underestimated, that the sale proclamation had not been duly published and that by reason of these irregularities or frauds an adequate price had not been realised.

Against the order setting aside the sale on the grounds just stated the auction-purchaser appealed. The District Judge at the hearing of the appeal came to no clear finding as to the publication of the sale proclamation, held that the statement of value (Rs. 600) though a gross mis-statement was not calculated to deter possible bidders and that the price fetched at the sale (Rs. 2,755) was not seriously inadequate. He, therefore, decreed the appeal.

Against this decision there was an application in revision to this Court. At the hearing of the Rule then obtained it was contended that the District Judge had failed to value the property sold, namely, judgment-debtor's $\frac{2}{3}$rd share in a certain Patni Taluk.

His judgment in fact makes it apparent that he conceived that he was required to value a $\frac{1}{3}$rd share. Moreover, his judgment indicates that he has fallen into a further error regarding the area, that is, he appears to think that the judgment-debtor's statement of area, 600 *bighas*, applies not to his own share ($\frac{2}{3}$rds) but to the whole Patni of which the Judge, therefore, proceeds to value $\frac{1}{3}$rd, *i. e.*, 200 *bighas*. The learned Judges who heard the Rule differed, Mr. Justice Mullick, who has himself apparently misapprehended the District Judge's statement regarding area, holding that the error committed by the District Judge did not bring the case within the scope of section 115 of the Code, while the Senior Judge, Mr. Justice Chatterjea, was of opinion that under section 115 of the Code, and also under section 15 of the Charter Act, the Court could and should interfere.

Against the latter's decision the present appeal has been preferred by the auction-purchaser.

At the hearing before us, it has been contended on behalf of the appellant that the error into which the District Judge has fallen is merely one of those erroneous decisions or "sad mistakes" to which the case of *Amir Hassan Khan* v. *Sheo Baksh Singh* (3), decided by their Lordships of the Judicial Committee, and the case of *Shew Prosad Bungshidhur* v. *Ram Chunder Haribux* (5) should be held to apply.

To this contention I am unable to assent. It may be that if the parties had been in dispute as to the judgment-debtor's interest in the Patni and if, however erroneously, the District Judge had decided that his interest was not $\frac{2}{3}$rds, but $\frac{1}{3}$rd (and the area not 600 *bighas* but 200 *bighas*), this would have been merely an erroneous decision on a question of fact with which, acting under section 115 of the Code, we could not and should not interfere.

But the case here appears to me to be different. The property sold was clearly specified in the sale proclamation as the judgment-debtor's $\frac{2}{3}$rd share. As to the extent of the judgment-debtors' interest there was no dispute between the parties. Specified shares are distinct entities. It is the duty of a Judge to decide *secundum allegata et probata*. Instead of doing so, the learned Judge here has set himself to value not the property sold but an entirely different property, and on his finding as to the value of this different or imaginary property he has declined to set aside the sale of the judgment-debtor's property valued by the judgment-debtor at more than double the price realised.

By way of analogy merely, I should refer, in support of the view I take to two cases decided by the Bombay High Court and reported as *Gorakh Babaji* v. *Vithal Narayan Joshi* (7) and in *Venkubai* v. *Lakshman Venkoba Khot* (8).

For these reasons and differing with all respect from my learned colleagues I am of opinion that the present appeal should be dismissed with costs.

WALMSLEY, J.—This appeal is against an order passed by Mr. Justice Chatterjea on an application made by the present respondent.

The circumstances are as follows:—The respondent's landlord obtained a decree for rent against him, and in execution of that decree he caused respondent's share in a Patni Taluk to be put up for sale. The share was two-thirds of the Taluk. In the

sale, the share was bought by the owner of the remaining one-third share. Subsequently the respondent applied to have the sale set aside, and this application was granted by the Munsif. Then the auction-purchaser preferred an appeal, and the order setting aside the sale was reversed and the sale was confirmed. Thereupon the judgment-debtor preferred a motion in this Court, a Rule was issued, and in due course the Rule came on for hearing before Mr. Justice Chatterjea and Mr. Justice Mullick. The former held that the case was one in which it was right to interfere and directed that the appeal should be heard again by the District Judge. The latter, however, was of opinion that the circumstances were not such as to bring the case within the scope of section 115 of the Civil Procedure Code. The auction-purchaser has lodged this appeal against Mr. Justice Chatterjea's order directing that the appeal should be re-heard.

A preliminary objection was taken at the hearing by the learned Pleader for the respondent, to the effect that no appeal lay, and he referred to the case of the *Justices of the Peace for Calcutta* v. *Oriental Gas Company* (1). I do not think that that case supports his argument. The learned Chief Justice said there: "We think that 'judgment' in clause 15 means a decision which affects the merits of the question between the parties by determining some right or liability." Applying that definition to Mr. Justice Chatterjea's judgment, it is clear that it affects the merits of the question in a very material degree. The effect of the decision by the lower Appellate Court was to confirm the sale, but by Mr. Justice Chatterjea's order the Munsif's order setting aside the sale is restored, until the auction-purchaser has convinced the District Judge at a second hearing of the appeal that it ought to be reversed. I hold, therefore, that the preliminary objection cannot be sustained and that the appeal does lie.

For the appellant it is urged that the reasons given by Mr. Justice Chatterjea cannot be brought within any of the clauses of section 115, Civil Procedure Code. It is clear that clauses (*a*) and (*b*) have no application. Can it be said that the learned District Judge "acted in the exercise of his jurisdiction illegally or with material irregularity?" The learned Pleader for the respondent says that because the lower Appellate Court treated the property as being one-third of the Taluk instead of two-thirds, there was no proper trial of the case. He stated this argument in several ways; that the learned Judge did not apply his mind to the case really before him; that he decided a case about the one-third share and not about the two-thirds share; that he did not try the judgment-debtor's case at all. Stated in any form, the argument is, if I may use the epithet without offence, nothing but a specious way of saying that the learned Judge made a very serious mistake, regarding the extent of the interest which had been sold. A mistake of fact, however, and a wrong decision based on it, do not constitute illegality or irregularity. I think this view is in accordance with a recent decision of this Court [*Shew Prosad Bungshidhur* v. *Ram Chunder Haribux* (5)] and with a decision by their Lordships of the Privy Council [*Amir Hassan Khan* v. *Sheo Bakhsh Singh* (3)]. In my opinion, therefore, the present case does not come within the scope of section 115, Civil Procedure Code.

For the respondent it is urged that if he cannot obtain relief under section 115, Civil Procedure Code, at any rate the provisions of section 15 of the High Courts Act are wide enough to cover his case. Attempts are often made to put an elastic interpretation upon the word 'superintendence.' Personally I think the word should be construed very narrowly. It is not necessary, however, to consider what meaning should be given to it, for there is one fact in the present case which prevents the respondent from asking us to go beyond the provisions of the Civil Procedure Code. That fact is his failure to apply to the lower Appellate Court for a review of judgment. It is clear that the respondent was "aggrieved by a mistake apparent on the face of the record", and if he had made a proper application under Order XLVII he would, doubtless, have obtained relief.

Although I share Mr. Justice Chatterjea's sympathy for the judgment-debtor, I think we cannot uphold his order. In my opini-

on the appeal should be allowed, the order directing the appeal to be re-heard by the District Judge should be set aside, and the Rule obtained by the judgment-debtor should be discharged. I, therefore, concur in the orders of the learned Chief Justice.

Appeal allowed.

CALCUTTA HIGH COURT.
FULL BENCH.

APPEAL FROM ORIGINAL CIVIL No. 91 OF 1916.

August 14, 1917.

Present:—Mr. Justice Fletcher, Mr. Justice N. R. Chatterjea, Mr. Justice Teunon, Mr. Justice Richardson and Justice Sir Asutosh Chaudhuri, KT.

MANI LALL SING—PLAINTIFF—APPELLANT

versus

THE TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA—DEFENDANT—RESPONDENT.

Calcutta Improvement Act (V B. C. of 1911), ss. 41 (a), 42 (a), 78, 81—Board, whether has power to acquire land for recoupment—"Affected" in s. 42 (a), meaning of—'Recoupment,' 'Betterment,' meaning of—Interpretation of Statutes—Preamble, whether governs express provisions.

By the Full Bench (N. R. Chatterjea, J., dissenting).—Section 42 (*a*) of the Calcutta Improvement Act authorises the Board of Trustees to acquire land compulsorily for purposes of "recoupment," *i.e.*, by selling or otherwise dealing with the land under section 81 or by abandoning the land in consideration of the payment of a sum under section 78 of the Act. [p. 781, col. 2.]

Per *Fletcher, J.*—The word "affected" in section 42 (*a*) of the Calcutta Improvement Act means affected in any way; and the expression "by the execution of the scheme" means through or owing to the execution of the scheme. [p. 780, col. 2.]

Betterment means that persons whose property has clearly been increased in market value by an improvement effected by local authorities should specially contribute to the cost of the improvement. [p. 779, col. 1.]

Recoupment means the acquisition of land by a public body beyond what is necessary for the actual execution of an improvement, so that some part at least of the improved value may be secured by the improving public body in ease of the burden on the rate-payers. [p. 779, col. 1.]

The preamble cannot restrict the enacting part of an Act though it may be referred to for the purpose of solving an ambiguity. [p. 779, col. 2.]

Per *Richardson, J.*—The phrase 'land affected by the execution of the improvement scheme" in section 42 (*a*) of the Calcutta Improvement Act suggests land affected for the better, and though the words may be wide enough to include land prejudicially affected should the Board choose to acquire such land, they specially include and signify land beneficially affected. [p. 799, col. 1.]

The words "by the execution of the scheme", which qualify the word "affected" refer not only to the period of construction but also to the period immediately following, when the improvement scheme is completed and in operation and "a going concern." [p. 799, cols. 1 & 2.]

Per *Chatterjea, J.*—The words "land required for the scheme" in section 41 (*a*) of the Calcutta Improvement Act mean the land which is actually required for what may be called the engineering or construction works, for instance, in a street scheme the land necessary for laying out the street. [p. 784, col. 1.]

The word "affected" in section 42 (*a*) of the Calcutta Improvement Act has no reference to value. In that section it is used in the sense of acted upon physically or materially. [p. 785, cols. 1 & 2.]

The Calcutta Improvement Act does not authorise the Board of Trustees to acquire land compulsorily for the purpose of recoupment. [p. 793, col. 1.]

Where there are two possible constructions of certain words in a section of the Calcutta Improvement Act defining the power of the Board of Trustees, if on the one construction the Board would have almost unlimited power of interference with private rights, and in the other they are not clothed with such power, but with a power more convenient and limited, the latter construction should be preferred. [p. 789, col. 2.]

Reference against the judgment of Mr. Justice Greaves, dated the 5th June 1917.

FACTS appear from the following Order of Reference.

SANDERSON, C. J.—This case comes before us sitting as a Court for the hearing of appeals from the Original Side of the High Court and it is an appeal from the judgment of Greaves, J., which was delivered on the 17th July 1916.

The plaintiff was the owner of certain premises, No. 10, Halliday Street, and the defendants were the Trustees for the Improvement of Calcutta and Mr. Peterson, the Land Acquisition Collector. The suit was filed for the purpose of obtaining an injunction to restrain the defendants from acquiring the said premises or doing any acts in furtherance thereof.

The land in question, No. 10, Halliday Street, lies to the west side of Halliday Street, the widening of which formed the basis of the Scheme No. VIIA. There was some discussion during the argument in this Court, as to how much of No. 10,

Halliday Street, had been taken for the actual street widening.

It was, however, finally agreed by the learned Counsel engaged in the appeal that the strips of land to the north and south of No. 10, which had been taken for the purpose of widening Tara Chand Dutt Street and Zakaria Street (which is not named on the plan, but which is the street to the south of No. 10), had been taken under another scheme or other schemes, and that only the portions of No. 10 required for rounding off the corners formed by the junction of these two streets with Halliday Street had been taken in Scheme VII A, so far as the actual widening of Halliday Street was concerned.

The remainder of No. 10, Halliday Street, the Trustees contend, they are entitled to acquire compulsorily under their improvement scheme as land "which will, in their opinion, be affected by the execution of the scheme" within the meaning of section 42.

The issue upon which the case was decided was the 5th, which runs as follows:—

(5). Are the lands in suit, or any portion thereof, required for the purposes of the Act? Is recoupment one of such purposes?

Greaves, J., decided this issue in favour of the Trustees. The question depends upon the interpretation of the provisions of the Bengal Act No. V of 1911, an Act to provide for the improvement and expansion of Calcutta.

Last year Mookerjee and Cuming, JJ., sitting as a Division Bench on the Appellate Side of the Court, heard an appeal in the case of the *Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh* (1). It was an appeal by the Trustees from a judgment of the Subordinate Judge of the 24-Pergannas, and judgment was delivered by the Division Bench on August 22nd, 1916. In that case the question whether the Trustees were entitled to acquire land compulsorily for the purpose of "recoupment" was involved, and the learned Judges came to a conclusion as to the construction of the Act contrary to that arrived at by Greaves, J., in the case now under appeal.

As at present advised, I agree with the conclusion arrived at by Greaves, J. As already stated the issue included the question: "Is recoupment one of such purposes?" It might have been more accurate to say "Is 'recoupment' one of the means authorised by the Act for carrying out the objects of the Act," but it is plain from the judgment that no misunderstanding occurred from the form of the issue.

I agree with Greaves, J.'s interpretation of the words "affected" in section 42 and I think the Trustees have power to acquire compulsorily land which, in their opinion, will be affected by the execution of the scheme with a view to selling or otherwise dealing with the same under section 81 or to the payment of a sum of money under section 78. Consequently, as at present advised, I am unable to agree with the decision in the case of the *Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh* (1), in so far as it decides the contrary, and as my learned brothers, Woodroffe and Chitty, JJ., have come to the same conclusion the question of law must be referred to a Full Bench in pursuance of the rules of this Court.

In view, therefore, of the fact that this appeal must be re-argued before a Full Bench, I do not think it necessary to deal in detail with the sections of the Acts or the arguments presented to us. It is sufficient for me to say that I have read the judgments about to be delivered by my learned brothers Woodroffe and Chitty, JJ., and that, as at present advised, I agree with the conclusions arrived at by them.

The question to be referred to the Full Bench is whether the case of the *Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh* (1), in so far as it holds that the Act V of 1911 (B. C.) does not authorise the Board of Trustees to acquire land compulsorily for purposes of "recoupment," *i.e.*, by selling or otherwise dealing with the land under section 81 or by abandoning the land in consideration of the payment of a sum under section 78, was rightly decided. It was agreed by the learned Counsel engaged in Appeal No. 92 of 1916 that it would be covered by the decision in 91 of 1916.

WOODROFFE, J.—Something has been said as to the supposed novelty and arbitrary

(1) 36 Ind. Cas. 749; 44 C. 219; 24 C. L. J. 246; 21 C. W. N. 8.

character of the principle of recoupment. In England the principle is well known:

"Municipal and other public bodies are sometimes given powers to take land beyond that which is necessary for the actual execution of the proposed works, in order that some part at least of the improved value of the adjoining lands may be secured in ease of the burden upon the rate-payers. These lands are said to be authorised to be taken for the purpose of 'recoupment', as the public body is empowered to sell or lease them at what may be an enhanced value" (Laws of England—Halsbury, VI, 25).

The principle of recoupment is well known here also and has been apparently provided for in the Bombay City Improvement Act of 1898 and the Calcutta Municipal Act of 1899, section 357 (2), both of which have been in operation for many years.

The latter Act gives the corporation *wider powers* than are claimed here for the Trustees.

The question is whether the power of taking land for recoupment has been given in the Calcutta Improvement Act (V of 1911 B. C.). Does it appear to be the intention of the Act that the public body of Trustees are to be allowed to re-imburse themselves the cost of improvement? It is possible, though it may not be likely, that what has been given under the Bombay Act and the Calcutta Municipal Act has been withheld here. I do not refer to the Bombay Improvement Act on the question of the construction of the Calcutta Improvement Act, but for the purpose of negativing the charge made against the Act of its being of an unusual arbitrary and oppressive character if it be construed to include the principle of recoupment. That principle is common enough and fair enough. Whether it exists in the provisions of the Act under discussion is another question. We have been told that a frontage tax was negatived. This is not against a power of recoupment having been given. For the former is a wider power applicable to every property fronting the improved area, whereas recoupment gives an option to the Trustees to acquire it or not according to the circumstances. It is obvious that the city cannot be improved except at a cost. It is argued before us that taxes and contributions provided for by the Act are insufficient to provide the funds necessary for improvement unless the principle of recoupment be allowed. Whilst this is *prima facie* possible, we must still look to see whether the power has in fact been given. This is a question of construction. Before dealing with the sections I may dispose of another apparent objection. It is equitable that those whose premises have been benefited by the improvement should contribute to it; and the application of this principle is subject to scrutiny and sanctions which guard against any misuse of powers.

In my opinion, the solution of the question before us depends in the main on the construction of sections 42 and 69. Subsidiarily sections 68, 78, 81, 122 are of importance. The preamble states the object of the Act to be to make provision for the improvement and expansion of Calcutta. This is the object of the Act generally stated. It there mentions particular ways in which this general object is given effect to, such as opening of congested areas, altering streets, acquiring lands, and "otherwise as hereinafter appearing." We must distinguish between the direct objects of the Act and the means by which they are to be given effect to. The object is to improve Calcutta. But to improve it money is needed, and the raising of money for that purpose is a means. The preamble then proceeds to say that it is expedient that a Board of Trustees should be constituted and invested with special powers for carrying out the objects of the Act. One of such powers is the power to acquire land for the execution of the proposed scheme (section 41). Every improvement scheme must provide for this. Another power (section 42) is an optional one. Such scheme may provide for the acquisition by the Board of Trustees of "any land in the area comprised in the scheme which will in their opinion be affected by the execution of the scheme." The question turns firstly on the meaning of the word "affected." It is obvious that the land so affected is different from land required for the execution of the scheme. Thus land may be taken outside the improvement scheme. The improvement brought about by the

execution of the latter is the cause of the effect produced on the "affected" land.

It was held in *Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh* (1) that the word "affected" does not mean "beneficially affected or improved in value;" nor does it mean "prejudicially affected or impaired in value," but signifies "acted upon physically or materially." It is difficult, however, to conceive of a case in which land is neither beneficially nor prejudicially affected in value. Perhaps what was meant to be said is that it is not sufficient to show that the land is affected in value, but that it is affected physically or materially must also be shown. But I am unable to see any ground which justifies us in reading into the section words which are not there. The Act says nothing about physical or material. It says "affected." This word must be given its plain and natural meaning, and that is "affected", howsoever it may be. In my opinion "affected" means affected and not merely physically affected, affected in value prejudicially or beneficially or so forth. If it is affected in any way, it is "affected." If it is beneficially affected, it is affected, and the question arises for what purposes and how the Trustees may acquire it. The next question is whether lands mentioned in section 42 can be acquired both by agreement under section 68 and compulsorily under section 69 or whether as Mookerjee and Cuming, JJ., have held, we are again to interpret a term used in its general sense in a particular sense. It has been held in the judgment cited that there can be no compulsory acquisition in respect of land dealt with in section 42 (*a*). This conclusion is based on the ground that section 69 authorises the Board to compulsorily acquire land "for carrying out any of the purposes of this Act." It is then said that as acquisition for the purpose of recoupment is not mentioned in the preamble, it is not a purpose, or a carrying out of a purpose, of the Act. As I have said, we must distinguish between an improvement and the means by which the improvement is effected. Recoupment is a means. The preamble is not concerned with the means. It merely states some of the general objects which are to be carried out by the means dealt with in the sections. It mentions acquiring land for certain objects of improvement. It does not mention the acquisition of land that it may be sold at a profit. It mentions the first because that is one of the objects of the Act: it does not specifically mention the second because it is a means, merely stating in a general way that the Trustees are invested with special powers (to be found in the sections) for carrying out the objects of the Act. I asked during the course of the argument whether there is any Act in this country or elsewhere in which recoupment is allowed and in which recoupment is directly mentioned in the preamble, and none was produced. On the contrary the word recoupment does not appear in any Act. We have further to see what are the express provisions in the body of the Act. It is and must be admitted that whatever be the meaning of the term "affected" in section 42, acquisition of land there mentioned is declared to be part of the improvement scheme. How then can it be said that the acquisition of land, which is part of the improvement scheme, is not for the carrying out of a purpose of the Act? As a matter of fact the contention that there cannot be compulsory acquisition under section 69 of land mentioned in section 42 (*a*) has been abandoned in the hearing before us, it being said that land may be acquired compulsorily or by agreement in respect of the matters mentioned in that section.

The words in section 69 are not only "for the purposes of this Act" but "for carrying out any of the purposes of the Act," that is, land may be compulsorily acquired both for the ultimate objects of the Act, namely, the improvement and expansion of Calcutta, and also as the sanctioned means whereby such improvement can (and as alleged can only) be effected.

What then is the object of acquiring land under section 69 combined with section 42? Even if recoupment can be included in the words "for the carrying out of the purposes of the Act," it must be shown that it is in fact so included, and that under section 42 acquisition may be made for such purpose.

As I have already said, "affected" includes both beneficially and prejudicially affected in value by the execution of the

scheme of improvement. If the land sought to be acquired is likely to be injuriously affected by the execution of the proposed scheme, the land may be acquired at the market price, in which case the prospective loss will, if it occurs, fall on the Trustees. The latter are not bound to take up this or any other affected land. Ordinarily, however, adjoining land will be beneficially affected by the adjoining improvement. In that case, if the Trustees elect to acquire it, they acquire it at the market price and take the chance of prospective profit. They get this profit in one of two ways, either by allowing the owner to apply under section 78 for exemption of acquisition on payment of a sum to be fixed by the Board, or they may sell the land under section 81 subject (with certain qualifications) to a right of pre-emption in the owner. Section 78 is of great importance. It is sought to be explained away by saying that it applies to surplus lands, *i. e.*, land which was originally acquired for the execution of the scheme but which was subsequently found not to be so required. The section does not say this, but "which is not required." But let us assume for the moment this construction and see what follows. The section contemplates an application by the owner to the Board requesting that the acquisition should be abandoned in consideration of the payment by him of a sum to be fixed by the Board. Why on the construction put forward by the appellant should the owner pay anything at all? His land is (say) taken by mistake and is found not wanted, and yet he is to be made to pay for the privilege of getting back his own land which, on a more correct estimate of what was required, should never have been taken from him. Learned Counsel for the appellant was unable to say anything more about this than that Government had put this "hardship" on his client and that he had to bear it. It is more reasonable to suppose that instead of imposing unnecessary hardships, the Legislature had in view a useful purpose, namely, recoupment. Moreover, the words of section 78 show that it does not apply to surplus lands under the improvement, because the scheme has not been commenced, and therefore, no one is in a position to say what are surplus lands: and because the payment by the owner negatives the idea that the lands here referred to are surplus lands. If they were, there is no reason why the owner should pay for getting back lands which on the hypothesis belong to him.

I agree with Greaves, J., that we must read "affected" as meaning affected, and not as qualified by terms which do not appear in the Act. I agree with him in holding that "affected" means affected in any way either prejudicially to the owner of the lands, or beneficially affected in the opinion of the Board, that is, enhanced in value by the improvement scheme and that recoupment by compulsory acquisition has been provided for by the Act. There is no question but that the land in suit was affected so as to justify its acquisition by the Board, whether we limit the term as the appellant suggests, or give it its full meaning as I think should be done. As, however, I am in disagreement with the decision in *Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh* (1), in that it holds that Act V of 1911 (B. C.) does not allow the compulsory acquisition of land for recoupment, I agree that the question, whether it is good law or not, should be referred to a Full Bench in terms of the Chief Justice's judgment.

CHITTY, J.—This is an appeal from the decree of Greaves, J., in a suit brought by Mani Lall Sing against the Trustees for the Improvement of Calcutta and the Land Acquisition Collector to restrain them from acquiring the plaintiff's premises, No. 10, Halliday Street, under the Calcutta Improvement Act V of 1911 (B. C.). The learned Judge dismissed the plaintiff's suit finding on issue No. (5) that the lands in suit are required for the purposes of the Act and that recoupment is one of such purposes. In the view that he took it was unnecessary to decide the other issues.

I agree with the learned Chief Justice and Woodroffe, J., that the decision appealed from is correct, and that this appeal ought to be dismissed. But as this involves disagreement with the decision of a Division Bench of this Court in *Trustees for the Improvement of Calcutta* v. *Chandra Kanta*

Ghose (1), and consequently a reference to a Full Bench, I will state briefly the reasons for my decision.

The question for determination is whether the principle of recoupment is contemplated by the Calcutta Improvement Act. I should have preferred not to use the word "purposes" in issue No. (5), as a distinction might be drawn between "purposes" meaning the "objects" of the Act and "purposes" denoting the means by which those objects are to be attained. The word "purposes" is no doubt wide enough to cover both meanings. Thus the raising of loans by the Board which is specifically provided for by the Act may be said to be a purpose of the Act, though it is strictly one of the means by which the objects of the Act are to be carried out. It may be conceded that the word "recoupment" or indeed any synonymous expression finds no place either in the preamble or in the body of this Act. Our attention has not been drawn to any Statute or Act in which it does occur, though many such Statutes and Acts contemplate "recoupment," which is a well-recognised principle in town improvement. So far as the preamble is concerned, it is expressed in very general terms and the only object or purpose of the Act there specified is "to make provision for the improvement and expansion of Calcutta"; those words are followed by an enumeration of various methods, by which the improvement and expansion are to be effected, and the sentence ends "and otherwise" (*i.e.*, in other ways) "as hereinafter appearing." These last words in my opinion clearly refer back to the various participles preceded and governed by the preposition "by." The second clause provides for the constitution of a Board of Trustees and for investing them with special powers for carrying out the objects of the Act. In my opinion, there is no force in the contention that the principle of recoupment finds no place in the preamble as a purpose or object of the Act. It is not to be expected that it should. We have to see whether it is one of the special powers with which the Board is invested. To see that we look into the Act itself. I agree that it must not be a matter of vague implication. It must be found there in provisions as to the meaning of which there can be no doubt.

The most important section is section 42, which deals with matters which *may* be provided for in improvement schemes, section 41 having dealt with matters which *must* be provided for. Section 42 runs:—"Any improvement scheme may provide for (*a*) the acquisition by the Board of any land, in the area comprised in the scheme, which will, in their opinion, be affected by the execution of the scheme." I agree with Greaves, J., that the decision of this case rests upon the meaning to be given to the word "affected." The arguments of Counsel on both sides were exhaustive and proceeded along somewhat devious paths, but all led us back to the simple question, what is the meaning to be placed on the word "affected." The learned Judges who decided *Chandra Kanta Ghosh's case* (1) expressed their opinion that in section 42 (*a*) it means neither "beneficially affected or improved in value" nor "prejudicially affected or impaired in value", but signifies "acted upon physically or materially." I am not sure that I understand their meaning. It may be that they meant that it does not necessarily signify affected in value. If they meant that it can have no reference to value, I am unable to agree. For the appellant it was argued that it certainly had no reference to value, but to injurious affection by reason of some interference with the owner's rights. No good reason was given for reading the word in so restricted a sense. It is noteworthy that when the Legislature intend, so to use it, they add the adverb, see section 23 (1) (4) of the Land Acquisition Act, 1894, where the words are "injuriously affecting." I cannot see why the word "affected" should not be given its ordinary and natural meaning, and signify "affected" in any way, beneficially or injuriously, physically or materially, or otherwise howsoever. It seems to me that if land be "affected" at all by the execution of a scheme, it must be affected for better or worse. There can be no middle course, for then it would not be affected at all.

If the word be so construed, section 42 (*a*) clearly authorises the Board to include in a scheme the acquisition of any land with-

in the given area which will in their opinion be affected by the execution of the scheme. Whether it will be so affected or not, the Board are the sole judges, though their scheme is of course dependent on the sanction of the Local Government. I must confess that I was unable to appreciate the force of the argument that section 42 (*a*) does not authorise compulsory acquisition; that that can only be effected under section 69; that section 69 only empowers the Board, with the previous sanction of the Local Government, to acquire land under the provisions of the Land Acquisition Act, 1894, for carrying out any of the purposes of this Act; and that the acquisition of land provided for under section 42 (*a*) is not a purpose of the Act. This appears to be the effect of the judgment in *Chandra Kanta Ghosh's case* (1), though I understood the learned Advocate-General to admit that for some purposes at any rate compulsory powers might be exercised under section 42 (*a*). It is difficult to see why a distinction should be drawn between section 42 (*a*) and section 42 (*b*), (*c*) and (*d*), which may certainly be included in purposes of the Act. In my opinion acquisition of land provided for under section 42 (*a*) is just as much a purpose of the Act, though a different one, as the acquisition of land provided for under section 41 as being in the opinion of the Board required for the execution of a scheme. I understood it to be conceded by the learned Counsel for the appellant that the Board could under section 68 acquire land by purchase or lease for purposes of recoupment. The learned Judges who decided *Chandra Kanta Ghosh's case* (1) seem to have been of the same opinion, for they say:—"The section (*i.e.*, section 42) is at best an enabling provision; it gives no power of compulsory acquisition, though it may possibly authorise the Board to acquire land by private agreement." But section 42 is quite general in its terms and makes no distinction between the two forms of acquisition, by agreement and compulsory, which are recognised by the Act. An attempt was made to draw a distinction between acquisition by agreement under section 68 and compulsory acquisition under section 69. Beyond the obvious distinction between agreement and compulsion therein appearing, I do not think that there is any other distinction. The phraseology of the two sections is slightly different, but their meaning is the same. Under section 68 the Board may make any agreement for the purchase or lease "of any land which they are authorised to acquire." That must mean "authorised to acquire" under this Act. They can, therefore, under section 68 only purchase or lease land for carrying out any of the purposes of this Act, which are the words used in section 69. I am of opinion that the acquisition of land provided for by section 42 (*a*) is for carrying out the purposes of the Act, and that such acquisition, when the scheme has been approved by the Local Government, can be put through under the provisions of either section 68 or section 69 as the case may be.

That the Board can acquire land for purpose of recoupment is, in my opinion, made clear by the provisions of sections 78 to 81. Section 78 is specially important as in my opinion it can refer to nothing else. It was argued that it may refer to surplus lands, *i. e.*, to lands which have been included in a scheme but have been found to be unnecessary for its execution. The words of the section, however, are "land .....which is not required for the execution of the scheme," not "which has been found to be unnecessary" for such execution. No satisfactory answer was given by the appellant's Counsel to the question put more than once, why, if a man's land has been taken and is to be given back as not required, should the unfortunate owner be made to pay to get it back. If the section referred to the abandonment of acquisition of surplus lands, it would, in my opinion, be in irreconcilable conflict with section 48 of the Land Acquisition Act, which must be read as incorporated in this Act. Further, the time, before which an application under section 78 must be made, *i.e.*, before the time fixed by the Collector under section 9 of the Land Acquisition Act, shows that it cannot possibly refer to surplus lands. In *Chandra Kanta Ghosh's case* (1) it is suggested that section 78 may come into play where land which was originally intended to be acquired as necessary for the execution of the scheme may turn out to be not actually required by reason of an alteration in the

scheme made under section 50 or by reason of some mistake in the original scheme itself. It is difficult to see how any such mistake could arise having regard to the various stages through which a scheme must pass before it is finally sanctioned. Nor is it reasonable to suppose that an elaborate section such as section 78 would be framed to meet a contingency which was not and could not be contemplated by the Act. But I cannot see how section 78 can apply in either of these two contingencies. If a scheme is altered or a mistake discovered, it must be before the land has been acquired. In that case the owners's land is still his own. Section 78 is only to be employed on the owner's application, and the question above referred to is again pertinent, why should he have to pay for retaining his own land which the Board do not require. It was argued that if section 78 refers to land acquired for purposes of recoupment, then under section 80 the Board would be able to repeat the process *ad infinitum*. This is clearly not so. That section merely provides that land, for which an exemption fee has been paid under section 78, is not thereby excluded from a fresh declaration under section 6 of the Land Acquisition Act.

Lastly the provision in section 8. (2) (*b*) giving the owner of land a right of pre-emption clearly denotes that the land has been taken for purposes of recoupment, and not as required for the execution of a scheme. It provides for the return of land to the owner at a price to be fixed by the Board, when that land has been acquired, while section 78 provides for such return at an earlier stage of the acquisition proceedings. I do not think that the sections in Chapter VI, Finance Accounts, have much bearing on the question before the Court, but section 122 provides for the crediting to capital account of all sums that can be received by the Board in respect of the sale of land, from whatever source it is derived [see section 122 (*a*), (*c*) and (*d*)]. I entirely agree with what Woodroffe, J., has said with regard to the alleged arbitrary nature of the Act. It appears to be far less arbitrary than the Land Acquisition Act which has been in force, with modifications, for nearly fifty years, or the Calcutta Municipal Act, 1899, with which the people of Calcutta are equally familiar. In this particular case although Greaves, J., actually decided issue (5) only and on that decision dismissed the suit, his judgment shows that he considered the land here in question to be "affected" by the execution of the scheme [Issue No. (6)]. There is no doubt on the facts, which are not in dispute, that this is so, as two small portions have been cut off for rounding off the corners of Halliday Street and the streets running into it. To this extent the case is distinguishable from *Chandra Kanta Ghosh's case* (1). The question of law, however, in both cases is the same, and, as we are in disagreement with the decision in that case, I agree that the question should be referred to a Full Bench.

A question was raised whether the Land Acquisition Collector was a necessary or proper party to this suit. In my opinion he was not. In any event, as he is sued in his official capacity, and the allegation in the plaint as amended is made against him in that capacity, the party, if any, to be added was the Secretary of State for India in Council.

The Hon. Mr. *B. C. Mitter* (Officiating Advocate-General) (with him Mr. *S. C. Roy*), for the Appellant.

Mr. *S. R. Das* (Officiating Standing Counsel) (with him Messrs. *Langford James* and *A. Sinha*), for the Respondent (Calcutta Improvement Trust).

JUDGMENTS OF THE FULL BENCH.

FLETCHER, J.—The question referred to the Full Bench for determination is as follows :—

"Whether the case of the *Trustees for Improvement of Calcutta* v. *Chandra Kanta Ghosh* (1), in so far as it holds that Act V of 1911 (B. C.) does not authorize the Board of Trustees to acquire land compulsorily for purposes of 'recoupment' *i. e.*, by selling or otherwise dealing with the land under section 81 or by abandoning the land in consideration of the payment of a sum under section 78, was rightly decided."

The suit out of which the present reference arises was instituted on the Original Side of this Court by the plaintiff

as the owner of the premises known as No. 10, Halliday Street, against the Trustees for the Improvement of Calcutta and the Land Acquisition Collector for the purpose of obtaining an injunction to restrain the defendants from acquiring the said premises or doing any acts in furtherance thereof. From the statement given in the opinion of the learned Chief Justice in the order of reference it appears that No. 10, Halliday Street, lies on the west side of Halliday Street, the widening of which formed the basis of a street improvement scheme framed by the Trustees and known as Scheme No. VII A. There was some discussion during the argument before the referring Judges as to how much of No. 10, Halliday Street, had been taken for the actual street widening. It was, however, finally agreed between the Counsel engaged in the appeal that the strips of land to the north and south of No. 10 which had been taken for the purpose of widening Tara Chand Dutt Street and Zakaria Street had been taken under another scheme or schemes, and that only the portions of No. 10 required for rounding off the corners formed by the junction of these two streets with Halliday Street had been taken in Scheme No. VII-A so far as the actual widening of Halliday Street was concerned. The remainder of No. 10, Halliday Street, the Trustees contend, they are entitled to acquire compulsorily under their improvement scheme as land—"which will in their opinion be affected by the execution of the scheme." The Trustees admit that the remainder of No. 10, Halliday Street, is being acquired by them for the purpose of what is called "recoupment." Greaves, J., dismissed the plaintiff's suit on the 17th of July 1916. Against that judgment the appeal out of which the present reference arises was preferred. On the 22nd of August 1916 Mookerjee and Cuming, JJ., sitting as a Division Bench delivered judgment in the case of the *Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh* (1) in an appeal against a decree of the Subordinate Judge of the 24-Pergannahs. This is the judgment referred to in the order of reference, and in that judgment the learned Judges held that the Trustees had no power under Act V of 1911 (B. C.) to acquire land compulsorily for the purpose of "recoupment." The appeal against the judgment of Greaves, J., came on for hearing before a Bench consisting of Sanderson, C. J., and Woodroffe and Chitty, JJ., and they not being in accord with the decision of Mookerjee and Cuming, JJ., made the present reference.

A point has been raised *in limine* that we ought not to decide the question referred to us, as the point does not "arise" for determination within the meaning of the rules of this Court in relation to references to a Full Bench. The foundation for this argument is certain observations made by the learned referring Judges. There is no substance in this argument. The learned referring Judges state that the question as to the correctness of the decision of Mookerjee and Cuming, JJ., does "arise" in the appeal in which this reference is made, and it is obvious it does arise with regard to the whole of No. 10, Halliday Street, except the small portions taken for rounding off the corners of the road. Further this reference arises out of a regular appeal No case has been cited to us of a reference to a Full Bench in a regular appeal, where the Full Bench has refused to answer the question referred. The case reported in the Bengal Law Reports Full Bench Rulings [*Prosunno Coomar Paul Chowdhry* v. *Koylash Chunder Paul Chowdhry* (2)], which was relied on by the Advocate-General, when looked at is not an authority for this proposition. For it appears that in that case it was only the minority of the Bench that was of opinion that the question ought not to be answered—the majority holding on the other hand that the question referred must be answered. It is also to be observed that on the rules relating to references to a Full Bench this case might in certain circumstances be heard by a Division Bench other than that which made the present reference, and in that event if we were to decline to answer the question, that other Bench might send the case back on a fresh order of reference. I am clearly of opinion that we must determine the question referred to us.

(2) (1867) B. L. R. Sup. Vol. 759 (F. B.); 8 W. R, 428; 2 Ind. Jur. (N. S.) 327,

Now the question referred must be determined on the construction of the provisions of Act V of 1911 (B. C.). But before considering the sections of the Act I should like to make clear what is understood by the terms "recoupment" and "betterment."

This is best shown by the Report in 1894 of a Select Committee of the House of Lords on Town Improvement (Betterment). That committee had before them "witnesses who have had experience in the actual working of betterment charges in various forms and they have also taken the evidence of other experienced witnesses and of gentlemen who have written on the subject." They reported [paragraph 3(1) of the report]:—"The principle of betterment, in other words, the principle that persons whose property has clearly been increased in market value by an improvement, effected by local authorities should specially contribute to the cost of the improvement is not in itself unjust and such person can equitably be required to do so. But the effect of a public work in raising the value of neighbouring lands is shown by experience to be uncertain. Whether in any particular case it is possible for a valuer to pronounce that such an effect has been produced by the completion of any public work is a point upon which the evidence of eminent valuers differs greatly."

[Paragraph 3 (10)].—"The Committee have received evidence upon what has been called 'recoupment', that is to say, powers given to a municipal or other public body to take land beyond what is necessary for the actual execution of the work, so that some part at least of the improved value may be secured by the improving public body in ease of the burden on the rate-payers. Some evidence was given by persons who had actual experience of the operations of such a system, the general effect of which was that it had not proved successful, but the Committee are not satisfied that it has ever been tried under circumstances calculated to make it successful, inasmuch as no sufficient power has ever yet been given to local authorities to become possessed of the improved properties without buying out all the trade interests, a course which is inevitably attended with wasteful and extravagant expenditure."

I have set out these portions of the report of the Select Committee as I feel, with all respect that the learned Judges who decided the case of *Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh* (1) have not kept clearly in view the object of "recoupment" and "betterment." The vesting of a local authority with power to acquire land for the purpose of "recoupment" cannot, I think, be described at the present day as "vesting the Board with arbitrary and unlimited powers of interference with private rights."

The question, therefore, as to whether or not a particular Statute authorises "recoupment" or "betterment" must be determined solely on a consideration of the terms of the Statute, and if it does so authorize, it must also be determined whether compulsory powers of acquisition have been conferred for carrying into effect such purposes.

Mookerjee and Cuming, JJ., in their judgment proceed in the first instance to consider the preamble of Act V of 1911 and observe that "recoupment" is not mentioned as one of the purposes of the Act. But one would not expect to find it there. The preamble usually only mentions the general object and intention of the Legislature in passing the enactment. Further, it is well established that the preamble cannot restrict the enacting part of an Act, though it may be referred to for the purpose of solving an ambiguity.

Mookerjee and Cuming, JJ., in their judgment place considerable stress on the first paragraph in the preamble. Their reading of that paragraph is not, however, the literal and grammatical reading of it. The construction those learned Judges put on the paragraph was that the objects of the Act are :

A.—The improvement and expansion of Calcutta.

B.—The re-housing of the working classes displaced by schemes.

The learned Judges, however, remark that "the words 'and otherwise hereinafter appearing' at the end of the paragraph are by no means easy to construe, with what precedes." The plain reading of the paragraph is that the object is the improvement and expansion of Calcutta by the means specified "and otherwise as hereinafter appearing." The preamble, I think, affords us little assistance in the present case, only its terms

cannot be used as in any way negativing the power of recoupment claimed.

Turning then to the sections of the Act which I think are material—

" Improvement scheme " is defined by section 2 as meaning a general improvement scheme or a street scheme or both.

" The duty " of carrying out the provisions of the Act, subject to the conditions and limitations contained therein, is by section 3 vested in a Board to be called "The Trustees for the Improvement of Calcutta."

Chapter III of the Act is headed improvement schemes and re-housing schemes. Sections 36, 37 and 38 deal with general improvement schemes.

Then comes an important section 39 in the following terms :—

" Whenever the Board are of opinion that for the purposes of—

(*a*) providing building sites, or

(*c*) creating new or improving existing means of communication and facilities for traffic, or

(*d*) affording better facilities for conservancy it is expedient to lay out new streets (including bridges, causeways and culverts), the Board may pass a resolution to that effect and shall proceed to frame a street scheme for such area as they think fit."

Section 41 provides that " every improvement scheme shall provide for (*a*) the acquisition by the Board of any land in the area comprised in the scheme which will in their opinion be required for the execution of the scheme. "

Section 42 enacts that " any improvement scheme may provide for (*a*) the acquisition by the Board of any land in the area comprised in the scheme which will in their opinion be affected by the execution of the scheme. "

Now it is quite clear that section 42 (*a*) authorizes the acquisition of land lying within the improvement area but which is not required for the execution of the scheme. The question is, to what extent, and that must largely depend on what is the meaning of the word "affected."

Mookerjee and Cuming, JJ., held that " affected " means in the section " acted upon physically or materially, " and that the power of acquisition given by section 42 (*a*) applied only where " (in respect of those lands) there will be a physical interference with a right, public or private, which the owner is entitled to exercise in connection therewith. "

This definition is clearly taken from the judgments delivered in the House of Lords in the case of the *Metropolitan Board of Works* v. *McCarthy* (3). That decision, however, was on the meaning of the word "injuriously affected " as used in section 68 of the Lands Clauses Consolidation Act, 1845, which is a very special section. A different meaning has been placed on the same words "injuriously affected " occurring in section 63 of the Lands Clauses Consolidation Act, 1845. It has also been held on more than one occasion that the decisions on section 68 of the Lands Clauses Consolidation Act, 1845, are of little or no assistance in construing the words "injuriously affected" in sections of Acts of Parliament not in *pari materia* with section 68 of the Lands Clauses Act.

The decision of Mookerjee and Cuming, JJ., comes to this, that in section 42 (*a*) of Act V of 1911 (B. C.) " affected " means " injuriously affected. " With this result I am unable to agree. I agree with the opinion of Woodroffe, J., in his opinion in making this reference that " affected " in section 42 (*a*) means affected in any way.

Next it was argued that as section 42 (*a*) only authorizes the Board to acquire land which is affected " by the execution of the scheme ", that the Board has only power to acquire land affected during the execution and not by the completion of the scheme. The argument is based on the decision in the case of *Hammersmith and City Railway* v. *Brand* (4), which turned on the meaning of the words "execution of the works" used in section 68 of the Lands Clauses Act, 1845. That case, however, is of no assistance in construing section 42 (*a*) of Act V of 1911 (B. C.). The words " by the execution of the scheme " used in section 42 (*a*) simply mean through or owing to the execution of the scheme.

Then if that be so, for what purpose can the Board acquire land which is not

(3) (1874) 7 H. L. 243; 43 L J. P. C. 385; 31 L. T. 182; 23 W. R. 115.

(4) (1868-9) 4 H. L. 171; 38 L. J. Q. B. 265; 21 L. T. 238; 18 W. R. 12.

required for the execution of the scheme under the provisions of section 42 (*a*). The purpose is given in section 81, which authorises the Board to retain or to let on hire, lease, sell or exchange any land vested in or acquired by them under the Act. That the Board have power to acquire land under section 42 (*a*) for the purpose of "recoupment" is strongly supported by the terms of section 78 of the Act. The view that Mookerjee and Cuming, JJ., took of that section, that it applied to land which was originally required for the execution of the scheme but was subsequently found to be unnecessary, cannot be supported. In such a case why should the owner pay money to the Board to get back his land?

The meaning of the section is perfectly clear. Under the scheme of the Act primarily the method provided for the Board securing for the public a portion of the "unearned increment" is by the means of recoupment. The Legislature did not, however, absolutely shut out the principle of "betterment", but provided by section 78 that where land is about to be taken for "recoupment" then on the application of the owner he and the Board may, if they agree as to the amount, deal with such owner's land on the principle of "betterment" instead. Section 78, I think, says that in as clear terms as is possible.

Lastly Mookerjee and Cuming, JJ., were of opinion that even if the Board had power to acquire land for the purposes of "recoupment", they had no power to acquire such lands compulsorily. The fact that the Board have power to acquire land for the purpose of "recoupment" does not necessarily mean that they have power to acquire it otherwise than by agreement. The powers of compulsory acquisition are set out in section 59 of the Act, which provides that the Board may with the previous sanction of the Local Government acquire land under the provisions of the Land Acquisition Act, 1894, for carrying out any of the purposes of the Act.

Under the provisions of section 49 (1) of the Act the Board are bound forthwith to execute a scheme sanctioned and notified by the Local Government. Surely one of the main purposes of the Act is the expansion and improvement of Calcutta by the execution of improvement schemes framed by the Board and sanctioned by the Local Government. With regard to land comprised in such schemes, the acquisition of which by the Board the scheme provides for, the Board with the sanction of the Local Government can exercise their compulsory powers of acquisition under section 69 of the Act. In my opinion we ought to answer the question referred to us in the manner following, namely:—That the case of the *Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh* (1), in so far as it holds that Act V of 1911 (B. C.) does not authorize the Board of Trustees to acquire land compulsorily for purposes of "recoupment", *i.e.*, by selling or otherwise dealing with the land under section 81 or by abandoning the land in consideration of the payment of a sum under section 78, was not rightly decided.

N. R. CHATTERJEA, J.—The question referred to the Full Bench is "whether the case of the *Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh* (1), in so far as it holds that Act V of 1911 (B. C.) does not authorize the Board of Trustees to acquire land compulsorily for purposes of recoupment by selling or otherwise dealing with the land under section 81, or by abandoning the land in consideration of the payment of a sum under section 78, was rightly decided."

It is contended on behalf of the appellant that upon the statement of the case in the referring order, this reference does not arise.

The contention of the Trustees (as it appears from the statement of the case) is that they are entitled to acquire the land compulsorily under their improvement scheme as land "which will, in their opinion, be affected by the execution of the scheme" within the meaning of section 42, and the learned Judges who made this reference are also of opinion that it is so "affected."

Woodroffe, J., observes: "There is no question but that the land in suit was affected so as to justify its acquisition by the Board, whether we limit the term as the appellant suggests, or give it its full meaning as I think should be done.

As, however, I am in disagreement with the decision in *Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh* (1), in that it holds that Act V of 1911 (B. C.) does not allow the compulsory acquisition of land for recoupment, I agree that the question whether it is good law or not should be referred to a Full Bench in terms of the Chief Justice's judgment."

Chitty, J., observes that: "There is no doubt on the facts, which are not in dispute," that the land in question is "affected" by the execution of the scheme, "as two small portions have been cut off for rounding off the corners of Halliday Street and streets running into it. To this extent the case is distinguishable from *Chandra Kanta Ghosh's case* (1). The question of law, however, in both cases is the same, and as we are in disagreement with the decision in that case I agree that the question should be referred to a Full Bench."

In *Chandra Kanta Ghosh's case* (1) the learned Judges were of opinion that the word "affected" in section 42 means "physically or materially affected," and the land proposed to be acquired in that case not having been physically affected was held not to have been "affected" within the meaning of section 42 (*a*). They had, therefore, to consider whether the Board has power to acquire land *for the purposes of recoupment* by including it in a scheme under section 42 (*a*), or under the other provisions of the Act. In the present case the learned Judges are of opinion that the land is "affected" within the meaning of section 42 (*a*) of the Act even according to the interpretation placed upon the section in *Chandra Kanta Ghosh's case* (1). It is true the Board in the present case also stated that the land was included in the scheme for the purpose of recoupment, but they also stated that in their opinion the land was affected by the execution of the scheme. If the land is properly included in a scheme under section 42 (*a*) as land "affected" by the execution of the scheme, it can be compulsorily acquired under section 69 of the Act, and it is immaterial what object the Board have in acquiring the land. No doubt in *Chandra Kanta Ghosh's case* (1) the learned Judges were of opinion that section 42 (*a*) does not authorize compulsory acquisition of land but in their view the land, in that caselwas not "affected." The question whether land can be compulsorily acquired in a case where the land is properly included in a scheme under section 42 (*a*) did not, therefore, arise in that case. In the present case the learned Judges being of opinion that the land is "affected" even according to the view taken of the word in that case, I think the question whether the Act authorizes the Board to acquire land compulsorily *for purposes of recoupment* does not arise in the present case.

There is no doubt that in many cases Full Benches have declined to answer the questions referred to them on the ground that the reference does not arise. A number of earlier cases on the point are referred to in the case of *Prosunno Coomar Paul Chowdhry* v. *Koylash Chunder Paul Chowdhry* (2), which was referred to the Full Bench by Peacock, C. J., and Loch, J. Three of the learned Judges (Peacock, C. J., Glover and Jackson, JJ.) were of opinion that the questions did arise. The other two Judges (Macpherson and Kemp, JJ.), "following the practice acted upon frequently by Full Bench Courts" held that no answer should be given to the first question referred on the ground that it did not arise. Jackson, J., (although he was of opinion that the question did arise) entirely agreed with Macpherson, J., that the Full Bench, if looking into the case as far as is necessary for the purpose it should find that the point does not arise, ought to desist from answering it and pointed out the serious inconvenience arising from following the opposite course. Peacock, C. J., and Glover, J., were of a different opinion; and the former even went so far as to hold that "if uniformity of decision in the High Courts is desirable as it undoubtedly is, one Division Bench ought not to decide contrary to a dictum of another Division Bench without referring the question to a Full Bench." The opinion of Peacock, C. J., however, has not been followed by Full Benches, and Full Benches have in many cases declined to answer the question referred where in their opinion it did not arise. For instance, see *Julmati Bewa* v. *Sheik Nayan* (5), *Bala*

(5) 4 C. W. N. 803; 28 C. 127 *note*.

Ram v. *Mangta Das* (6) and *Profulla Krishna Deb* v. *Nosibannessa Bibi* (7). It is said that the rule does not apply to regular appeals, as the case may go to a Division Bench other than the Bench which referred it, and specially where as in the present case the Division Bench have not come to a decision on questions of fact, but may apply to second appeals where the whole case is referred to the Full Bench for decision. But the reference in *Prosunno Coomar Paul's case* (2) arose out of a regular appeal, and in the present case, upon the statement of the case in the referring order itself, *Chandra Kanta Ghosh's case* (1) is distinguishable. I am accordingly of opinion that the question of the correctness of that case does not arise. As, however, the majority of the Full Bench are of a different opinion, I proceed to state my views upon the question referred to us.

The first paragraph of the preamble to the Act (Act V of 1911) states the objects of the Act. It says—Whereas it is expedient to make provision for

(1) the improvement and expansion of Calcutta by opening up congested areas, laying out or altering streets, providing open spaces for purposes of ventilation or recreation, demolishing or constructing buildings, acquiring land for the said purposes and (2) for re-housing of persons of the poorer and working classes displaced by the execution of the improvement schemes.

It is contended on behalf of the Trustees that in order to read it in this way there should be a comma after the word "purposes." But as pointed out by the Judicial Committee in the case of *Maharani of Burdwan* v. *Krishna Kamini Dasi* (8), "it is an error to rely on punctuation in construing Acts of the Legislature." The omission of a comma, I think, does not affect the reading of the preamble in the way stated above. Then follow the words "and otherwise as hereinafter appearing." It is contended on behalf of the appellant that the words should be read with the words 'to make provision,' on the other hand it is said that these words mean "by other means and methods as hereinafter appearing." It is difficult to construe the words with reference to the earlier portion of the preamble, but whatever they may mean they have no reference to the acquisition of land, because acquisition of land has already been provided for in the earlier part and is restricted to the "said purposes", *i. e.*, the purposes expressly mentioned therein. It is to be observed that the acquisition of land for the purposes of recoupment is not one of the purposes of the Act enumerated in the preamble. The second paragraph states that it is expedient that a Board of Trustees should be constituted and vested with special powers for carrying out the objects of the Act. The fourth paragraph recites that the sanction of the Governor-General has been obtained to the enactment of the provisions of Chapter V relating to taxation.

Before dealing with the important sections which have any bearing upon the question referred I will briefly refer to the provisions of the Act.

Section 2 gives the definitions of words used in the Act, and it is only necessary to notice clause (*f*) which says that "improvement scheme" means a general improvement scheme or a street scheme or both. Chapter II relates to the constitution of the Board, conduct of business, and the appointment of their officers and servants and such other matters. Chapter III deals with improvement schemes and re-housing schemes, and comprises sections 36 to 67. Section 36 provides for the framing of a general improvement scheme and section 39 provides for the framing of a street scheme. Section 40 mentions the matters to be considered when framing improvement schemes in respect of any area, and which include "the nature and the conditions of neighbouring areas and of Calcutta as a whole." Sections 41 and 42 lay down matters which *must* and *may* be provided for respectively in improvement schemes. Section 43 provides for the preparation by the Board of a notice of the scheme and of the boundaries of the area comprised therein and for the publication of such notice, and section 45 provides for the service of notices on persons whose land is proposed to be acquired in execution of the scheme. Section 47 provides for the application by the Board to the Local Government for the sanction of the scheme, and

(6) 34 C. 941; 6 C. L. J. 237; 11 C. W. N. 959.
(7) 37 Ind. Cas. 425; 24 C. L. J. 331.
(8) 14 C. 365 at p. 372; 14 I. A. 30; 11 Ind. Jur. 275; 4 Sar. C. P. J. 772; 7 Ind. Dec. (N. S.) 242.

for the particulars to accompany the application. Section 48 provides for the sanction of the scheme by the Government; and section 49 (1) provides for the notification by the Local Government of the sanction, and sub-section (2) lays down that the publication of a notification shall be conclusive evidence that the scheme has been duly framed and sanctioned. Section 50 provides for alteration of the scheme after it has been sanctioned.

Chapter IV, which consists of sections 68 to 81, deals with acquisition and disposal of land. Section 68 provides for the acquisition by the Board of land by agreement and section 69 provides for acquisition of land by the Board for carrying out any of the purposes of the Act. Section 70 and the following section provide for the constitution of a tribunal for the purpose of acquiring land. Section 78 provides for the abandonment of land the acquisition of which has been sanctioned but which is not required for the execution of the scheme.

Chapter V relates to taxation which comprises duty on transfer of property, terminal tax on passengers and customs duty on jute.

Chapter VI deals with finance. Section 88 provides for Municipal contributions, and section 89 gives power to the Board to borrow money. Sections 122 and 123 respectively deal with the crediting of moneys to capital account and with the application of moneys credited to the capital account.

The most important sections to be considered in connection with the question referred to us are sections 41, 42, 68, 69, 78, 80 and 81.

Section 41 (*a*) says that every improvement scheme *shall* provide for the acquisition by the Board of any land which will in their opinion be required for the scheme, whereas section 42 (*a*) lays down that any improvement scheme *may* provide for the acquisition by the Board of any land in the area comprised in the scheme which will in their opinion be "affected by the execution of the scheme."

There is no question that the land "required for the scheme" means the land which is actually required for what may be called the engineering or construction works, for instance, in a street scheme the land necessary for laying out the street. The main controversy has centred round the expression "affected" in section 42 (*a*). In *Chandra Kanta Ghose's case* (1) it was held that the word 'affected' in section 42 means "neither beneficially affected or improved in value, nor prejudicially affected or impaired in value, but signifies acted upon physically or materially." On the other hand in the opinion of the referring Judges it means affected in any way and not merely "physically affected," "affected in value prejudicially or beneficially or so forth." The dictionary meaning of the word is "acted upon" and it is capable of a very large meaning. It may be conceded that it may mean affected beneficially as well as prejudicially, although it is generally used in the latter sense. But the meaning to be attached to the word would vary according to the context, and the question is in what sense the word has been used in section 42 (*a*), and whether it has any reference to *value* of the land. According to the contention of the respondents the object of inclusion of land under section 42 (*a*) is recoupment. But the acquisition of land prejudicially affected cannot be any means of recoupment. The word, therefore, could not have been used in the sense of "depreciated in value." It is true that the Board is not bound to include any land in the scheme under section 42 (*a*), it is merely optional with them to do so, and, therefore, they would not include any land depreciated in value within the scheme. But what I mean to say is that the object being recoupment, the word "affected" could not have been used in the sense of 'prejudicially affected in value.' Then does the word refer to land beneficially affected or improved in value? When an improvement scheme is framed with respect to any area, the whole of it would be beneficially affected in value by the scheme. For instance in a street scheme, the properties fronting a street would be more beneficially affected in value, the other portions of the area may be less beneficially affected in value by it, but every portion of it will be more or less beneficially affected in value. If, therefore, the word 'affected' in section 42 (*a*) has reference to value, the whole of the area may be acquired by the Board under section 42 (*a*). But if that was the intention of the Legislature, I do not see the

necessity of the words "which will in their opinion be affected by the execution of the scheme," because every portion of the area is affected more or less. In that case after providing in section 41 (*a*) that the improvement scheme *shall* provide for the acquisition by the Board of any land in the area comprised in the scheme which will in their opinion "be required for the scheme," it would have been sufficient to say in section 42 (*a*) that any improvement scheme "*may* provide for the acquisition by the Board of any land in the area comprised in the scheme," and the words "which will in their opinion be affected by the scheme" would be wholly unnecessary. Then again, if the word "affected" has any reference to value and if recoupment is the object of inclusion of land not actually required for the scheme, (the inclusion of lands prejudicially affected in value being out of the question) it is difficult to see why the ambiguous word 'affected' was used instead of "increased in value," which would have expressed the intention which, according to the respondent, the Legislature had in framing the section. It is not as if such an expression is never used in similar Statutes. Section 58, sub-section 3, of the House and Town Planning, etc. Act 1909 (9 Edw. 7, Chap. 44) provides: "Where by the making of any town planning scheme, any property *is increased in value*, the responsible authority...shall be entitled to recover from any person whose property is so *increased in value* one-half of the amount of that increase."

In this connection it may be pointed out that under section 24 of the Land Acquisition Act the Court, in determining the amount of compensation to be awarded for land acquired under that Act, shall not take into its consideration "any increase to the value of the other land of the person interested likely to accrue from the use to which the land acquired will be put." That gives the benefit of any rise in the value of other lands of the person whose land is taken up, to him, and section 24 has not been repealed by the Calcuttta Improvement Act.

I am accordingly of opinion that the word 'affected' has no reference to value in section 42 (*a*). The only sense, therefore, in which the word could have been used is in the sense of "acted upon physically or materially." That is one of the recognized meanings as given in the Oxford Dictionary, and in the case of *Metropolitan Board of Works* v. *McCarthy* (3), the House of Lords in construing the words "injuriously affected" held that "where by the construction of works there is a physical interference with any right, public or private, which the owners or occupiers of property are by law entitled to make use of, in connection with such property apart from the uses to which any particular owner or occupier might put it, there is a title to compensation, if by reason of such interference, the property as a property is lessened in value." It is true that the question in that case was as to the meaning of the words "injuriously affected" in section 68 of the Land Clauses Consolidation Act, 1845, under which the plaintiff claimed compensation, and not merely "affected" as in the present case. But if the word "affected" does not signify physical interference, the mere addition of the word "injuriously" would not do so, because when land is depreciated in value, it may also be said to be "injuriously affected." The words, no doubt, had to be construed with reference to the provisions of that particular Statute, and it was held that in order to found a claim to compensation under that section for an interest in land "injuriously affected," there must be an injury affecting the house or land itself in which the person claiming compensation has an interest, and that a mere personal inconvenience, obstruction and damage to a man's trade or the good-will of his business will not be sufficient. It was further held that the property must be lessened in value by the physical interference, but that was because they had to deal with the question of compensation claimable under the section in respect of land *injuriously* affected.

The passage quoted above, however, shows that the word "affected" may appropriately be used with reference to physical interference with rights. In fact, it is not disputed on behalf of the respondent that it may mean "physically affected," their contention being that it means "affected" in any way, whether "physically affected" or 'affected in value.' I think, however, that although the value may also be affected by physical

interference, the word as stated above has no reference to value in section 42 (*a*). That being so, the word must in section 42 (*a*) mean "physically or materially affected." It is true that those words are not in the section, but the word 'affected' must be construed having regard to the context.

Land may be physically "affected" by the execution of a scheme in a variety of ways, for instance, a building near the improvement may suffer from the construction of works, by subsidence, or by having easements affected or by reason of "severance", in which case the Board may have to pay heavy compensation, and it may be more advantageous to the Board to acquire the building or land affected, and then to dispose of it, rather than pay compensation for the injurious affection, although such building or land is not required for the execution of the scheme under section 41 (*a*). Section 49 of the Land Acquisition Act provides that a part only of any house or building cannot be acquired, if the owner desires that the whole of it should be acquired. Now if only a part of a house or building is necessary for the execution of a scheme, the remaining portion of it may be affected by the execution of the scheme. The latter portion cannot come under section 41 (*a*) and must, therefore, come under section 42 (*a*); and if there were no provisions such as are contained in section 42 (*a*), the whole elaborate procedure prescribed in Chapter III of the Act would have to be repeated for acquisition of such land, because although no fresh declaration is necessary, a fresh sanction of the Government would be required. The word "affected" may properly apply to all such cases as are stated above, and I do not see how it can be said that "physically or materially affected" is not a natural meaning of the word.

It is contended on behalf of the appellant that even if 'affected' means "beneficially affected *in value*," the expression used in section 42 (*a*) being not merely "affected" but "affected *by the execution of the scheme*," the affection must be due to the actual execution of the scheme itself, and not due to any use to which the land is put after the execution of the scheme. In section 41 (*a*) the words land "required for the scheme" admittedly mean land required for the work actually to be done on it, *i. e.*, the land required for engineering or construction works. The land affected by the execution of the schemes in section 42 (*a*) must, therefore, mean land affected by the engineering or construction work itself, and I think it must be shown that in any particular case the rise in value is due to the execution of the scheme itself, and apart from the use to which it might be put.

I think it unnecessary, however, to consider the point further, or to discuss the cases decided under the Lands Clauses Consolidation Act and the Railway Clauses Consolidation Acts which were cited before us, because I am of opinion that the word "affected" has no reference to value in section 42 (*a*).

Section 42 (*a*) does not by itself give the Board power to acquire land. The power of acquisition is given by sections 68 and 69. Section 68 provides that the Board may enter into an agreement with any person for the purchase or leasing by the Board from such person of any land which the Board are authorized to acquire or any interest in such land; and section 69 provides that "the Board may, with the previous sanction of the Local Government, acquire land under the provisions of the Land Acquisition Act, 1894, for carrying out any of the *purposes of this Act.*" No practical difficulty arises in a case of purchase by agreement under section 68, because although in such a case also, the acquisition must be one which the Board are authorized to make, the transaction being by consent of parties, there is no one to raise the question. But where the land is to be compulsorily acquired, it must be shown that it is to be acquired for "any of the purposes of the Act." It is true that the scheme submitted to Government for sanction would include both lands under sections 41 (*a*) and 42 (*a*), but the mere fact that the land is included in the scheme framed under section 42 (*a*) will not justify its acquisition unless it be for the purposes of the Act, otherwise it would have been sufficient to say in section 69 that the Board may acquire any land sanctioned by the Government without the addition of the words 'for carrying out any of the purposes of the Act." So that section 42 (*a*) alone does not help us in deciding the question whether land can be acquired for recoupment. The purposes of the Act are mentioned in the preamble. Recoupment is not stated to

be one of the purposes of the Act. It is said that recoupment, being only one of the means by which the purposes are to be accomplished, does not find a place in the preamble. That may be so, but when the preamble states "acquiring land for the said purposes" and the purposes such as "opening up congested areas," etc, are expressly mentioned in the preamble, the power given to the Board under section 69 to acquire land for "any of the purposes of the Act" must be taken to have reference to the "purposes" enumerated in the preamble and those only.

It is also contended on behalf of the respondent that "purposes" include the means by which the object is to be attained and recoupment being one of the means, is one of the purposes of the Act. But I am unable to hold that 'means' which are the instruments for accomplishing the purposes of the Act are 'purposes' of the Act. If, however, the body of the Act gives power to acquire land for the purposes of recoupment, *expressly* or by *necessary implication*, then the mere fact that the preamble does not state it would not matter. There is no express provision in the Act that any land can be acquired for the purposes of recoupment. Then is the power given by necessary implication? It is said that the words "for carrying out" any of the purposes of the Act in section 69 imply such power, but I think that "carrying out" merely means "giving effect to." The Board has the power to acquire lands for giving effect to the purposes of the Act mentioned in the preamble such as "opening congested areas" and the other purposes enumerated therein, as no other purpose is mentioned in any other part of the Act. Section 80 shows that if any land, in respect of which an agreement has been executed or payment has been accepted under section 78, is subsequently required for any of the purposes of the Act, it may be acquired under a fresh declaration. Now if recoupment is one of the purposes of the Act, the same land, which has already paid what may be called the exemption fee, may again be included in a scheme for the purposes of recoupment and the process may be repeated any number of times—a result which I think could never have been contemplated.

In *Chandra Kanta Ghosh's case* (1) the learned Judges held that section 42 does not authorize compulsory acquisition of land, "though it may possibly authorize the Board to acquire land by private agreement." As stated above, section 42 (*a*) by itself does not confer the power of acquisition of any land either compulsorily or by agreement. The question whether any land included in the scheme under section 42 (*a*) can be compulsorily acquired under section 69, depends upon whether the acquisition of the land is for "carrying out any of the purposes of the Act." Section 42 (*a*) may be satisfied merely by voluntary acquisition. But if any land is "physically" or "materially affected" by the execution of a scheme, the acquisition of such land would be necessary for carrying out the "purposes of the Act." In such a case the Board have the power to compulsorily acquire such land under section 69, as well to acquire it by agreement under section 68, and I do not see any reason why in such a case, land mentioned in section 42 (*a*) cannot be compulsorily acquired.

Section 49 provides that whenever the Local Government sanctions an improvement scheme it shall announce the fact by notification, and the Board shall forthwith proceed to execute the same, and that the publication of the notification shall be conclusive evidence that the scheme has been duly framed and sanctioned. It is contended on behalf of the respondents that a scheme submitted for sanction under section 47 includes lands proposed to be acquired under section 42 (*a*), and when it is sanctioned under section 48, it becomes a statutory duty of the Board to execute it. But that assumes that the scheme has been sanctioned for the purposes of the Act and that the Act contemplates acquisition of land for the purposes of recoupment. If acquisition of land for the purpose of selling it and making profit therefrom is a purpose of the Act, the carrying out of a scheme sanctioned by the Government would no doubt be carrying out a purpose of the Act, but that is begging the very question to be decided. The second clause of section 49 says that the publication of the notification shall be conclusive evidence that the scheme has been framed and sanctioned. But the mere fact that it is sanctioned does not show that the land is

required for carrying out any of the purposes of the Act.

The next important section is section 78. That section relates to the abandonment of land, the acquisition of which has been sanctioned but which is not required for the execution of the scheme, and great reliance is placed upon it as showing that the Board have the power of recoupment. That section provides that "in any case in which the Local Government has sanctioned the acquisition of land in any area comprised in an improvement scheme which is not required for the execution of the scheme, the owner of the land, or any person having an interest therein, may make an application to the Board, requesting that the acquisition of the land should be abandoned in consideration of the payment by him of a sum to be fixed by the Board in that behalf."

It is contended on behalf of the appellant that it contemplates land which was originally considered necessary for the execution of the scheme, but which is subsequently found not to be so required. On the other hand, the respondents contend that it refers to land which was not and was never required for the scheme, but which was included in the scheme for the purposes of recoupment. The words used in the section, however, are "which is not required for the execution of the scheme," and that implies that the lands were originally considered necessary for the execution of the scheme, but were subsequently found not to be so required. The words, I think, do not refer to the time when the sanction of Government is applied for, but to the time when the abandonment is applied for by the owner under section 78. A comparison of the words used in sections 41 (*a*) and 42 (*a*) with those used in section 78 indicates this. When framing a scheme under section 41 (*a*) or 42 (*a*) it is a mere opinion of the Board that the land "will be required" or "will be affected." It is only in the further stages of the proceedings that it may turn out that the land *is not* required, and it is then that the application under section 78 is made. The section may apply to a case where a scheme having been sanctioned was subsequently altered under section 50. It may also apply to a case where a certain quantity of land was entered in the scheme as being necessary for the execution of the scheme but it was subsequently found that a lesser quantity would suffice for the purpose. It is contended that it cannot apply to surplus lands, because surplus lands can be ascertained only after acquisition. But a scheme may be altered after sanction and before acquisition, and there may be cases where surplus lands are ascertained after sanction and before acquisition. The strongest argument against the applicant's contention is that if it is well founded, the owner has to pay for retaining his own land "which on a more correct estimate of what was required should never have been taken from him." It is to be borne in mind, however, that the Board cannot of their own motion abandon the acquisition of any land. It is only upon the application of the owner that the Board can do so. If no application is made for abandonment under section 78, the Board must acquire the land (except as provided in section 48 of the Land Acquisition Act), and section 81 provides that the Board may retain or may let on hire, lease, sell, exchange or otherwise dispose of any land vested in or acquired by them under this Act.

The Board are to admit the application under section 78, if it reaches them before the time fixed by the Collector under section 9 of the Land Acquisition Act for making claims in reference to the land. It would appear from sub-section (3) of section 78 that the section has application after the Collector has started proceedings under the Land Acquisition Act. It says that if the Board decide to admit any such application they shall forthwith inform the Collector, and the Collector shall thereupon stay for a period of 3 months all *further proceedings* for the acquisition of the land. It appears, therefore, that the proceedings under section 78 take place after the declaration and before the notice under section 9 of the Land Acquisition Act. But as soon as the declaration is made under section 6 of that Act, the power to acquire the land is absolute whether the land is required or not. The Government can withdraw from the acquisition, but it cannot do so except on payment of compensation under section 48 of the Land Acquisition Act, and section 48 (*a*) of the

Improvement Act provides for payment of compensation for delay if the Collector does not make an award within 2 years of the declaration under section 6 of the Land Acquisition Act. The Board, therefore, incur a liability, as soon as a declaration is made under section 6 of the Land Acquisition Act.

On the other hand as soon as a declaration is made, the owner has no longer any right to get back the land and cannot compel the Government to give it up. The land having been made the subject of declaration, the value of it may go up, in some cases may go up enormously. It is not reasonable that the Board should incur a liability to the owner for damages, and at the same time be deprived of the benefit of the rise in value of the land, and in these circumstances it is not inequitable that the owner should pay for the retention of the land. He is under no compulsion to apply to the Board for abandoning the acquisition, but if he chooses to do so, he must pay the sum fixed by the Board for the abandonment of the land which, if he had not applied for its retention, the Board might have acquired and sold to others at a profit. This, however, does not show that lands may be deliberately included in the scheme for the express purposes of recoupment as contended on behalf of the respondent. The lands are not to be included in the scheme originally for the purpose of thereafter making profit, but if they are included because considered necessary for the scheme, and it is subsequently found not to be required either by reason of an alteration of the scheme, or by reason of less lands being actually required, the Board have the power to dispose of such lands. The provisions of section 81 apply to such lands. That section gives to the Board the power to dispose of lands *vested* in or *acquired* by them under the Act, and that of course means properly acquired by them. It is contended that cases of alteration of scheme or mistake in estimate must be rare, and that it is not likely that the elaborate provisions of section 78 should have been framed for such stray cases, and that under the circumstances the construction contended for on behalf of the respondent should be preferred. But the Act contemplates alteration of schemes and section 50 makes express provisions for it, and there may be some cases of wrong estimates. Once it is held that such cases may come under the section, it cannot be said that the section gives the power of acquisition of lands for the purposes of recoupment by necessary implication. It appears that Greaves, J., by whom this case was originally tried, did not attach much importance to the argument founded upon section 78, and he was of opinion that the words of the section would be satisfied by applying them to 'surplus lands', and that he should be loath to spell out of these words so large a power as is claimed by the defendant. I agree with what Greaves, J., says on this point. The question is, not whether the power of acquisition of land for the purposes of recoupment can possibly be spelt out of the section, but whether the power is given by *necessary* implication. If the construction put forward on behalf of the appellant can reasonably be placed on the section, in other words, if the words of the section can be satisfied by reference to lands subsequently found unnecessary, it cannot be said that the power of recoupment is given by *necessary implication*. As pointed out by Bell, J., in *Dickson* v. *Pape* (9): "A necessary implication is not guess, not probability, but an inference which by no reasonable intendment can be otherwise, it is a state of things excluding any reasonable conclusion but the one." The powers claimed by the Trustees are very large; according to their contention they may acquire any land within the area for which an improvement scheme is framed, for the purpose of recoupment. Now, when there are two possible constructions of the words defining their powers, if on the one construction the Board would have almost unlimited power of interference with private rights, and in the other they are not clothed with such power, but with a power more convenient and limited, the latter construction should be preferred.

It is not and cannot be disputed that the power of recoupment may be given to Municipal and other public bodies. As stated in Halsbury's Laws of England, Volume VI, page 25: "Municipal and other public bodies are sometimes given powers to take

(9) (1845) 7 Irish L. R. 107 at p. 123.

land beyond that which is necessary for the actual execution of the proposed works, in order that some part at least of the improved value of the adjoining lands may be secured in ease of the burden upon the rate-payers. These lands are said to be authorised to be taken for the purpose of 'recoupment' as the public body is empowered to sell or lease them out at what may be an enhanced value." *Galloway* v. *London Corporation* (10), *Quinton* v. *Bristol Corporation* (11). If the Act clearly authorises the land to be taken for the actual works only, a local authority or other public body will be restrained from taking more than is actually necessary for such works: *Donaldson* v. *South Shields Corporation* (12), but if it appears that it is the intention of the Act that the public body are to be allowed to reimburse themselves, they will then be at liberty to take all the lands delineated on the plans: *Galloway* v. *London Corporation* (10), *Quinton* v. *Bristol Corporation* (11). On the other hand, when local authorities are authorized to take lands from time to time for specific works such as street widening and the land is not specified in the Act, they cannot, in order by resale to reduce the expenses to the rate-payers, take more than is *bona fide* necessary for the purpose: *Denman & Co.* v. *Westminster Corporation* (13), *Fearnley* v. *Limehouse District Board of Works* (14).. It will serve no useful purpose to discuss these cases which turn upon the provisions of the particular Statutes with which they deal. I will only notice two cases upon which the parties respectively placed some reliance. On behalf of the respondent reliance was placed on the case of *Galloway* v. *London Corporation* (10), where it was pointed out that there is a distinction between powers given to a body of adventurers for a certain purpose (as for example the formation of a railway) and powers given to an existing public body such as the Corporation of a city of making public improvements in its city, and that the powers thus entrusted to it for such a purpose will not be subject, as in the other case, to a strict and restrictive construction. But even such public bodies authorized to make large improvements cannot exercise their powers except for the purposes of the Act. It is to be borne in mind that in England Statutes authorizing public bodies to acquire land compulsorily generally contain a schedule or a plan or a book of reference defining the land to be acquired. In the case of *Gard* v. *Sewers Commissioners* (15) Kay, J., in construing the Statute 57, Geo. III, C. XXIX, which empowered a public body to alter and widen the streets, and for that purpose to compulsorily acquire lands and houses which might be adjudged by them to prevent or obstruct such widening or alteration, after stating that the Commissioners (in that case) were a body, like the Corporation of London in the case of *Galloway* v. *London Corporation* (10), "armed with powers for the purpose of making improvements in this great city; and that it is part of the scheme of the Act that they may take, in carrying it out at some time, more land than is actually wanted for the physical purpose of widening the streets, and, therefore, the Court will deal very liberally with them—will give a most wide interpretation to, and will not interfere with, their powers—although it may appear that they are taking more lands than will be wanted for the actual widening, and intending, all along, to sell the portion which they will not use for that purpose, and by the sale to raise money to enable them to carry out the purposes of the Act", observed as follows:— "I was referred to the 96th section of the Act, to show that they have the power, subject to the right of pre-emption, of selling any land which they may have taken and which they really do not want for the purpose of widening the streets, and that the moneys which they obtain from such a sale may be used for the purposes of the Act, and it was urged that this is within the case of *Galloway* v.

(10) (1866) 1 H. L. 34; 35 L. J. Ch. 477; 12 Jur. (N. S.) 747; 14 L. T. 865.

(11) (1874) 17 Eq. 524; 43 L. J. Ch. 783; 30 L. T. 112; 22 W. R. 434.

(12) (1849) 68 L. J. Ch. 162; 79 L. T. 685.

(13) (1906) 1 Ch. 464; 75 L. J. Ch. 272; 94 L. T. 370; 54 W. R. 345; 70 J. P. 185; 4 L. G. R. 442; 22 T. L. R. 270.

(14) (1899) 68 L.J.Ch. 344; 80 L.T. 351; 63 J.P. 310.

(15) (1885) 28 Ch. D. 486; 54 L. J. Ch. 698; 52 L. T. 827.

London Corporation (10). Now there is a very wide distinction between this and the case of *Galloway* v. *London Corporation* (10). In that case the lands which were to be taken were all put in a schedule to the Act; they were actually defined by boundaries and quantities, and the words of the Act were that they might take all those lands, which not only shewed the extent to which they were to go, but placed a limit within the four corners of the Act, upon the quantity of land which they were to take. There is nothing of that kind in this Statute. It contains no schedule. There is no limit whatever upon the lands which are to be taken, save such as is comprised in the words which I have read, and that makes an enormous difference between the two cases. Suppose, for example, that the Commissioners were to desire to widen one of the main thoroughfares of London—the whole of Fleet Street or one of the great arteries of London, or so much as came within their jurisdiction—and to say 'We will take lands on both sides of the street,' if the argument be right, they could adjudge that every house and every piece of vacant land on both sides of the street obstructed it, however wide these might be, and they might take the whole of every such house and piece of land. Suppose the street passed the Bank of England, they might, if they thought fit, take the whole of the Bank, although they might only want two feet of it for the purposes of widening the street. Suppose there was a large frontage of land, a quarter of an acre, in the city of London vacant, with no building upon it, then although they might only want a yard of such frontage, they might if they chose take the whole, according to the argument. That would be giving a very much greater power to the Commissioners having the control of pavements than was given in *Galloway* v. *London Corporation* (10); and that is a distinction between the two cases which would make me hesitate very much indeed before I could hold that under the Acts such bodies as the Commissioners are entitled to such power as that." In the Court of Appeal (which affirmed the decision of Kay, J.) Baggallay, L. J., referring to *Galloway's case* (10) observed: "The circumstances in that case, as has been pointed out in *Thomas* v. *Daw* (16), were very different. In that case the Corporation were not merely authorised to take what they might adjudge to be necessary for the purpose of improvement they were about to effect, but lands were specified in the schedule to the Act of Parliament and power to deal with them was given by the Act to the Corporation." I have quoted the observations of Kay, J., at length, for the purpose of showing that there is a wide distinction between a Statute in which the Legislature has expressly defined the lands to be acquired, and a case like the present where the lands are not defined in the Act and a public body have been given power to acquire land only for the purposes of the Act. The scheme when framed under section 42 (*a*) of the Calcutta Improvement Act would define the area out of which the acquisition is to be made, but the area is not defined by the Statute itself. The Board may frame a scheme of improvement either under section 36 or section 39 for such area as they may think fit, and if the respondent's contention is correct, they can include any land within the scheme they think proper, with the deliberate object of recoupment and then acquire any such land for the purposes of recoupment. That is a power wholly different from the power to acquire land for the purpose of recoupment within an area defined by the Statute itself.

It is said that the principle of recoupment is well known in this country, and reference is made to the Calcutta Municipal Act, and the Bombay City Improvement Act, though the word 'recoupment' is not expressly used in any Act. But whether any Statute gives the power or not depends upon the construction of the particular Statute, and the intention must be gathered from the language used in the particular Statute. With regard to the Acts referred to above, however, it may be observed, that in the first place it does not appear that the question whether the public body concerned has the power of acquiring land for the purpose of recoupment has ever been raised or decided. In the next place the words used in those Acts are different from those used in the Calcutta Improvement Act.

(16) (1866) 2 Ch. 1; 36 L. J. Ch. 201; 15 L. T. 200; 15 W. R. 113.

Section 357 (1) of the Calcutta Municipal Act III of 1899, after providing for the acquisition of any land "required for the purpose of widening, extending or otherwise improving any public street and the buildings, if any, standing upon such land," provides in sub-section (2) for the acquisition of any lands *in addition* to those mentioned in sub-section (1) outside the proposed street alignment with the building thereupon, which the Corporation may in the exercise of any of the powers conferred by sub-section (1) consider it expedient to acquire. It is to be noted that whereas under section 42 (*a*) of the Calcutta Improvement Act, in order to enable the Board to acquire any land in the area comprised in the scheme, it is necessary that the land must in their opinion be "*affected by the execution of the scheme*," section 357 (2) of the Calcutta Municipal Act empowers the Corporation to acquire any land ouside the street alignment which it may consider *expedient* to do so in exercise of the powers conferred by sub-section (1) of that section. Section 25 of the Bombay City Improvement Act (Bombay Act V of 1898) provides that an improvement scheme which may exclude any part of the area in respect of which an official representation is made or include any neighbouring land if the Board are of opinion that such exclusion or inclusion *is expedient*, shall, within the limits of the area comprised in the scheme, provide for the acquisition of any land which will in the opinion of the Board be *necessary for or affected by the execution* of the scheme. Section 29 provides that on receipt of the sanction of the Government a declaration is to be notified under the signature of a Secretary to Government stating the fact of such sanction, and that the land proposed to be acquired by the Board for the purposes of the scheme is required for a public purpose, and that the declaration *shall be conclusive evidence* that the *land is needed for a public purpose* and the Board shall thereupon proceed to execute the scheme. The publication of a notification under section 49 of the Calcutta Improvement Act, however, is conclusive evidence only of the fact that the scheme has been duly framed and sanctioned. However that may be, as I have said already, one Act cannot be construed with reference to the provisions of another Act. The question whether the Calcutta Improvement Act gives power to the Board of compulsory acquisition of land for the purposes of recoupment, must be determined with reference to the provisions of that Act.

The Calcutta Municipal Act gives wider powers to the Corporation than those given to the Board by the Calcutta Improvement Act. But it may be pointed out that when land is acquired under the Calcutta Municipal Act, the market value of the land or building under section 557 (*d*) of that Act shall, until the contrary is shown, be presumed, for the purposes of clause *first* of sub-section (1) of section 23, to be twenty-five times the annual value of the property as entered in the assessment book prescribed by the Act, and when land is acquired under the Land Acquisition Act the owner is entitled to the 15 per cent. statutory compensation in addition to the market value of the land. Under the Calcutta Improvement Act there is no such presumption, nor is the owner entitled to any statutory compensation.

Chapters V and VI of the Act relate to taxation and finance. In addition to the duty on transfer of property, terminal tax on passengers and customs duty on jute there is provision for Municipal contributions and section 89 gives the Board the power to borrow *any sum necessary for the purpose of meeting expenditure* debitable to the capital account under section 123. Section 123 lays down that the money credited to the capital account shall be held by the Board in trust and shall be applied to (among others) meeting all costs of framing and executing improvement schemes and re-housing schemes, and meeting the costs of acquiring land for carrying out any of the purposes of the Act. If the acquisition of land for the purpose of recoupment was intended to be one of the means for carrying out the objects of the Act (and the intention must be determined as *expressed* in the provisions of the Act), the Legislature would have expressed it in clear language so as to put it beyond reasonable doubt, as it has done in the case of other means for carrying out the objects of the Act, and would not have

left it to be spelt out of section 42 (*a*) or 78 of the Act.

The order of reference to the Full Bench refers also to section 81 of the Act. But that section comes into operation only when land has been acquired by or vested in the Board. Where land has been acquired by or vested in the Board properly, or in cases properly coming under section 78, the Board have the power of disposal of such lands or of requiring the owner to pay for abandonment, as the case may be, and disposal of every land vested in the Board may not result in profit. But as already explained, that is very different from including land in a scheme (which is neither required for nor affected by the scheme) with the deliberate object of acquiring it for the purpose of recoupment.

I have the misfortune to differ from the majority of the Full Bench, but after an anxious consideration of the provisions of the Act, I am unable to hold that the case of *Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh* (1), in so far as it holds that Act V of 1911 B. C. does not authorise the Board of Trustees to acquire lands compulsorily *for the purpose of recoupment*, was wrongly decided, and I would accordingly answer the question referred in the affirmative.

TEUNON, J.—This reference arises out of the proposed acquisition by the Board of Trustees for the Improvement of Calcutta of a plot of vacant land, being premises known as No. 10, Halliday Street.

It appears that the Board of Trustees have decided to make or open out in the northern part of Calcutta a main thoroughfare spoken of as Central Avenue, and that the making of this avenue involves the widening of the street known as Halliday Street. With this chief object in view, and in pursuance of a resolution in terms of section 39, clause (*c*), of the Calcutta Improvement Act, 1911, the Trustees have framed their Scheme No. VIIA in the manner contemplated in sections 39 to 42 of the Act. The scheme has been duly published as required by sections 43 to 45 and, on submission, in accordance with the provisions of section 47, has been sanctioned by Government under section 48.

The scheme thus sanctioned comprises a considerable area and provides, *inter alia*, for the acquisition of a part of such area including premises No. 10. The said premises are said to measure 2 Bighas 15 Cottahs, and though a small portion is required for the widening of the street, *i.e.*, for rounding off the corners at the junction of Halliday Street with 2 side streets, the major portion avowedly has been included within the area of acquisition under the provisions of section 42 (*a*), as land which, in the opinion of the Board, will be affected by the execution of the scheme. In other words, in the opinion of the Board, by the widening of Halliday Street, this land will be enhanced in value, and in so far as it is not within the street alignment and so required, it is to be taken for purposes of recoupment.

The owner, one Mani Lal Singh, accordingly brought his suit substantially to restrain the Trustees from acquiring the said major portion falling outside the street alignment, on the ground that acquisition for purposes of recoupment is not within their statutory powers. On the 17th day of July 1916, the question thus arising was decided against the plaintiff by Greaves, J., sitting in the exercise of the Original Civil Jurisdiction of this Court.

Meanwhile in the case of *Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh* (1) the same question had arisen in respect of premises No. 40/10, Chaulpati Road, which lie within the District of the 24-Pargunnahs and outside the limits of the Original Civil Jurisdiction. In that case the question was decided in favour of the plaintiff and against the Trustees by the Subordinate Judge of the 24-Pergunnahs, and, on appeal by the Trustees, on the 22nd of August 1916, his decision was affirmed by a Divisional Bench.

Against the decision of Greaves, J., the plaintiff Mani Lal Singh next appealed, and the learned Judges constituting the Bench before which this appeal came, finding themselves in disagreement with the decision of the 22nd August 1916, have consequently referred to the Full Bench the question which may be stated in effect as follows, namely, "whether the case of the *Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh* (1), in so far as it holds that Bengal Act V of 1911 does not authorise the Board of Trustees to acquire land com-

pulsorily for purposes of recoupment, was rightly decided."

In the case of *Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh* (1) the premises 40/10, Chaulpati Road, lay wholly outside and some 55 feet away from the street alignment there proposed. In the case of Mani Lal Singh, as I have already pointed out, a small portion of the area or premises proposed to be acquired falls within, and the major portion without, the proposed street alignment. At the hearing of this reference it was consequently suggested, though, as it appeared to me, in a half-hearted manner, that on the facts the two cases should be distinguished and that the reference to the Full Bench was, therefore, unnecessary and incompetent. To this contention I am unable to accede. As regards the major portion of the premises in question, the portion falling outside the proposed street alignment, the Divisional Bench making the reference found themselves, as I understand, unable to distinguish between the case before them and the case of *Chandra Kanta Ghosh* (1). In my opinion, in so far as that area is concerned, the two cases cannot be distinguished, and the question referred should, therefore, be answered.

The decision of that question depends, in my opinion, on the construction to be placed on section 42, clause (*a*), of the Act, which reads thus—"Any improvement scheme may provide for (*a*) the acquisition by the Board of any land, in the area comprised in the scheme, which will, in their opinion, be affected by the execution of the scheme."

The argument before us has been somewhat discursive, but the considerations advanced, in support of the plaintiff's contention that section 42, clause (*a*), should not be construed as authorising acquisition for purposes of recoupment, may be summarised as follows:—In the preamble, and again in Chapter V dealing with taxation, there is no reference or no specific reference to recoupment. In other Acts, in which acquisition by local authorities for purposes of recoupment is authorised, for instance in the Calcutta Municipal Act, 1899, section 357, and in the recent Town Planning Act of the Imperial Parliament, we find express reference to "expediency" or to "increase in value." Inasmuch as the Act is one which gives large powers of interference with private rights, its provisions should be strictly construed: In construing the words [section 42 (*a*)] "affected by the execution of the scheme" we should be guided by the decisions of the Courts in England under the Lands Clauses Consolidation Act in the case of lands "injuriously affected by the execution", of the authorised "works" or "undertaking" and we should further have regard to the analogy afforded by the sixth clause of section 24 of the Land Acquisition Act, I of 1894. Lastly, it is contended that section 78 of the Improvement Act, regarded by the referring Judges as embodying a distinct reference to, and therefore as of special importance in construing section 42 (*a*), should itself be construed as referring merely to lands which, for some cause or other, for example by reason of some mistake or some alteration in the original scheme, have become "superfluous" or surplus lands:

For these reasons, it is contended, we should construe the word "affected" as having no reference to value but as implying some physical interference resulting in either a decrease or an increase in the rights which the owner of the land in question is entitled to exercise in connection therewith. In this view we should, therefore, hold that recoupment is not a purpose for which, under section 69 of the Act, the Board may, with the sanction of the Local Government, acquire land under the provisions of the Land Acquisition Act.

To the argument based on the omissions from the Chapter on Taxation and from the preamble, on the use of other language in other enactments, and, on the sixth clause of section 24 of the Land Acquisition Act, I am unable to attach importance. A provision for recoupment is not a form of taxation. In the preamble the main object of the Act, namely, "the making of provision for the improvement and expansion of Calcutta" is set out. There is no exhaustive enumeration of the ways or methods in which, far less of the means whereby, the end in view is to be attained, and it cannot be said by reference to the preamble alone that power to secure to the Trustees the

improved value, or part of the improved value, resulting from their expenditure of public funds, is not one of "the special powers" with which they may be invested. In any case the operative provisions of the Act are not to be controlled or restricted by the preamble.

No doubt when in an enactment authorising public bodies to execute improvements and to acquire the lands necessary for the same we find that they are further authorised to take such additional lands as "they may think it expedient to take," or such lands as in their opinion will be "increased in value" by the improvements made, it becomes clear that in such enactment the Legislature has recognised and embodied the principle of recoupment. But no stereotyped form for the conferment of this power of acquisition for purposes of re-imbursement has yet been evolved, and the question is whether by the language used in the enactment under consideration that power has been given.

Similarly the analogy afforded by the sixth clause of section 24 of the Land Acquisition Act does not appear to me to assist the appellant. In the Improvement Act the plans, schedules and books of reference required by English Statutes, are replaced by a description of the area "comprised in the scheme." Such scheme is framed in the first instance by the Board, after consideration of objections and representations, is submitted with plans and full particulars to Government for approval, and is finally sanctioned, if approved, by Government. The area fixed and sanctioned as "the area comprised in the scheme" may be said to correspond with the "lands delineated on the plans" in England. The Board must provide [section 41 (*a*)] for the acquisition of all lands falling within that area and "required for the actual execution of the scheme," that is, I take it, for the construction of the proposed improvements. As in England the promoters may, if so empowered by the Act, take all "the lands delineated on the plans," so here the Board [section 42 (*a*)] may take the whole or any part of the remaining area comprised in the scheme if, in their opinion, such whole or part "will be affected by the execution of the scheme," that is, by the proposed improvements when executed or completed. No doubt the sixth clause of section 24 of the Land Acquisition Act has not been modified by the provisions of this Act, but the clause embodies merely a principle of valuation, and the "other land" referred to therein must, in cases such as the present, be lands outside the area comprised in the scheme, or land which, though within that area, the Board does not propose to acquire.

It is then said that in Acts authorising the taking of private property doubtful provisions should be construed in favour of the landowner. But the cases of *Galloway* v. *London Corporation* (10), *Quinton* v. *Bristol Corporation* (11) and *Rolls* v. *London School Board* (17) would seem to be authority for holding that to public bodies acting for the public benefit the principle above enunciated is not to be applied so strictly as in the case of companies seeking their private profit. However that may be, the question, to use the language of Chief Justice Erle, is what meaning and intention "is conveyed to the rational mind" by the words used in the present Act.

The argument based on the Lands Clauses Consolidation Act, and on the meaning placed by the Courts in England on the words "injuriously affected by the execution of the work" in the said Act is possibly the one on which, on behalf of the appellants, has been laid most stress.

The argument is two-fold. In the first place it is said that the words "by the execution of the scheme" restrict the Board of Trustees and the Court to the effect produced by the acquisition of the lands required for the actual execution of the work, that is, in this case, for the construction of the widened thoroughfare. We may not, it is said, take into consideration the use to which the land so required is to be put. This branch of the argument appears to be based partly on the analogy afforded by the 5th and 6th clauses of section 24 of the Land Acquisition Act and partly on the English decisions which, in the case of persons from whom no land is taken, limit compensa-

(17) (1884) 27 Ch. D. 639; 51 L.T. 567; 33 W. R. 129.

tion to damage caused by the construction of the undertaking, and exclude damage arising from the subsequent authorised user. This branch of the argument is, in my opinion, fallacious. We are here dealing with an improvement scheme as a whole, and the prospective user, or the possibility of such user, is of the essence of the matter.

The argument in its second branch is that we should give to the word "affected" in section 42, clause (*a*), the meaning given in the Lands Clauses Consolidation Act and in the decisions thereunder to the words "injuriously affected."

I am not of opinion that the said Act and the cases cited are of any assistance to us. The Act and the cases, in so far as we are now concerned with them, deal only with damage sustained by reason of "injurious affection," and the title to, and assessment of compensation in respect thereof. A distinction is drawn between cases in which other lands of the claimant have been taken and cases in which no other lands of the same owner have been acquired. The rules or principles laid down as applicable in the two cases are not in all respects the same. No such distinction appears to be drawn in section 42 of the present Act. Moreover, the word used is "affected," not "injuriously affected." The omission of the word "injuriously" cannot be supposed to be otherwise than of intention. Indeed, the words "injuriously affected" were before the framers of this Act in the Land Acquisition Act, under which proceedings for compulsory acquisition have to be taken. I am, therefore, unable to assign to the word "affected" now under consideration the meaning or meanings that have been placed upon the words "injuriously affected" in the Lands Clauses Consolidation Act.

Indeed, as has been affirmed by the learned Judges who decided the case of *Chandra Kanta Ghosh* (1), the word "affected," as used in section 42, sub-clause (*a*), of the Improvement Act, is not a 'word of art' to which a technical meaning must be given. It must be construed in its ordinary acceptations, and with reference to the context. When that is recognised, its interpretation in the present case does not to my mind present much difficulty. Land upon which an effect of some sort or kind has been produced, whether for the better or for the worse, would seem to have been "affected." If by the widening of Halliday Street, and the consequent improvement in means of access and in other amenities, these lands will, in the opinion of the Board, be appreciated in value, the Board is in my judgment entitled to say that these lands "will in their opinion be affected by the execution of the scheme."

In this conclusion I am fortified by the provisions contained in section 78 of the Act, and with all respect I am unable to agree with Greaves, J., in attaching no importance to that section. The section provides in substance that on application by the owner and on payment by him of a sum 'to be fixed by the Board,' that is, a sum arrived at apparently by a process of negotiation or 'haggling,' the Board shall abandon the proceedings for the compulsory acquisition of any land, not being land required for the execution of the scheme. The appellant contends that this section should be construed as dealing only with land which, for any reason, has become 'superfluous.' Any such construction appears to me to be strained and unnatural. The applications have in fact to be made at a time when in ordinary course it could not be predicated that any land originally 'required' had become superfluous. The words "required for the execution of the scheme" appear clearly to refer to section 41, clause (*a*), and the lands that may be dealt with under this section are the additional lands which the Board had proposed to acquire as being lands "affected" within the meaning of section 42, clause (*a*). In other words, if in respect of such lands the Board and the owner can arrive at an agreement as to the measure of the "affection" or appreciation, the Board, instead of completing the acquisition and dealing with the lands thereafter under the provisions of section 81, may realise forthwith the improved value, or a reasonable share in the improved value, resulting or likely to result from their expenditure. It is contended that the provisions of section 80, which render the land, in respect of which such payment has been made, liable to inclusion in subsequent improvement schemes, militate against the construction which I place on section 78. I am unable to agree. In any such subsequent scheme, the value deter-

mined by the first scheme becomes the starting point, and there is nothing inequitable in including the land in the second, whether by reason of its being required for, or by reason of its being still further appreciated in value by, such second scheme.

In conclusion, I should say that the equity of the principle which requires contribution from private owners in respect of an increase in the value of their properties resulting from improvements effected out of public funds, has now long been recognised. Such contribution may be obtained by the imposition of a "betterment" or "improvement" charge; or of a "frontage rate," or by the method of recoupment. It would indeed have been matter of surprise if in an Act passed in the year 1911, in order to the carrying out of large measures of town improvement, the Legislature had omitted to secure any portion of the improved value "in ease of the burden upon the rate-payers." In this Act we find no indication of frontage rates or improvement charges. We might, therefore, reasonably expect to find recognition of the system of recoupment. That system may in practice result in heart-burning as between *A* whose land has been included in the acquisition area and his neighbour *B* whose land has been left out. Doubtless it is this result which has led to the charges levelled against the system, and against this Act if construed as sanctioning the system, namely, that it is arbitrary, unjust, authorises confiscation and the levy of blackmail and leads or may lead to oppression. There may be particular instances of hardship but as between the private owner and the general body of rate-payers or tax-payers the method, in my opinion, is essentially just. Further, in the Act, against the abuse or misuse of the powers conferred, ample safeguards have been provided. I am not, however, to be understood as saying that these considerations have weighed with me in construing the Act.

In my judgment, in sections 42, 78 and 81 of the Act, clear and plain provision has been made for the taking of additional or excess lands for the purpose of securing to the rate-payers, or their representatives the Board of Trustees, the increase in value or part of the increase in value resulting, or likely to result, from the improvements effected. It follows that the acquisition of such lands is in furtherance of the objects of the Act, and that under section 69 the Board may with the previous sanction of the Local Government acquire such lands under the provisions of the Land Acquisition Act, 1894.

In this view the answer to the question referred to the Full Bench, in my opinion, should be in the negative.

RICHARDSON, J.—The clause on which the answer to this reference mainly depends is contained in an Act of 1911 for the improvement and expansion of Calcutta in various ways, involving the acquisition of land either by agreement or, subject to the payment of compensation to the owner, by compulsion. The machinery set up is a Board of Trustees, invested with special powers for carrying out the objects of the Act. The full name of the Board is "The Trustees for the Improvement of Calcutta" (section 3). The short name, which is generally used, is "the Board" [section 2 (*c*)]. Chapter II relates to the constitution of the Board and cognate matters. The principal function of the Board is to prepare and execute "improvement schemes" and "re-housing schemes," which are dealt with in Chapter III. By definition (section 2) the term "improvement scheme" means a "general improvement scheme or a street scheme, or both." Chapter IV headed "acquisition and disposal of land" includes four sections with some bearing on the matter in hand. They are sections 68 and 69 and sections 78 and 81. The remaining chapters have little relevancy. Their headings are Chapter V "Taxation," Chapter VI "Finance," Chapter VII "Rules" and Chapter VIII "Supplemental Provisions." There is also a schedule which, in conjunction with section 71, modifies in some particulars the Land Acquisition Act, 1894. Land is compulsorily acquired under the provisions of the latter Act as modified.

Chapter III, which includes the disputed clause [section 42 (*a*)], is the most important in the Act. It forms the constructive part to which the rest of the Act is subordinate. Sections 33 and 39 indicate the conditions under which the Board are empowered to frame "general improvement schemes" and "street schemes." The next few sections apply to improvement schemes generally,

Section 41 indicates what an "improvement scheme" must comprise and section 42 what it may comprise. When such a scheme has been framed, provision is made (*a*) for its publication in the Government Gazette and in local newspapers "with a statement of the period within which objections will be received" (section 43), (*b*) for notice to the Chairman of the Corporation, in case the Corporation may think fit to make any representation with regard to the scheme, and (*c*) for service of notice individually on the owners and occupiers of land "which the Board propose to acquire in executing the scheme." The notice to an owner or occupier shall, *inter alia*, "require such person, if he dissents from such acquisition, to state his reasons in writing within a period of sixty days" [section 45 (*b*)]. By section 47 the Board is required to consider all objections, representations and statements of dissent received under the preceding sections and to hear all persons making them who may desire to be heard. By the same section, when the prescribed procedure has been followed, the Board may either abandon the scheme or submit it to the Local Government for sanction. If sanction is applied for and granted, then by section 49, the fact is to be announced by notification and "the Board shall forthwith proceed to execute the scheme." Section 50 makes provision for the alteration of a sanctioned improvement scheme before it has been carried into execution. The rest of the chapter need not be further noticed.

As Mr. Das argued, clause (*a*) of section 42 must clearly be read with clause (*a*) of section 41. There are two categories of land, land required for the execution of the scheme for the acquisition of which provision must be made in the plans, and land affected by the execution of the schemes for the acquisition of which provision may be made. The controversy relates to the words "affected by the execution of the scheme" and the extent or nature of the discretionary power which the clause confers. The words are no doubt wide and general and, because of their generality, may seem subject to possible limitation, should the context require it.

There is no presumption, however, that general words are not used in a general sense. The presumption is the other way. The general rule for the construction of Statutes is that the Legislature means what it says. The words best declare the intention: *Sussex Peerage case* (18). But owing perhaps to the imperfection of language as an instrument, or to the fact that language is sometimes misused even in legislative enactments, it may not always be easy to say what the meaning is. The language may be doubtful or ambiguous. The Courts may have a choice between different possible constructions, and in such cases there may be subsidiary rules or principles more or less controlling the choice according to the nature of the subject-matter, whether the Act is penal or remedial and so forth. Beyond that there is more delicate ground where the strict literal meaning would lead to a result so absurd as to be irrational, and it may be found possible to modify the meaning so as to avoid that result.

These observations merely echo what has been so often and so forcibly laid down by Judges of the highest authority in England—never perhaps more forcibly than in the case relating to the Trade Disputes Act, 1906: *Vacher & Sons* v. *London Society of Compositors* (19). In another case in the same volume [*Inland Revenue Commissioners* v. *Herbert* (20)] Lord Haldane re-states the law, with particular application to legislation of a novel kind, in a passage which I venture to quote:—

"In approaching the controversy as to the meaning of these sections, I think it worth while to recall a principle which must always be borne in mind in construing Acts of Parliament, and particularly legislation of a novel kind. The duty of a Court of law is simply to take the Statute it has to construe as it stands, and to construe its words according to their natural significance. While reference may be made to the state of the law, and the material facts and events with which it is apparent that Parliament was dealing, it is not admissible to speculate on the probable

(18) (1844) 11 Cl. & Fin. 85; 8 Jur. 793; 8 E.R. 1034; 65 R. R. 11.

(19) (1913) A. C. 107; 82 L. J. K. B. 282; 107 L. T. 722; 57 S. J. 75; 29 T. L. R. 73.

(20) (1913) A. C. 326; 82 L. J. P. C. 119; 108 L. T. 860; 11 L. G. R. 865; 57 S. J. 516; 29 T. L. R. 502.

opinions and motives of those who framed the legislation, excepting in so far as these appear from the language of the Statute. That language must indeed be read as a whole. If the clearly expressed scheme of the Act requires it, particular expressions may have to be read in a sense which would not be the natural one if they could be taken by themselves. But subject to this the words used must be given their natural meaning, unless, to do so would lead to a result which is so absurd that it cannot be supposed, in the absence of expressions which are wholly unambiguous, to have been contemplated."

Now if that be the spirit in which a question of this nature, should be approached, it seems desirable to determine the ordinary and natural meaning of the words used in the clause before us before considering whether by any legitimate process of construction those words can or should be made to yield some other meaning.

In the first place, the only limitation, imposed by the clause itself, on the locality of the land affected, is that the land must be in the area comprised in an improvement scheme which has been subjected, or laid open, to the fire of criticism which the Act allows and invites.

Then as to the word "affected," "affect" in its primary or dictionary sense is an extensive but colourless word. But it is a word which easily takes colour from the context in which it is used. According to the context, it may mean affect in one way or the other, for the worse, or for the better. It may be that it often has the secondary sense of affecting adversely. An illustration will be found in the third paragraph of the preamble. An Act which affects a previous Act is an Act which alters or is inconsistent with the previous Act.

In the present context, the scheme is an improvement scheme. The full phrase is "land affected by the execution of the improvement scheme." To my mind at any rate that suggests land affected for the better; and in my opinion, though the words may be wide enough to include land prejudicially affected, should the Board choose to acquire such land, they specially include and signify land beneficially affected.

As to the words "by the execution of the scheme," which qualify the word affected, I cannot doubt that they naturally and obviously refer not only to the period of construction but also to the period immediately following when the improvement scheme is completed and in operation "and a going concern." *Harding* v. *Board of Land and Works* (21). Mr. Mitter suggested that "the execution of the scheme" must mean the same in section 42 (*a*) as in section 41 (*a*). But the two expressions "*required for* the execution of the scheme" and "*affected by* the execution of the scheme" must each be construed as a whole.

It follows then that, in my opinion, the whole clause is wide enough to embrace a discretionary power, on the part of the Board, in framing an improvement scheme, to make provision for the acquisition of land in the area specified, which will, in their opinion, be beneficially affected by the execution of the scheme as an accomplished fact.

If that be so, provision may clearly be made for the acquisition of land for purposes of recoupment. It is said, that introduces a novel power to which the Act makes no express reference. But if the power comes within the ambit of the phraseology, the criticism is at best inconclusive. No one denies the generality of the words and it is the function of general words to include things not specially named. The source of the words appears to be the similar but not in all respects identical Act in force in Bombay (Bombay Act IV of 1898), though Counsel was stopped by the Court from arguing that what may have been done in Bombay under that Act was of any assistance in interpreting the Calcutta Act. The clause in the Calcutta Act fills a prominent place and means something. As it stands, there is no restriction on the purposes which the Board may have in view in exercising their discretion. The purpose of recoupment is not excluded. Undoubtedly the power to acquire land for that purpose is a large power, but that fact by itself is not a sufficient reason for limiting and cutting down general words, still less for putting in words which are not there.

The construction of the disputed clause thus arrived at, while it conflicts with nothing

(21) (1886) 11 A. C. 208; 55 L. J. P. C. 11; 55 L. T. 225.

in the preamble or any other part of the Act, seems to me supported and confirmed by the provisions of section 78 and section 81.

The preamble even if it controls the enacting provisions, which it does not, creates no difficulty. Recoupment may not be directly a method of improvement on the same plane with the method specified in the first paragraph, but indirectly it may be a method of great, and possibly indispensable, service. The power to acquire land for that purpose may easily, without straining the language at all, be included among the special powers with which the second paragraph contemplated that the Board should be armed "for carrying out the objects of this Act."

Whatever may be the true construction of the disputed clause, sections 68 and 69 can present no difficulty. They give a merely subsidiary power to acquire land just as sections 24 and 25 give the subsidiary powers of making contracts and spending money, and these subsidiary powers are conferred in order that improvement schemes (whatever they may comprise) and re-housing schemes may be carried out.

Under section 69 the power to acquire land compulsorily is given in the wide terms used in sections 24 and 25, "for carrying out any of the purposes of the Act." If that is a limitation, it is a limitation so wide in its extent, that if not expressed it would have to be understood. Anything which the Act permits or directs to be done will come within the phrase. Improvement schemes "which the Board shall forthwith proceed to execute" are within it, and as regards acquisition there is no difference between land included under section 41 (*a*) and "affected" land (whatever the expression means) included under section 42 (*a*). Land of both kinds is acquired for carrying out one or other of the purposes of the Act and may for that reason be acquired either by agreement or compulsorily. It is said section 68 does not mention the purposes of the Act but empowers acquisition by agreement of "any land which the Board are authorised to acquire." Possibly those words were employed so as to include not only all the lands which may be acquired compulsorily under section 69, but also land which under clause (*b*) of section 50 may be acquired by agreement but not without the formalities attendant on framing a scheme—by compulsion. However that may be, section 68 cannot authorize the acquisition, even by agreement, of any land for carrying out some purpose which is not a purpose of the Act. The suggestion that "affected" land included in a framed and sanctioned scheme may be acquired by agreement under section 68 but not by compulsion under section 69 seems to be unfounded.

Section 78, with which must be read section 13 of the schedule, provides for the abandonment (in consideration of a special payment) of the acquisition of land, the acquisition of which has been sanctioned in connection with some improvement scheme, but "which is not required for the execution of the scheme." These words read with sections 41 (*a*) and 42 (*a*) seem to point to land entered for acquisition in a sanctioned improvement scheme, not as land "required for the execution of the scheme" under section 41 (*a*) but as land not required but "affected" under section 42 (*a*). Section 78 seems to pre-suppose that persons interested will know from the outset, or as soon as a scheme is published, what lands are "required" and what lands are "not required." This they will do if land "not required" signifies or includes "affected" land.

It is suggested that the section refers to land which is not required for carrying out a scheme because of some alteration made under section 50. But apart from the result of this interpretation to which I shall presently advert, the special provisions of section 78 seem too elaborate to be adequately accounted for in that way, inasmuch as it cannot be predicted that alterations will be numerous or important. Moreover, if it is the interest of the Board to withdraw from the acquisition of any land, the withdrawal will presumably take place at their own initiative under section 48 of the Land Acquisition Act. No owner is compelled to make an application under section 78 of the principal Act, and if he knew that the Board meant to withdraw he would probably refrain from doing so in order to escape from the special payment and in order to obtain any damages to which he might be entitled under section 48 of the Land Acquisition Act.

After land has been acquired or the title has vested, the Board may proceed under section 81, and this applies to all land—includ-

ing affected land—which comes into the hands of the Board and is not required for the actual execution of a scheme.

Now if "affected" land includes land beneficially affected acquired for purposes of recoupment, it will appear that such land might well be the special object of the powers conferred by these two sections.

If the relevant provisions be fairly construed, apart from any preconceptions as to what the Legislature ought or ought not to have done, they show, I think, with reasonable certainty, that the Board were intended to have power to take land for purposes of recoupment and that section 78 and section 81, particularly the pre-emption clause, were enacted principally—though perhaps not wholly—for the benefit of the owners of such land. This construction leads to no inconsistency or repugnancy and gives the Act as a whole a reasonable and intelligible meaning.

The reference to this Bench has been occasioned by a difference of opinion in the Court on a pure question of construction, and that being so and this Bench not being altogether unanimous, I state my own opinion with diffidence. I am not, however, led to alter that opinion by any merits apparent in the alternative construction of the disputed clause which is offered. As Greaves, J., has said, it all turns on the word "affected." If the significant word "injuriously" be in effect prefixed and the expression "affected by the execution of the scheme" be read as if it occurred in a section relating to the payment of damages, and not in a section relating to the framing of an improvement scheme, the meaning so obtained is not the meaning of the words as they stand. This violent treatment of the clause seems to rest entirely on the series of English cases by which the true meaning of the words "injuriously affected by the execution of the works" in section 68 of the Lands Clauses Consolidation Act, 1845, was settled (Cripps on Compensation, 5th Edition, page 136).

According to this view the only purpose of section 42 (*a*) was to enable the Board to acquire land, in respect of which they might otherwise have to pay damages for injurious affection in cases in which such damages are claimable. But this is already partly provided for by clause (2) of section 49 of the Land Acquisition Act. This view, again, involves the interpretation of sections 78 and 81 in the manner already touched upon, according to which they were designed to enable the Board to make a profit out of the abandoned parts of their various undertakings, or to finance themselves out of land entered in their plans through errors of calculation or judgment.

The construction of section 42 (*a*) on which this result depends does not appear to be admissible and the result itself compares unfavourably in point of probability with the result, so much canvassed, of giving to the words their natural scope and effect.

If an Act of this kind is to achieve its objects, the powers which must be taken are necessarily large and, *inter alia*, means must be furnished for raising the money required. At the present day there can be no initial improbability in finding in such an Act provision made for what is known as betterment, or for what is known as recoupment. Some such provision, if it exists, need create no surprise. The principle underlying betterment and recoupment has received legislative recognition in various Acts and in many ways. In practice it may be difficult to combine contribution with equality of treatment. In a case already referred to [*Harding* v. *Board of Land and Works* (21)], some violence was done to the strict grammatical meaning of the enactment there in question in order to prevent an inequality which might have extended to some land being taken without any compensation at all. It is one thing, however, to determine the true antecedent of a relative word like "such," and quite another thing to alter the language of the Act in the manner which is suggested as proper in the present case. Our duty is to construe the Calcutta Act as it stands, without entering into questions of policy and expediency further than the language necessitates. In that Act no attempt is made to frame an elaborate and possibly costly scheme of contribution. The method adopted is an extension of the power to take land compulsorily, and there is at least this to be said, that a man whose land is taken for purposes of recoupment is in no worse case than the man whose land is taken for the actual execution of a scheme. The former has the benefit of sections 78 and 81 and

though it is a benefit at which he may look with somewhat jaundiced eyes and may be pardoned for so doing, there it is.

Hardship in some degree may be inevitable in connection with any scheme or set of schemes involving the taking of land on a considerable scale in a great city. But the Act deprives no man of his property without compensation. The presumption that the Legislature will not interfere with private rights without compensation is not in question.

I do not know what the position is, but it is at least conceivable that without the aid of recoupment the operations of the Board, entailing an expense commensurate with the size and importance of Calcutta, would come to a standstill, so that there would be no improvement and expansion of the city in the interest of the present and future generations of citizens and the Act would be a dead letter. If the construction of the Act is to depend on results, this consideration cannot be entirely neglected.

In conclusion I may be permitted to emphasize that if the power in question is discretionary, the duty and responsibility of carrying out the provisions of the Act and giving effect to the statutory purpose and directions are laid upon a Board of Trustees, specially constituted, and that, among other safeguards, the Act has been careful to ensure full publicity and full opportunity for the ventilation of objections to any improvement scheme which may be proposed.

I should also add that as regards the preliminary objection to the hearing of this reference, I agree with what has been said by my brother Fletcher. So long as the judgment in *Chandra Kanta Ghosh's case* (1) stands the Board cannot, as I understand that judgment, acquire any land compulsorily for purposes of recoupment.

In the circumstances, looking at the language and the objects of the Act, I am respectfully of opinion that this power to acquire land for purposes of recoupment was within the contemplation of the Legislature. I agree with Fletcher, J., and concur in the answer which he proposes to give to the question referred.

CHAUDHURI, J.—I think this reference to a Full Bench of this Court is competent, although one of the referring Judges considers the case of *Chandra Kanta Ghosh* (1) distinguishable to the extent that small portions of the land have been cut off in this case, whereas in that case no portion of the land was similarly treated, and another learned Judge may be said to have implied as much. The main question is whether the decision in *Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh* (1), that the Calcutta Improvement Act V of 1911 (B. C.) does not allow the compulsory acquisition of land for recoupment, is good law or not, and the reference is properly before us.

The question has been elaborately argued and practically the whole of the Act beginning from the preamble has been analysed and examined, but it seems to me that it is really a question as to the meaning of the word "affected" in section 42 of the Calcutta Improvement Act. Section 41 deals with matters which must be provided for in improvement schemes under the Act and section 42 with what may be provided for. "Improvement scheme" is defined in section 2, clause (*f*), as meaning a general improvement scheme, or a street scheme, or both. Section 36 lays down when a general improvement scheme and section 39 when a street scheme may be framed. In this case we are concerned with a street scheme, but sections 41 and 42 deal with improvement schemes generally and no separate provision has been made in the Act for acquisition of land in respect of street schemes, whereas in the Bombay Act IV of 1898, acquisition of land *necessary for or "affected" by the execution* of a street scheme has been dealt with together in section 51, clause (*a*). These are dealt with separately in sections 41 and 42 of the Calcutta Act. The expression "affected" has apparently come from the Bombay Act and although there is no express provision in the Bombay Act authorising recoupment, the same question has apparently not arisen under that Act.

It is quite clear that section 42 provides for acquisition of land which is not covered by section 41, namely, of land other than that required for the execution of the scheme. It provides for the acquisition by the Board of any land in the area comprised in the scheme which will in their opinion be affected by the execution of the scheme. The learned Judges in *Chandra*

Kanta Ghosh's case (1) have said that "affected" is not a word of art, but of ordinary English, capable of very large meaning, adopting the language of Wills, J., in *Buckinghamshire County Council & Hertfordshire County Council, In re* (22). They think that having regard to the context it means "neither beneficially affected or improved in value, nor prejudicially affected or impaired in value," but signifies "acted upon physically or materially." They say that in this section affected land means land in respect of which there has been "physical interference with any right, public or private, which the owner is entitled to exercise in connection therewith." The words "physically or materially acted upon" quoted from the Oxford Dictionary have little to do with the physical interference in the passage above quoted, which has been taken from the argument of Mr. Thesiger on behalf of the defendant in error in *Metropolitan Board of Works* v. *McCarthy* (3), who used those words in connection with his definition of the right to compensation in respect of property *injuriously affected*, when he sought to reconcile and explain the various cases on the subject. The test submitted by the learned Counsel was accepted by Lord Cairns (page 243) and by Lord Chelmsford with qualification (page 256) for purposes of the case before them. The words were used to define the expression "injuriously affected" in connection with property. The word "physical" was used to distinguish the case from cases of that class, where the interference complained of was not of a physical but rather of a "mental nature or of an inferential kind." The words "a right, public or private, which the owner of the property is entitled to make use of" were used to distinguish the case from such cases as the *Hammersmith & City Railway* v. *Brand* (4). Although the learned Judges have said that "affected" in section 42 does not mean "prejudicially affected or impaired in value," they have really adopted the definition of "injuriously affected" given in *Metropolitan Board of Works* v. *McCarthy* (3). Section 42 does not deal with compensation, nor does it in any manner indicate that it relates to compensation. It supplements section 41 and provides for what may be included in an improvement scheme, in addition to what must. The sections relating to compensation come much later in a different chapter, *viz.*, Chapter IV and schedule. Section 69 deals with compulsory acquisition under the provisions of the Land Acquisition Act, 1894, modified as indicated in the schedule referred to in section 71 (*b*). If it was intended to place the Board in a position "to escape from the payment of damages" by allowing them to acquire severed or injuriously affected land in their improvement schemes, Chapter IV or the schedule would have been the proper place for providing for it. Section 42 merely permits the inclusion of land in the scheme which in the opinion of the Board may be affected by the execution of the scheme. It does not say land affected by the execution of the scheme must be acquired. Whether the land will be affected or not is left to be considered by the Board. They have liberty to include what in their opinion may be affected, which may include more than what may be actually affected. They have, it is said, been so empowered "to escape from the payment of damages", namely, damages for such physical interference with the land or its incidents which may lessen its value. The definition adopted includes interference with rights, public or private, which give an additional market value to the property apart from the uses to which the owner or occupier might put it; public rights such as the right of access to premises by a public highway, and private rights such as the obstruction of easements such as rights of way, of light, of support are included. The breach of restrictive covenants for the benefit of other land and the prevention of the carrying out of covenants relating to land also come in. It seems to me that the definition adopted is vague and indefinite, and may include a great deal more than what the Land Acquisition Act as modified by this Act provides for in respect of damages or compensation. It strikes me that if it were intended to safeguard the Board in respect of injuriously affected property, the Act would have clearly defined the matter and not left it so vague. There can be no damages unless the property

(22) (1899) 1 Q. B. 515; 68 L. J. Q. B. 417; 80 L. T. 85; 63 J. P. 356; 15 T. L. R. 138.

is impaired in value. The learned Judges have, therefore, really held that affected means "prejudicially affected or impaired in value," although they say at the outset of their judgment that the word does not mean it. They say the opposite view may include "any land or all land in the area, for the whole area may be considered benefited by the scheme." They look upon this as a forced and unnatural contention. I did not understand the learned Advocate-General who appeared for the appellant to go so far. He conceded that the section may be read as providing for the acquisition of land, either beneficially or prejudicially affected, but his argument was that it related only to such land as the Board considered affected by *the execution of the scheme*, which he said were the governing words of the section. Section 41 deals with the land required for the scheme and section 42 with land affected by the execution of the scheme. If it is unnatural to hold that the Legislature intended the Board to benefit by the acquisition of property beneficially affected or improved in value, it is also unnatural to hold that in discharging a public duty for the benefit of the public, the Board was provided with power to take up property prejudicially affected or impaired in value.

Sections 41 and 42 merely provide for the framing of schemes, which have to be notified under section 43. Notice as to the proposed acquisition has to be served under section 45 on persons interested, inviting their objections. The objections have to be considered by the Board under section 47, and then the sanction of the Government has to be obtained after setting out the objections. Sanction may then be given by the Government with or without modification under section 48. The sanction has to be notified by the Government (section 49) and then the Board is authorised to execute the scheme. Publicity of the scheme is provided for, objections have to be considered, and submitted to the Government and sanction can then be obtained. These are undoubtedly safeguards against undue interference.

The Board cannot proceed to acquire any land until the sanction has been notified as above.

Chapter IV deals with the acquisition and disposal of land. Section 68 deals with acquisition by agreement, and section 69 with compulsory acquisition, that is to say, the Act provides for acquisition in two ways, namely, by private treaty and compulsorily under the Land Acquisition Act. They both cover the same ground. They do not deal with different classes of land, namely, land necessary under section 41 or land considered affected under section 42. It seems quite clear that lands under both these heads may be acquired in either way. The learned Judges in *Chandra Kanta Ghosh's case* (1) have emphasised the words *for carrying out any of the purposes of the Act* occurring in section 69, as distinguishing it from section 68 where those words do not occur. They have in this overlooked the provision in section 24 which has to be read with section 68, which empowers the Board to enter into contracts *necessary or expedient for carrying out any of the purposes of the Act*, which really means necessary under section 41 or expedient under section 42. In discussing the purposes of the Act the preamble has been considered by them. I am unable to agree that "the re-housing of persons of the poorer and working classes displaced by the execution of improvement schemes" is a separate head of the objects of the Act. It comes under the head: "The Improvement and Expansion of Calcutta." The punctuation shows that it is part of the sentence beginning with the words "acquiring land for the said purposes, etc." The sentence following it is "and otherwise as hereinafter appearing" which does not run with it, if it is treated as a separate head, but it grammatically follows the portion governed by the preposition "by" after the words "expansion of Calcutta." Acquisition of land for purposes of recoupment is not specified as one of the objects of the Act. It is a means for effecting an object. It is not mentioned as an object in the preamble of the Acts which have been brought to our notice which explicitly provide for recoupment. It is scarcely to be looked for in the preamble. So far as the Calcutta Improve-

ment Act is concerned, section 42 clearly provides for acquisition of land other than that required for the execution of improvement schemes. "Affected land" may be sanctioned by the Government to be acquired, but what it is to be done with such land? The acquisition may be "to escape payment of damages," but what is the Board to do with such property? Power of disposal by them is provided for by section 81, by which also the right of pre-emption is given to the owner of the land. Section 78 provides for abandonment of acquisition of land which is not required for execution of the scheme even after sanction, in consideration of payment by the owner of a sum to be fixed by the Board, which clearly comes under section 42. This section may be compared with section 48 of the Land Acquisition Act, which provides for payment of compensation when the acquisition is not completed. Section 78 provides for exaction of payment for abandonment, if the owner applies for it after the sanction for acquisition has been given and before the time fixed by the Land Acquisition Act for making claims in reference to the land. It clearly provides for recoupment. I think sections 78 and 81 taken together show that power to acquire land for recoupment has been given by the Calcutta Improvement Act, and in section 42, the word "affected" was deliberately used as a word having a very large meaning, "to give large powers of acquisition of land outside immediate requirements." Sections 89 and 91 deal with the power of the Board to borrow, including the power to grant mortgages of property vested in the Board, and sections 122 and 123 deal with credits to capital account and the application of the capital account. The Act gives power to acquire superfluous land, to demise and sell it, to return it on payment by the owner. For the above reasons I agree with the view taken by the learned Judges who have referred this case.

Reference answered in the negative.

MADRAS HIGH COURT.
FULL BENCH.

APPEAL AGAINST ORDER No. 137 OF 1916.

September 26, 1917.

Present:—Justice Sir William Ayling, KT., Mr. Justice Seshagiri Aiyar and Mr. Justice Bakewell.

KOPPARTHI LINGAYYA AND OTHERS—CREDITORS—PETITIONERS—APPELLANTS

versus

ARAVETI CHINNARAYANA AND OTHERS—DEBTORS—RESPONDENTS.

Provincial Insolvency Act (III of 1907), s. 46—Appeal, presentation of, after time—Time occupied in obtaining copy of order, exclusion of—Limitation Act (IX of 1908), ss. 4, 5, 12, 29—Applicability of ss. 4, 5, 12 to proceedings under Act III of 1907—'Alter' and 'affect' in s. 29, meaning of.

Recourse should not be had to the general provisions of the Limitation Act in dealing with the admission of petitions and appeals presented after the time prescribed under the provisions of the Provincial Insolvency Act. [p. 809, col. 2; p. 812, col. 1.]

Abu Baker Sahib v. *Secretary of State for India*, 5 Ind. Cas. 884; 34 M. 505 at p. 507; 7 M. L. T. 132; 20 M. L. J. 283, followed.

Venkata v. *Chengadu*, 12 M. 168 (F. B.); 4 Ind. Dec. (N. S.) 467, *Srinivasa Aiyangar* v. *Secretary of State*, 18 Ind. Cas. 617; 24 M. L. J. 41; 38 M. 92, *Kullayappa* v. *Lakshmipathi*, 12 M. 467; 4 Ind. Dec. (N. S.) 675, *Veeramma* v. *Abbiah*, 18 M. 99; 6 Ind. Dec. (N. S.) 418, *Seshama* v. *Sankara*, 12 M. 1; 4 Ind. Dec. (N. S.) 351, considered.

Per *Ayling, J.*—The application of the general provisions of the Limitation Act extending in certain circumstances the period fixed by a special law must be deemed to 'affect' that period within the meaning of section 29 of the Limitation Act. [p. 808, col. 2.]

Per *Seshagiri Aiyar, J.*—Wherever an attempt is made to construe a special period fixed by an enactment with reference to the general provisions of the Limitation Act contained in sections 5 to 18, the effect of such a process would be to affect the period of limitation fixed by the local Act. [p. 810, col. 1.]

The Provincial Insolvency Act is not a self-contained enactment, nevertheless the general provisions of the Limitation Act should not be introduced into the construction of section 46, clause (4), of the former Act. [p. 810, col. 2.]

Even where an Act is not complete in itself, if by importing the general provisions of the Limitation Act the period fixed in a special Act is likely to be enlarged either by the process of computation in obtaining copies or by excluding the period during which a fraud was practised or during which another litigation was proceeding in a different Court, still the period of limitation would be affected. [p. 811, col. 2.]

Appeal against the order of the District Court, Cuddapah, dated the 11th October 1915, in Insolvency Petition No. 9 of 1915,

This appeal coming on for hearing on the 19th April 1917, upon perusing the grounds of appeal, the order of the lower Court and the material papers in the case and upon hearing the arguments of Mr. *C. A. Seshagiri Sastri*, for the Appellants, and of Dr. *S. Swaminadhan*, for the 5th Respondent, of Mr. *P. Somasundaram* for Mr. *V. Subramanyam Pantulu*, for the 4th and 9th Respondents, and of Mr. *V. S. Narasimhachariar*, for the 1st, 7th and 8th Respondents, and the other respondents not appearing in person or by Pleader, and the case having stood over for consideration till the 24th April 1917, the Court (Spencer and Srinivasa Aiyangar, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

This is an appeal against an order of the District Judge of Cuddapah passed under section 15 of the Provincial Insolvency Act dismissing an application made by creditors to declare the respondents insolvent. The learned Judge dismissed the application on the ground that the act of insolvency complained of occurred more than 3 months before the presentation of the petition, the last date for presentation having fallen in the period during which the Court was closed for vacation. He held that the petition could not be presented on the re-opening day as section 4 of the Indian Limitation Act was not applicable, and that section 10 of the General Clauses Act could not save the petitioners, as a question of limitation was involved.

The appeal against the District Judge's order, for which section 46 of the Act provides, has not been presented within 90 days of the order. Unless the time occupied in obtaining a copy of the order appealed against be excluded under section 12 or section 5 of the Indian Limitation Act, this appeal must be rejected.

The question for our decision, therefore, is whether sections 4, 5 or 12 of the Indian Limitation Act are applicable to proceedings under the Provincial Insolvency Act.

The latest decision of this Court on the point is *Munjuluri Sivaramayya* v. *Singumahanti Bujanga Rao* (1), wherein Oldfield, J., expressed his opinion that section 12 (2) of the Indian Limitation Act could not be applied to proceedings under the Provincial Insolvency Act. The learned Judge was inclined to think that section 5, being one of the general provisions of the Act and not altering or affecting any period of limitation within the meaning of section 29 (1) (*b*), might be applicable, but he felt himself bound to follow the decisions in *Veeramma* v. *Abbiah* (2) and *Appa Rau Sanayi Aswa Rau* v. *Krishnamurthi* (3). Sadasiva Aiyar, J., who sat with him, considered that section 5 was applicable. He distinguished *Veeramma* v. *Abbiah* (2), dissented from *Appa Rau Sanayi Aswa Rau* v. *Krishnamurthi* (3) and followed *Nijabutoolla* v. *Wazir Ali* (4), *Reference under section 39 of Forest Act V of* 1882 (5) and *Seshama* v. *Sankara* (6). Both learned Judges agreed to cut the Gordian knot under the exceptional circumstances of that case by treating the time-barred appeal as a revision petition and dealing with it under section 15 of the Charter Act, a course which can be taken only when the High Court in the exercise of its power of superintendence considers that a Subordinate Court has failed to do its duty. [*Vide*, *Abdullah* v. *Salaru* (7)].

The present appeal purports to have been brought under section 15 of the Charter Act, as well as under section 46, clause (2) of Act III of 1907, but the circumstances are not such as to warrant our proceeding under the Charter.

Duraisami Aiyangar v. *Meenakshi Sundara Aiyar* (8), to which Oldfield, J., was again a party, is a direct decision that section 12 of the Indian Limitation Act is not applicable to applications under the Provincial Insolvency Act, and was followed by the same learned Judge in *Trasi Deva Rao* v. *Parameshraya* (9) in respect to another section, namely, section 14 of the Indian

(1) 30 Ind. Cas. 703; 39 M. 593; 18 M. L. T 200.

(2) 18 M. 99; 6 Ind. Dec. (N. S.) 418.

(3) 20 M. 249; 7 M. L. J. 94; 7 Ind. Dec. (N. S.) 177.

(4) 8 C. 910 10 C. L. R. 333; 7 Ind. Jur. 84; 4 Ind. Dec. (N. S.) 587.

(5) 10 M. 210; 3 Ind. Dec. (N. S.) 899.

(6) 12 M. 1; 4 Ind. Dec (N. S.) 351.

(7) 18 A 4; A. W. N. (1895) 124; 8 Ind. Dec. (N. S) 707.

(8) 25 Ind. Cas. 610; 16 M. L. J. 246; (1914) M. W. N. 831.

(9) 27 Ind. Cas. 144; 39 M. 74; 29 M. L. J. 451.

Limitation Act, with the remark that the whole of that Act is inapplicable to proceedings under the Provincial Insolvency Act.

In none of the above cases was the decision in *Srinivasa Aiyangar* v. *Secretary of State for India* (10) considered. That was a case wherein Benson and Sundara Aiyar, JJ., after a very full consideration of the law on the subject, applied section 15 of the Indian Limitation Act to a suit instituted under section 59 of the Revenue Recovery Act (II of 1864). They held (we think rightly) that the special period for bringing suits under that Act was governed by the provision in section 59, which allows six months' time, rather than by any Article in the schedules to the Indian Limitation Act, but that the general provisions in the body of the Act were intended to be applicable, in the absence of anything to the contrary, to proceedings under special or local laws. In so doing, they followed the authority of a Bench of this Court in *Seshama* v. *Sankara* (6 and of a Full Bench in *Venkata* v. *Chengadu* (11).

The Full Bench decision in *Abu Baker Sahib* v. *Secretary of State for India* (12), which formed the basis for the decision in *Duraisami Aiyangar* v. *Meenakshi Sundara Aiyar* (8), was to the effect that appeals under section 10 of the Madras Forest Act (V of 1882) are independent of the general provisions of the Indian Limitation Act.

The rights conferred by sections 10 and 14 of the Madras Forest Act to appeal, against decisions of Forest Settlement Officers upon claims to have certain rights recognised at the time of afforestation, to a District Court and to a Forest Court respectively are evidently rights of a very special nature. As pointed out by the Chief Justice, the vesting of a power to extend time for appealing in the hands of the Governor-in-Council is in itself an indication that the Courts were not intended to exercise a similar power under the Indian Limitation Act in regard to these so-called appeals.

(10) 18 Ind. Cas. 617; 24 M. L. J. 41; 38 M. 92.

(11) 12 M. 168 (F. B.); 4 Ind. Dec. (N. S.) 467.

(12) 5 Ind. Cas. 884; 34 M. 505 at p. 507; 7 M. L. T. 132; 20 M. L. J. 283.

The cases in *Veeramma* v. *Abbiah* (2) and *Appa Rau Sanayi Aswa Rau* v. *Krishnamurthi* (3) related to the applicability of the provisions of the Indian Limitation Act to acts done in relation to the Indian Registration Act. *Sivarama Pattar Kariakar* v. *Krishna Iyer* (13), which followed these two decisions, held that independently of the Indian Limitation Act, section 10 of the General Clauses Act would operate to make a presentation on the first day after the Court re-opened, though after the time allowed in the Registration Act, a good presentation. So, too, in *Official Assignee of Madras* v. *Sabapathy Mudaliar* (14), an appeal presented under the Indian Insolvency Act on the re-opening day, when the last day for filing it fell on a holiday, was admitted.

In *Veeramma* v. *Abbiah* (2) and *Appa Rau Sanayi Aswa Rau* v. *Krishnamurthi* (3), as in other decisions, it has always been held that what must be looked to in deciding whether the Indian Limitation Act can be applied to a special or local law is the question whether the particular Act is or is not self-contained and complete in itself.

It has been settled by a course of decisions that the Madras Forest Act and the Indian Registration Act are special Acts complete in themselves, and we do not here propose to question the reasoning by which that result has been arrived at.

But sections 6 and 47 of the Provincial Insolvency Act show that that enactment is at least not independent of the rules of civil procedure followed in the trial of regular suits and appeals under the Civil Procedure Code.

We also think that the analogy of the Madras Forest Act did not justify the assumption in *Duraiswami Aiyangar* v. *Meenakshi Sundara Aiyar* (8) that the general provisions of the Indian Limitation Act were not applicable to the Provincial Insolvency Act on the strength of *Abu Baker Sahib* v. *Secretary of State for India* (12).

(13) 23 Ind. Cas. 23; 26 M. L. J. 307; 15 M. L. T. 233.

(14) 14 Ind. Cas. 579; 23 M. L. J. 221; 12 M. L. T. 169.

In our opinion the correct view is that taken by the Allahabad High Court in *Dropadi* v. *Hira Lal* (15), where the matter has been fully discussed by a Full Bench.

We consider that the cases in *Duraisami Aiyangar* v. *Meenakshi Sundara Aiyar* (8) and *Trasi Deva Rao* v. *Parameshraya* (9) were wrongly decided, and that the *dictum* of Oldfield, J., in *Munjuluri Sivaramayya* v. *Singumahanti Bujanga Rao* (1) as to the applicability of sections 5 and 12 of the Limitation Act to proceedings under the Provincial Insolvency Act was also incorrect. But as there is so much divergence of opinion on the point, we refer to a Full Bench the question whether recourse can be had to the general provisions of Act IX of 1908 in dealing with the admission of petitions and appeals presented after the time prescribed under the provisions of the Provincial Insolvency Act (III of 1907).

This appeal coming on for hearing on the 18th and 19th of September 1917 in pursuance of the above Order of Reference, upon perusing the said Order of Reference and the records in the case and upon hearing the arguments of Mr. *A. Krishnaswami Aiyar* and Mr. *C. R. Seshagiri Sastri*, for the Appellants, and of Dr. *S. Swaminadhan*, for the 5th Respondent, Mr. *P. Somasundaram* for Mr. *V. Subramanyam Pantulu*, for the 4th and 9th Respondents, and of Mr. *V. S. Narasimhachariar*, for Respondents Nos. 1, 7 and 8, and the other respondents not appearing in person or by Pleader and the question having stood over for consideration till this day, the Court expressed the following

OPINION.

AYLING, J.—The question propounded for our decision is:

Whether recourse can be had to the general provisions of Act IX of 1908 in dealing with the admission of petitions and appeals presented after the time prescribed under the provisions of the Provincial Insolvency Act III of 1907?

The obstacle to the application of these general provisions is section 29 of the same Act, which says:—

"Nothing in this Act shall..... affect or alter any period of limitation specially prescribed for any suit, appeal or application by any special or local law now or hereafter in force in British India."

The meaning of this section has been considered by a Full Bench of this Court in *Abu Baker Sahib* v. *Secretary of State for India* (12), and in my opinion that judgment effectively answers the question before us. In place of section 29 of Act IX of 1908 and the Provincial Insolvency Act, the learned Judges were dealing with section 6 of Act XV of 1877 (the previous Limitation Act)

* * * * * *

The learned Vakil for appellants has in fact been forced to argue that the decision in *Abu Baker Sahib* v. *Secretary of State for India* (12) was wrong and requires re-consideration. How far we are entitled to question the correctness of a considered ruling of a Full Bench of equal numerical strength is a matter into which I do not propose to enter: for I entirely and respectfully concur in the ruling now called in question. It is a pure question of interpretation of a Statute. The juxtaposition of the words "affect" and "alter" compel us to give an independent meaning to the word "affect"; and I cannot understand how the application of the general provisions extending in certain circumstances the period fixed by law can be held not to "affect" that period.

The cases mainly relied on by appellants' Vakil are *Venkata* v. *Chengadu* (11) and *Srinivasa Aiyangar* v. *Secretary of State* (10). In the latter case the two learned Judges were inclined to question the correctness, or rather the general applicability of the decision in *Abu Baker Sahib* v. *Secretary of Satate for India* (12), largely because the Full Bench ruling in *Venkata* v. *Chengadu* (11) had not been considered; but they deemed it unnecessary to decide whether section 29, Indian Limitation Act, rendered the general sections of the Limitation Act inapplicable to special and local Acts generally. They disposed of the case before them with an eye solely to the peculiar features of the

(15) 16 Ind. Cas. 149; 34 A. 496; 10 A. L. J. 3 (F. B.).

Act with which they were dealing—Act II of 1864: and I need hardly point out, even if the two were mutually destructive, the authority of this ruling cannot be held to counterpoise the Full Bench decision.

The decision in *Venkata* v. *Chengadu* (11) was that of a Bench of four Judges, the main judgment being that of Muthusami Ayiar, J., the question referred for their decision did not relate to the applicability of the general sections of the Limitation Act, or the interpretation of section 6 of the same (corresponding to section 29 of the present Act); but to whether the provisions of the Limitation Act (Article 95, Schedule II) or section 59 of Act II of 1864 should be followed in computing the period of limitation. No doubt Muthusami Aiyar, J., expressed the opinion, with the concurrence of Kernan, J., that section 6 of the Limitation Act did not bar the application of the general sections. *Kullayappa* v. *Lakshmipathi* (16) is another pronouncement of the same two learned Judges to the same effect. But the other two Judges, who were parties to *Venkata* v. *Chengadu* (11) (Parker and Wilkinson, JJ.), expressed no opinion on the point; and this is remarked by Benson and Sundara Aiyar, JJ., in their judgment in *Srinivasa Aiyangar* v. *Secretary of State* (10). The decision in *Kullayappa* v. *Lakshmipathi* (16) is certainly not entitled to be treated as a Full Bench decision on the question now before us.

Veeramma v. *Abbiah* (2) is another Full Bench case in which Muthusami Aiyar and Shephard, JJ., expressed contrary views as to the effect of section 6 of Act XV of 1877. Collins, C. J., does not refer to the section; but, by implication, he would seem to have favoured Shephard, J.'s view.

I can find nothing in these cases, which would induce me to differ from the view of the learned Judges in *Abu Baker Sahib* v. *Secretary of State for India* (12).

It has been suggested that in the case of an appeal to a District Court (with which we are not concerned here) the period allowed by section 47 (4), Provincial Insolvency Act (30 days), is so short that it might be impossible to procure copy of the order in time for presentation with the appeal, as required by Order XLI, rule 1 (*mutatis mutandis*), and that in such a case a Court could not be asked to enforce the limitation clause, section 46 (4). That is not the case here: and we are not called on to say what a Court should do, if such facts were established. The possibility of such a difficult case may be a ground for legislation, or possibly the provision of a remedy in the Rules and Orders under the Civil Procedure Code. But we have merely to interpret the law as it stands: and I feel no hesitation in answering the reference in the negative.

SESHAGIRI AIYAR, J.—Both sides are agreed that the only question to be considered in this reference is whether the time taken up for obtaining copies of the order appealed against should be deducted in computing the period of limitation fixed by section 46, clause 4, of the Provincial Insolvency Act. The decision of the question turns largely upon the interpretation to be placed upon section 29 of the Indian Limitation Act. A very learned argument was addressed to us by Mr. A. Krishnasami Aiyar upon the meaning to be attached to the word 'affect' in clause 1 (*b*) of that section. Apart from authority, if I were deciding this question for the first time, I would have respectfully concurred in the view taken by three learned Judges of this Court including the present Chief Justice in *Abu Baker Sahib* v. *Secretary of State for India* (12). The word *alter* would apply directly to similar provisions in the Limitation Act, if any, giving an extended period to suits or appeals of the nature provided for in the special Act. The word "affect" is more comprehensive. Whenever by a process of computation or exclusion or deduction the special period fixed by the enactment is indirectly extended or cut down, it must be taken that that period has been *affected*. The illustration which Mr. Krishnasami Aiyar suggested would also be connoted by the term 'affect'; for example, there may be a special period compelling a party to take steps to set aside the order of a Special Officer under the Boundaries Act. When a party instead of adopting that course wants to avail himself of the general period of limitation prescribed for a declaration of title in Article 120 of the Limitation Act, the relief

(16) 12 M. 467; 4 Ind. Dec. (N. S.) 675.

granted to him would indirectly affect the period of limitation prescribed in the special law. The decision of the Full Bench in *Secretary of State* v. *Illikkal Assan* (17) is an illustration of this mode of *affecting* the period of limitation fixed in a special Act. But I am not prepared to agree with the learned Vakil that this category of cases exhausts the significance of the word 'affect.' Nor am I prepared to accede to the contention that a computation of period of limitation which in effect extends the time fixed does not *affect* the period of limitation. In my opinion, wherever an attempt is made to construe a special period fixed by an enactment with reference to the general provisions of the Limitation Act contained in sections 5 to 18, the effect of such a process would be to *affect* the period of limitation prescribed by the local Act. Therefore my reading of the section apart from authority is in accordance with the pronouncement in *Abu Baker Sahib* v. *Secretary of State for India* (12). But the matter has been complicated a great deal by other decisions to which I shall presently very briefly refer.

Before dealing with the cases quoted at the Bar, I may dispose of one aspect of the case which was very strongly pressed upon us by Mr. Krishnasami Aiyar. He did not dispute the proposition that where a special Act is self-contained the general provisions of the Limitation Act should not be imported into the consideration of questions arising under the former Act. Upon this point we have the judgment of the Judicial Committee in *Mohummud Buhaddor Khan* v. *Collector of Barielly* (18) that to Acts of a special kind which are self-contained, the general provisions of the Limitation Act should not be annexed. Sir Arthur Collins, C. J., and Muthusami Aiyar, J., followed this decision in *Veeramma* v. *Abbiah* (2). There are other decisions to the same effect; and, therefore, it may be taken as settled that where the Code is complete in itself the general provisions of the Limitation Act commencing from sections 5 to 18 should not be read as forming part of that Code. In the present case it was contended that the Provincial Insolvency Act is not a Code complete in itself. I think this contention is well founded.

We have only to refer to sections 6 and 47 to show that the Civil Procedure Code was intended to be largely utilized in regard to proceedings under the Act. Therefore, the Act has to be supplemented by the importation of the general rules of procedure as to suits.

One special matter affecting limitation may also be pointed out, and that is, by section 47 of the Provincial Insolvency Act the procedure to be followed in presenting appeals under that Act is to be the same as in the case of appeals under the Civil Procedure Code. As the learned Vakil pointed out, under the Civil Procedure Code an appeal can be filed only if the memorandum is accompanied by copies of the decree and of the judgment. It is well recognised that an appeal filed without these annexures must be regarded as no presentation in the eye of law. See *Chamela Kuar* v. *Amir Khan* (19) and *Abdul Hakim* v. *Hem Chandra Das* (20). It, therefore, follows that under the Provincial Insolvency Act, it is incumbent upon the party preferring an appeal that he should file copies of the order or judgment appealed against. It is not disputed that in a considerable number of cases such a copy may not be obtainable within the 30 days allowed for presenting an appeal to the first Appellate Court. It was not, therefore, unreasonably suggested that the Legislature could not have intended that the period of 30 days fixed by section 46, clause 4, should be inclusive of the period taken for obtaining copies of the order appealed against. The result of such a construction would be to deny the right of appeal in many cases. If it were shown in the present case that an application was made immediately after the order was passed and that more than 90 days had elapsed before the copies were obtained, I would have hesitated a great deal before coming to the conclusion that the party is not entitled to prefer the appeal after

(17) 32 Ind. Cas. 755; 39 M. 727; 3 L. W. 228; 30 M. L. J. 215; 19 M. L. T. 157; (1916) 1 M. W. N 167.
(18) 1 I. A. 167; 13 B. L. R. 292; 21 W. R. 318; 3 Sar. P. C. J. 363 (P. C.).
(19) 16 A. 77; A. W. N. (1893) 223; 8 Ind. Dec. (N. S.) 51.
(20) 30 Ind. Cas. 165; 42 C. 433.

obtaining the copies, because to hold otherwise would be to deny the right of appeal given by the section. However, it has not been shown that in this particular case the copies were not granted expeditiously.

Apart from this particular aspect of the case, the general question now remains whether by virtue of the fact that the Provincial Insolvency Act is not self-contained we are at liberty to introduce into the construction of section 46, clause 4, the general provisions of the Limitation Act. In *Venkata* v. *Chengadu* (11) a Bench of four Judges had to consider this question with reference to section 18 of the Limitation Act. That was a case under the Revenue Recovery Act. Two Judges, Kernan, J., and Muthusami Ayyar, J., held that section 18 was applicable to the Revenue Recovery Act. Justices Parker and Wilkinson expressed no definite opinion on the question. In *Seshama* v. *Sankara* (6) Chief Justice Collins and Muthusami Ayyar, J., in dealing with a case under the Madras Boundaries Act XXVII of 1860, held that section 14 of the Limitation Act was applicable to the special period fixed in that Act. In *Kullayappa* v. *Lakshmipathi* (16) Kernan and Muthusami Aiyar, JJ., applied section 14 of the Limitation Act to a case arising under the Rent Recovery Act. In *Iswara Patter* v. *Karuppan* (21) Chief Justice Collins and Justice Davies applied section 18 of the Limitation Act to a case arising under the Revenue Recovery Act. In *Veeramma* v. *Abbiah* (2), which was a case under the Registration Act, all the three learned Judges who took part in it, *viz.*, Collins, C. J., Muthusami Aiyar, J., and Shephard, J., held that the Act was complete in itself and that consequently there was no occasion for invoking the aid of the general provisions of the Limitation Act. The Chief Justice and Justice Muthusami Aiyar once again reiterated the proposition that if the Act was not complete in itself, the general provisions of the Limitation Act may be looked into for construing a special Act. On the other hand Shephard, J, gave an interpretation of the term 'affect' which subsequently found favour with the Judges who decided *Abu Baker Sahib* v. *Secretary of State for India* (12). All these decisions were passed under section 6 of the Limitation Act of 1877. There was thus a considerable divergence of opinion regarding the interpretation to be placed upon the word 'affect' at least in Madras, and yet when the new Limitation Act of 1908 was passed, the Legislature did not choose to give an authoritative interpretation of the term. My mind has been exercised considerably as to whether the Legislature intended to adopt the interpretations placed upon the term by Collins, C. J., Muthusami Aiyar, J., Kernan, J. and Davies, J, or whether it preferred the interpretation placed upon the word by Shephard, J. The opinion of Arnold White, C. J., Miller, J., and Wallis, J., was not given until after the new Act was passed, although they had to construe the language of section 6 of the old Act. The view taken by Shephard, J., is shared by a very large number of Judges in the other High Courts, and as that view is in consonance with the natural interpretation to be placed upon the word 'affect', I prefer to hold with the Judges who decided *Abu Baker Sahib* v. *Secretary of State for India* (12) that even in cases where the Act is not complete in itself, if by importing the general provisions of the Limitation Act the period fixed in a special Act is likely to be enlarged, either by the process of computation in obtaining copies or by excluding the period during which a fraud was practised or during which another litigation was proceeding in a different Court, still the period of limitation would be affected.

It seems to me that this is eminently a matter in which the Legislature should interfere. I fail to see why litigants preferring appeals under special Acts should not have the same privilege of extension provided by the general provisions of the Limitation Act as they have in cases directly coming under the Civil Procedure Code. There is no conceivable reason for putting one class of litigants under a disability of this kind. I may also be permitted to suggest that until the Legislature intervenes to amend the Limitation Act, our High Court should amend the rule in Order XLI by saying that the presentation of an appeal in cases under the Insolvency

(21) 3 M. L J. 255.

ALLAH BAKHSH *v.* NUR BAKHSH.

Act need not be accompanied by copies of the order, decree or judgment appealed against. My answer is in the negative.

BAKEWELL, J.—I agree with Mr. Justice Ayling.

Reference answered in the negative.

M. C. P.

PUNJAB CHIEF COURT.
CIVIL REVISION No. 496 OF 1917.
May 23, 1917.
Present:—Mr. Justice Broadway.
ALLAH BAKHSH—DEFENDANT—PETITIONER
versus
NUR BAKHSH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Appeal, second—Cross-objections rejected—Appeal, whether lies—Revision.

An appeal, purporting to be filed on behalf of the defendant, was dismissed by the lower Appellate Court on the ground that it was not filed by the defendant or his duly authorised agent. In the meantime an appeal was filed by the plaintiff and the defendant preferred cross-objections challenging the decree on practically the same grounds as were taken in his memorandum of appeal The cross-objections were rejected by the lower Appellate Court, on the ground that as the defendant had already preferred an appeal which had been dismissed he was not entitled to re-open the matter by filing cross-objections to the plaintiff's appeal :

Held, (1) that a second appeal was not competent from the order rejecting the cross-objections; [p. 812, col. 2.]

(2) that the defendant's appeal having been held not to have been filed by the defendant, he was entitled to file cross-objections and the order rejecting the cross-objections was, therefore, subject to revision. [p. 813, col. 2.]

Revision from the order of the District Judge, Ludhiana, dated the 7th August 1916.

Mr. *Girdhari Lal*, for the Petitioner.

Sheikh *Umar Bakhsh*, for the Respondents.

JUDGMENT.—The facts of this case are as follows:—

On 3rd November 1914 one Khaira sold certain lands to Allah Bakhsh, the consideration entered in the deed of sale being Rs. 4,000.

Master Nur Bakhsh sued to pre-empt the land on payment of Rs. 2,130. He was granted a decree for pre-emption on payment of Rs. 3,070 on 29th February 1916.

On 10th March 1916 an appeal was filed against the above decision in the Court of the District Judge purporting to be on behalf of Allah Bakhsh.

It was signed by Pir Bakhsh and Lala Mela Ram, Pleader. Pir Bakhsh had been acting as attorney for Allah Bakhsh in the primary Court, but the learned District Judge found that his power-of-attorney did not authorise him to file and prosecute an appeal. He also found that Lala Mela Ram's power-of-attorney though signed by Pir Bakhsh had not been duly signed as accepted by the Pleader. This appeal was, therefore, dismissed on the 25th April 1916 on the ground that it had not been filed by Allah Bakhsh, nor by any one duly authorised on his behalf.

In the meantime an appeal had been filed by Master Nur Baksh against the decree passed in his favour in which it was sought to get the money held payable reduced to Rs. 2,130. On behalf of Allah Bakhsh cross-objections were filed challenging the decree on practically the same grounds taken in the abortive appeal referred to above.

These cross-objections were rejected on 7th August 1916 by the District Judge on the ground that as Allah Bakhsh had already preferred an appeal against the decree, which appeal had been dismissed, he was not now entitled to re open the matter by filing cross-objections in the appeal filed by Nur Bakhsh.

Against this order of dismissal Allah Bakhsh has preferred this appeal through Mr. Girdhari Lal.

Mr. Umar Bakhsh for the respondent raised a preliminary objection to the effect that no appeal lay against the order complained of. Mr. Girdhari Lal contended that the order in question amounted to a "decree" and cited *Ganapati* v. *Sitharama* (1). This ruling, however, is clearly distinguishable. Section 100 and Order XLI, rule 22, Civil Procedure Code, also afford Mr. Girdhari Lal no assistance and I hold that no appeal lies in the case.

Mr. Girdhari Lal then asked that this should be treated as a revision. Mr. Umar Bakhsh, contended that inasmuch as Nur Bakhsh's appeal had been dismissed on 6th September 1916, substantial justice had

(1) 10 M. 292; 3 Ind. Dec. (N. S.) 957.

been done and no revision should be allowed. It seems to me, however, that this is eminently a fit case for interference on the revision side.

The merits of the cross-objections have not been considered at all, and they have been dismissed on erroneous grounds.

The appeal having been held *not* to have been filed by Allah Bakhsh it is obvious that he was entitled to file cross-objections. Had the learned District Judge adopted the ordinary procedure and disposed of the cross-objections along with the appeal by Nur Bakhsh, instead of rejecting them a month previously, an appeal would have been permissible, *Ganapati* v. *Sitharama* (1). I accordingly treat this as a revision and accepting it with costs return the cross-objections to the lower Appellate Court for disposal in accordance with law.

Revision accepted.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 288 OF 1916.

January 10, 1917.

Present:—Mr. Justice Oldfield and Mr. Justice Bakewell.

CHELLA BALAYYA—DEFENDANT—APPELLANT

versus

KANUPARTHI SUBBAYYA—PLAINTIFF—RESPONDENT.

Negotiable Instruments Act (XXVI of 1881), ss. 4, 27—Promissory note, execution of, by illiterate person—Mark of executant, absence of—Execution, proof of, by authority—Agency—Contract Act (IX of 1872), s. 226.

A promissory note purporting to have been executed by one *C.* contained the words 'Nishi, mark of *C.*' but there was no separate mark:

Held, (1) that a separate mark was unnecessary to prove execution of the document;

(2) that the payee was at liberty to prove execution by the authority of the executant.

Radhakrishna Mudaliar v. *Subraya Mudaliar*, 34 Ind. Cas. 849; 40 M. 550; 31 M. L. J. 357; 4 L. W. 255, distinguished.

The ordinary law of agency stated in section 226 of the Contract Act is applicable to negotiable instruments.

Appeal against the order of the District Court, Cuddapah, in Appeal Suit No. 140 of 1914, preferred against the decree of the Acting District Munsif, Cuddapah, in Original Suit No. 513 of 1913.

Mr. *I. V. Ramanuja Rao*, for the Appellant.

Mr. *M. Patanjali Sastri*, for the Respondent.

JUDGMENT.—The suit promissory note purports to be executed by defendant-appellant in virtue of the words on it "Nishi, mark of Chella Subbayya."

There is in fact no separate mark. The plaintiff contends that the absence of one is immaterial and that he is at liberty to prove that the words referred to were written with defendant's authority and, therefore, constituted a valid execution of the instrument.

As regards the 1st point, we cannot see and have not been shown authority for holding that any separate mark is essential, if the writing relied on is in fact written with authority.

As regards the 2nd, no case has been cited to the effect that the ordinary law of agency stated in section 226 of the Indian Contract Act is inapplicable to negotiable instruments, and section 27, Negotiable Instruments Act, is to the contrary effect, its restrictive portion being irrelevant in the present connection. *Radhakrishna Mudaliar* v. *Subraya Mudaliar* (1), relied on by appellant, was decided with reference to the execution of a Will and the special wording of section 50, Indian Succession Act. It, therefore, lays down no general rule. We accordingly agree with the lower Appellate Court that plaintiff is at liberty to prove the execution of the suit note by defendant's authority and that the case must be remanded in order that he may have an opportunity to do so. The appeal against order is dismissed with costs.

Appeal dismissed.

M.C.P.

(1) 34 Ind. Cas. 849; 40 M. 550; 31 M. L. J. 357 4 L. W. 255.

NARAIN SINGH *v.* KHAZAN SINGH.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 3397 OF 1916.

May 24, 1917.

Present:—Mr. Justice Broadway.

NARAIN SINGH—PLAINTIFF—APPELLANT

versus

KHAZAN SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS

Custom—Alienation—Necessity—Expenses of defence of head of family, whether legal necessity.

Money raised on ancestral land for the purposes of the defence of the head of the family on a criminal charge must be considered as having been raised for a valid legal necessity.

Second appeal from the decree of the District Judge, Ferozepore, dated the 23rd October 1916.

Mr. *Duni Chand*, for the Appellant.

Mr. *Brij Lal*, for the Respondents.

JUDGMENT.—The suit out of which this appeal has arisen was instituted on the 12th March 1915 by Narain Singh, son of Jhanda Singh, against Khazan Singh and Sher Singh, asking for a declaration to the effect that a mortgage executed on the 14th June 1910 by Bhagwan Singh in favour of Sher Singh was null and void as against the plaintiff, Bhagwan Singh's nearest reversioner. Sher Singh pleaded that the money, namely, Rs. 400, was advanced by him to Bhagwan Singh for "legal necessity", inasmuch as Bhagwan Singh was being tried for his life on a charge under section 302, Indian Penal Code. The money was taken and expended for purposes of his defence in that case. The Courts below have held that money so expended must be considered as having been expended for legal necessity and have dismissed the plaintiff's suit. He has accordingly preferred this second appeal through Mr. Duni Chand and I have heard Mr. Brij Lal on behalf of the respondent.

The real point for determination is whether or not money raised on ancestral lands for the purposes of the defence of the head of the family on a criminal charge can be considered a legal necessity. Now legal necessity is of various kinds, and there appears to be room for considerable difference of opinion as to whether a given expenditure is legal necessity or not. The only reported case directly in point that Counsels have been able to cite or that I have been able to discover is *Beni Ram* v. *Man Singh* (1). In that case it was held that the necessity for raising the money to pay for the defence of a head of a joint Hindu family committed to the Court of Session on a serious criminal charge is a valid legal necessity, such as would support a mortgage of the family property executed for such a purpose.

This case is clearly in point, but Mr. Duni Chand wished to distinguish it on the ground that that decision was based on Hindu Law whereas the question here has to be decided in accordance with the customary law of this province.

In my opinion the case cannot be so distinguished. The point really is whether such expenditure was for legal necessity, and it seems to me that the purpose for which this money was taken and the mortgage executed was one which must be regarded as coming within the meaning of the expression "legal necessity." Mr. Duni Chand then urged that in any event the whole of this sum of money cannot be regarded as a charge on the property inasmuch as there were two other persons, namely, Rama and Shama, related to the mortgagee, Sher Singh, who were also tried with Bhagwan Singh. Mr. Brij Lal contended that as a matter of fact the expenditure incurred in the defence of the three persons under trial was considerably in excess of Rs. 400, and there seems every reason to believe that this contention is correct. Receipts have been filed from Counsel and their clerks showing the expenditure of Rs. 930. There seems every reason to believe that a further sum of Rs. 120 was also paid to Counsel, and there seems to me to be force in Mr. Brij Lal's contention that at least another Rs. 150 must have been expended in miscellaneous expenses such as obtaining copies of the record for Counsel. In these circumstances I hold that the sum of Rs. 400 was expended for legal necessity and that the mortgage must be regarded as valid. This appeal is accordingly dismissed with costs.

Appeal dismissed.

(1) 11 Ind. Cas. 663; 34 A. 4; 8 A. L. J. 1015.

ADIRAJA ARSU *v.* BUDAN SAHIB.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 95 OF 1917.

December 6, 1917.

Present:—Mr. Justice Bakewell and Mr. Justice Kumaraswami Sastri.

ADIRAJA ARSU *alias* KUMARAYYA BALLALA—PETITIONER—APPELLANT

versus

Sheik BUDAN SAHIB AND OTHERS—RESPONDENTS.

Hindu Law—Religious and charitable trusts—Temple manager, power of, to pledge credit of temple—Fireworks, purchase of, for festival—Liability of temple assets—Trustee, power of to act without concurrence of co-trustees.

As a general rule of Hindu Law, property given for the maintenance of religious worship and of the charities connected with it is inalienable. [p. 815, col. 2.]

The manager of a temple has no authority to pledge the credit of the temple except for necessity, which necessity must relate to the preservation of the temple or the maintenance of the religious service. He should ordinarily only apply the income in the administration of the charity. [p. 816, col. 1.]

The purchase of fireworks for use at festivals cannot be charged on the assets of the temple, as it is not necessary for the preservation of the temple or the maintenance of religious service. [p. 816, cols. 1 & 2.]

Per *Bakewell, J., obiter.*—Even if under the scheme of management of a temple one of several managers has authority to collect and disburse its income, it does not follow that he can exercise the abnormal power of alienating or charging the temple property or otherwise dealing with its capital without the concurrence of his co-trustees. [p. 816, col. 1.]

Letters Patent appeal against the order of Mr. Justice Coutts Trotter, dated 20th July 1917, in Civil Revision Petition No. 1015 of 1916, preferred against the decree of the Court of the District Munsif, Karkal, in S. C. Suit No. 76 of 1916.

Mr. *B. Sitarama Row*, for the Appellant.

Mr. *K. Ramnath Shenai*, for the Respondents.

JUDGMENT.

BAKEWELL, J.—The question in this case is, what is the remedy of a person who has sold goods on credit to the manager of a temple to be used for the purposes of the institution? It has been found that the plaintiff, the vendor, was aware that the 2nd defendant, the purchaser, was the manager and that he made the purchase of fireworks for the temple, and that these goods were necessary for the temple.

A temple is a permanent religious charity carried on for the benefit of the present and future worshippers, and it is obvious that its property should be preserved intact in order that the existence of the charity may be continued, and that its income alone should be applied by the manager or *dharmakartha* in the administration of the charity [see *Palaniappa Chetty* v. *Sreemath Deivasikamony Pundara Sannadhi* (1)]. It follows that the manager has ordinarily no authority to dispose of the capital of the institution, since such a disposition would endanger its very existence, and that his authority is ordinarily limited to the receipt of the income and its proper disbursement in the upkeep of the fabric and the performance of the customary ceremonies.

It has been held by their Lordships of the Privy Council that "as a general rule of Hindu Law, property given for the maintenance of religious worship and of the charities connected with it is inalienable" [*Prosunno Kumari Debya* v. *Golab Chand Baboo* (2)], but that, under certain circumstances, the manager of that property is "empowered to do whatever may be required for the service of the idol and for the benefit and preservation of its property, at least to as great a degree as the manager of an infant heir" (*Ibid* page 152). That decision and other cases were fully considered by their Lordships in a recent case reported as *Palaniappa Chetty* v. *Sreemath Deivasikamony Pandara Sannadhi* (1), where it was contended that the manager had the power to grant a permanent lease of land belonging to the temple at a fixed rent and in consideration of a premium in case of necessity and for the benefit of the institution. Their Lordships observe "that the only specific point touching the present case actually decided in those three authorities was this: that a *debutter* estate may be mortgaged to secure the re-payment of money borrowed and applied to prevent its own extinction by sequestration" (page 718*); and, although they point out that it is not possible to define precisely the things which may constitute a benefit to the

(1) 39 Ind. Cas. 722; 40 M. 709; 21 C. W. N. 729; 15 A. L. J. 485; 1 P. L. W. 697; 33 M. L. J. 1; 19 Bom. L. R. 567; 22 M. L. T. 1; (1917) M. W. N. 477 & 507; 26 C. L. J. 153; 6 L. W. 222 (P. C.).

(2) 2 I. A. 145; 14 B. L. R. 450; 3 Sar. P. C. J. 449; 23 W. R. 253; 3 Suth. P. C. J. 102.

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estate and justify the exercise of this power, the illustrations which they give relate to the preservation of the institution and its endowments.

They also point out that there must not only be a benefit to the estate from the exercise of the power, but there must be an unavoidable necessity for the alienation. The manager should, therefore, consider in each case whether the particular alienation of the temple property which is contemplated is the most provident disposition which can be made in the interests of the institution.

It follows, I think, from these propositions that the manager has no authority to pledge the credit of the temple, because the result would be that strangers to the trust would be able to proceed against the general property of the temple in execution of their decrees, and the consequent alienation of its property would not be made by the trustees acting upon a due consideration of the interests of the temple. Moreover, the manager would in this indirect manner obtain much larger powers of disposition than the reported decisions allow him.

The District Munsif has held that the purchase of fireworks was necessary for the temple, but that is not sufficient; the necessity must relate to the preservation of the temple or the maintenance of the religious service, and the discharge of fireworks, though customary at certain festivals, cannot possibly be included in these purposes. For these reasons I am of opinion that the purchase of these goods was not within the authority of the 2nd defendant as manager of the temple, and the temple funds cannot be made liable for the price in these proceedings.

No question has been raised as to the powers of one manager or trustee to act without the concurrence of his co-trustees, but I may point out that even if under the scheme of management one manager has authority to collect and disburse the income, it does not follow that he can exercise the abnormal power of alienating or charging the temple property or otherwise deal with its capital without the concurrence of his co-trustees.

For these reasons I would allow the appeal and set aside the decree of the District Munsif, and remit the case for re-trial upon the question of the personal liability of the 2nd defendant, and direct the respondent to pay the costs of the 1st defendant throughout.

KUMARASWAMI SASTRI, J.—I agree with my learned brother that the plaintiff is not entitled to a decree against the assets of the temple, as the purchase of fireworks cannot be said to be necessary for the performance of the trusts. I concur in the order proposed.

Appeal allowed.

M. C. P.

PUNJAB CHIEF COURT.

CIVIL APPEAL NO. 3442 OF 1916.

May 24, 1917.

Present:—Mr. Justice Broadway.

CHELOO—PLAINTIFF—APPELLANT

versus

KALI DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Appeal, second—Suit undervalued by plaintiff—Defendant's appeal heard by inferior Court—Jurisdiction—Plaintiff, whether can object.

When an inferior Court disposes of a case which should have been heard by a superior Court, there is ground for thinking that the parties are prejudiced. [p. 817, col. 2.]

Where the plaintiff undervalued his suit for an injunction and the defendant, putting the same value on the appeal as had been put upon the suit, preferred his appeal to the Court of the Senior Subordinate Judge instead of the District Judge and the former Court heard and decreed the appeal:

Held, that the plaintiff was entitled in second appeal to raise an objection to the jurisdiction of the lower Appellate Court notwithstanding his own undervaluation of the suit. [p. 817, col. 1.]

Sundar Das v. *Dhanpat Rai*, 16 P. R. 1907; 104 P. L. R. 1908; 127 P. W. R. 1907, *Sukh Raj* v. *Kanhaya Lal*, 28 Ind. Cas. 113; 2 P. R. 1915; 194 P. L. R. 1915, followed.

Second appeal from the decree of the Senior Subordinate Judge, Rohtak, dated the 15th June 1916.

Mr. *Parduman Das*, for the Appellant.

Mr. *Gullu Ram*, for the Respondents.

JUDGMENT.—The suit out of which this appeal has arisen was one for the issue of an injunction to the defendants for the demolition of a latrine erected by them, and for a perpetual injunction restraining them from reconstructing the latrine at the site on which

it had been erected. The plaintiff valued the suit for the purposes of jurisdiction and Court-fee at Rs. 20. The suit was tried by the Munsif, second class, who granted the plaintiff a decree as prayed. Against this decree the defendants preferred an appeal to the Senior Subordinate Judge valuing the appeal as the suit had been valued. The learned Senior Subordinate Judge reversed the decree passed by the Munsif and dismissed the plaintiff's suit. Against this decision the plaintiff has preferred the second appeal, and the first ground taken is that the suit had been improperly valued and that, therefore, the appeal to the Senior Subordinate Judge was wrongly entertained. Mr. Parduman Das for the appellant referred me to Chief Court Rules and Orders, Volume 3, page 92, and *Sukh Raj* v. *Kanhaya Lal* (1). Mr. Gullu Ram for the respondents admits that the suit and appeal in the Courts below have both been wrongly valued and that the Senior Subordinate Judge had no jurisdiction to hear the appeal, although the Munsif had jurisdiction to try the suit. *Sukh Raj* v. *Kanhaya Lal* (1) is authority for holding that the plaintiff was competent to raise an objection with regard to his own valuation in second appeal, and I have no hesitation in following that decision. Mr. Gullu Ram then referred me to *Hansa* v. *Ram Singh* (2), *Hakim* v. *Ralya* (3), *Mihan Singh* v. *Sri Ram* (4), *Ramaswamy Aiyangar* v. *Otai Gounden* (5), *Drobo Moyee Dabee* v. *Bipin Mundul* (6) and *Aklemunnessa Bibi* v. *Mahomed Hatem* (7). It is not, however, necessary for me to discuss all these rulings, as in my opinion *Sundar Das* v. *Dhanpat Rai* (8) relied on by Mr. Parduman Das is directly in point. In that case the facts were as nearly as possible the same as the facts in the case under consideration, *Hansa* v. *Ram Singh* (2) was referred to in that ruling and distinguished. In the present case in my opinion the Full Bench decision is also distinguishable. Here an inferior Court has disposed of an appeal which it had no jurisdiction to hear. There a superior Court had disposed of an appeal which first should have been dealt with by an inferior Court and which it would have been competent to hear had certain preliminary steps, laid down by law, been taken. In *Hakim* v. *Ralya* (3) the learned Judge dealt with the case on the facts before him and specifically refrained from laying down any general rule. In my opinion, when an inferior Court disposes of a case which should have been heard by a superior Court, there is ground for thinking that the parties are prejudiced.

I accordingly accept this appeal and direct that the appeal to the learned Senior Subordinate Judge be returned to the appellant in that case for presentation to a Court of competent jurisdiction. In the circumstances, however, parties will bear their own costs in this Court.

Appeal accepted.

(1) 26 Ind. Cas. 113; 2 P. R. 1915; 194 P. L. R. 1915.
(2) 36 P. R. 1902; 22 P. L. R. 1902 (F. B.).
(3) 125 P. R. 1907; 80 P. W. R. 1907.
(4) 73 P. L. R. 1914.
(5) 15 M. L. J. 487.
(6) 10 W. R. 6.
(7) 31 C. 813, 8 C. W. N. 701.
(8) 16 P. R. 1907; 104 P. L. R. 1903; 127 P. W. R. 1907.

PATNA HIGH COURT.

LETTERS PATENT APPEAL No. 110 OF 1917.

February 12, 1918.

Present:—Mr. Justice Chapman, Mr. Justice Atkinson and Justice Sir Ali Imam, KT.

LAL NRIPARAJ SINGH, RAI BAHADUR, (UNDER THE COURT OF WARDS)

versus

MOHAN GAUNTIA—RESPONDENT.

C. P. Land Revenue Act (XVIII of 1881), ss. 65A (4), 132, 152—Gauntia, protected—Succession—Resignation by eldest heir—Surrender of Gauntiaship, validity of—Jurisdiction of Civil and Revenue Courts—Suit to recover Gauntiaship, whether cognizable by Civil Court.

The object of section 65 A of the Central Provinces Land Revenue Act is not to the benefit of the *zemindar* but to retain, if possible, certain selected families in the Gauntiaships of their villages, and to protect them against transfers and sub-divisions. [p. 829, col. 1.]

Section 65 A, clause (4), of the Central Provinces Land Revenue Act is mandatory in its terms. The right of the eldest male heir to resign or renounce his rights as a Gauntia, with a view to giving up all claim to inherit the estate which has by statutory devolution descended upon him must be exercised at the time when the succession opens, *viz.*, on the death of the last protected Gauntia. [p. 832, col. 2; p. 833, col. 1.]

LAL NRIPARAJ SINGH *v.* MOHAN GAUNTIA.

The provisions of section 132 of the Central Provinces Land Revenue Act were drawn up with reference to section 65 A of the Act and were intended to enable the Deputy Commissioner merely to determine claims to protection under that section and to enforce the provisions of that section. It was never intended that the Deputy Commissioner should be empowered to deal with a suit for ejectment or for the recovery of a Gauntiaship. Such a suit is cognizable by the Civil Courts. [p. 831, col. 2.]

Per *Atkinson, J.*—The right of election under section 65A, clause (4) (*b*), must be exercised in respect of the entire estate which devolves on the eldest male heir. If two or more villages form the protected tenure of a Gauntia, even though they may have been declared protected by separate certificates at different times, the eldest male heir must exercise his choice of resignation or adoption in respect of all or none of such villages; there can be no splitting up of the estate or tenure into different parts having distinct entities. [p. 833, col. 1.]

Per *Imam, J.*—There is nothing in section 65A of the Central Provinces Land Revenue Act to show that the protection afforded to the tenure of a Gauntia is to extend to a group of tenures. Where a person in whom two Gauntiaships are vested dies, it is open to his eldest heir to resign at the time of his succession in favour of another heir either both the Gauntiaships or one of them. [p. 834, col. 1.]

Letters Patent Appeal from the decision of Mr. Justice Roe and Mr. Justice Jwala Prasad, in First Appeal No. 393 of 1915, dated the 21st May 1917, against the decree of the Subordinate Judge, Sambalpur, in Title Suit No. 11 o f1913, dated the 20th May 1914.

FACTS of the case appear from the following

JUDGMENT.

ROE, J.—The plaint in this case was filed on the 2nd April 1913 in the Court of the Subordinate Judge at Sambalpur by Mohan Gauntia, son of Karuna Gauntia. Karuna was the Gauntia of two villages, named Bandipali and Sargipali. These villages are part of the Zemindari of Barpali. In 1891 Karuna received a certificate as a protected Thiccadar of these two villages. In Sambat 1957 corresponding to 1900 A. D, Karuna died leaving him surviving the plaintiff Mohan Gauntia and two younger sons Kuber Gauntia and Balaram Gauntia. In 1907 Kuber Gauntia executed an *ekraranama* in favour of the Darpali estate, surrendering Sargipali village to the Barpali Zemindar and acknowledging receipt of a sum of Rs, 2,300 in consideration of improvements made to the village during his tenure thereof. In 1908 Mohan Gauntia filed a petition in the office of the Court of Wards, who had by that time assumed charge of the Barpali estate, denying Kuber's right to surrender the village and requesting that the village of Sargipali be restored to himself. The Court of Wards refused to give up the village. The plaintiff Mohan Gauntia, therefore, sues to recover it from the Court of Wards.

The learned Subordinate Judge has decreed the suit and against that decree the present appeal is made.

A preliminary objection is made by the plaintiff-respondent that that appeal filed is out of time. In this suggestion there is no substance. The date of the Subordinate Judge's decree is the 20th of May 1914. An appeal was filed in the District Court on the 26th June 1914. The memorandum of appeal was returned to the appellant under the instructions of the District Judge on the 17th August 1915 and the present appeal was filed in the High Court on the 16th of August 1915.

The first ground taken in appeal is that the suit is bad by reason of the failure of the plaintiff to give due notice of suit in accordance with the Central Provinces Court of Wards Act. Under that Act a plaintiff is required to state definitely in his plaint the date of the notice. The plaintiff recites in his plaint that he served this notice on the 11th October 1901. The petition filed by the plaintiff before the Officer-in-charge of the Court of Wards, bearing date the 11th October 1909, contains the following phrase:

"Therefore, the applicant should not be driven to the necessity of bringing a civil suit for the recovery of the village."

The plea taken by the appellant is a purely technical plea and were I of opinion that the suit should be decreed on the merits, I would accept this direct limitation that the plaintiff was prepared to enforce his rights by a civil action as sufficient notice of his intention to sue. No particular form of notice of suit is required by the Central Provinces Court of Wards Act, and it is not suggested that the suit must be filed within any definite period after the notice is given. It is said only that the suit shall not be filed within two months of the receipt of notice. In my view the Act contemplates only an intimation to the Court of Wards that a party proposing to sue the Court of Wards has a grievance which requires investigation. In this view the notice dated the

11th October 1909 is sufficient intimation that the plaintiff has a grievance which he may be driven to redress in the Civil Courts.

In dealing with the case on the merits I propose to set down firstly the facts upon which the documents on the record and the admissions of the plaintiff must be held to be beyond dispute. Karuna, the plaintiff's father, died in July 1900, (*Shraban-Bhado*, 1957). Prior to that date he had signed all receipts granted to tenants with his own hand. After that date all receipts granted to tenants for lands held in the village Sargipali are signed by the hand of Kuber. No receipt to any Sargipali tenant bears the signature of Mohan Gauntia.

Mohan also admits that by an agreement dated 1901, the Bhogra lands of Sargipali were made over to Kuber and Balaram. He does not suggest that prior to the date of that agreement he cultivated them himself. His witness Madan Gabir says: "The Bhogra lands left by Karuna used to be cultivated by Kuber and Balaram." It must be held to be beyond dispute that from 1901 at least Mohan ceased to have any direct connection with the Sargipali tenants and the Sargipali Bhogra lands.

The final publication of the Record of Rights was made in the year 1907. To those who are cognisant of settlement methods it is clear that the preliminary records must have been prepared about the year 1905. Evidence is given by Markand Singh the defendant's witness that Mr. Kaluram the Assistant Settlement Officer came to Baripali in 1905 and that the papers of Sargipali were made over by him to Kuber and those of Bandipali to Mohan. The plaintiff's evidence upon this point is as follows:

"I got the rent rolls of Bandipali from Mr. Tholon the Assistant Settlement Officer. Mr. Tholon gave the rent roll of Sargipali to Kuber."

Whether the Assistant Settlement Officer was Mr. Tholon or Mr. Kaluram is immaterial. It must be held to be beyond dispute that when in 1905 the Assistant Settlement Officer (whoever he was) came to the village Mohan acquiesced in the delivery of the rent roll of Sargipali to Kuber.

After the relinquishment by Kuber of Sargipali in 1917, the Manager of the Court of Wards took steps to settle the Bhogra lands. There were a number of applicants for the settlement of these Bhogra lands. Mohan Gauntia's offer of Rs. 380 was accepted. His offer is dated the 8th June 1908, and the order granting him the lease is dated the 26th June 1908.

On the 10th July 1908 Mohan Gauntia filed a petition saying "that Bhubno, Chintamoni and Damru are cultivating the aforesaid Bhogra lands. I, therefore, pray that I may be given possession of the aforesaid Bhogra lands. In four or five days the above named cultivators be ousted from the said lands or else by delay the proper time for cultivation will be over and I will be put to serious loss."

On the 4th September 1908 a further petition was made repeating this prayer and again on the 6th January 1906 Mohan Gauntia reported that as he had not been able to get possession of the lands he would not be able to pay the rent payable, Rs. 380. It was not until the 11th October 1909 that Mohan Gauntia made any suggestion that the surrender by Kuber was invalid. It must be held to be beyond dispute that from the 4th June 1908 to the 11th October 1909 he acquiesced in the claim made by the Court of Wards to re-settle the Bhogra lands of Sargipali.

Under section 65 (*a*) of the Central Provinces Land Revenue Act of 1881, the tenure of a Gauntia who has been declared to be protected shall not be partitioned and shall devolve on one member only of the Thiccadar's family, and where there are two or more heirs bearing the same relationship to the former Thiccadar, the eldest of such heirs shall succeed. It is incontestable that Mohan Gauntia was entitled on the death of his father to succeed to both Bandipali and Sargipali.

It is for the defendants to prove that at sometime prior to 1907 Mohan divested himself of all rights in Sargipali in favour of Kuber. It is certain that since 1901 Mohan has had no direct connection either with the tenants or the Bhogra lands of Sargipali. It is certain that in 1905 he acquiesced in Kuber's claim to be recorded as Gauntia

of Sargipali. It is certain that in 1908 he acquiesced in Kuber's surrender of the village. These three facts seem to me conclusive proof of the defendant's case. No real attempt is made to explain away the last two facts. Mohan in his evidence explains Kuber's collection of the rents from the Sargipali tenants by an assertion that, having collected them, Kuber made them over in their entirety to him and from them he (Mohan) paid the dues of the Baripali estates for a time to the Baripali Zemindars themselves and thereafter to the usufructuary mortgagee who was put in possession of the property by the Baripali Zemindar.

It is pretended that this arrangement was made by a written agreement drawn up in 1901 and the Patwari took away this written agreement on the plea that the Zemindar wanted it and that it has never been given back. What the position may have been for the first year of Karuna's death is absolutely immaterial. We may accept the plaintiff's story that during this period the three brothers were quarrelling. The sole point of importance is, what was the nature of the agreement by which the quarrel was settled. Did Mohan thereby surrender his rights as Gauntia, or did he thereby appoint Kuber his agent for the collection of rents?

The learned Subordinate Judge takes it that Mohan Gauntia must have remained the Thiscadar of Sargipali, for the reason that many of the receipts for rents paid to the Zemindars were given to him personally and that many of the Challans issued by the Zemindars for the supply of wood, goats and such like were directed to him and are in his possession and have been produced by him. He also attaches importance to the fact that a Takavi loan for the improvement of Sargipali was taken in Mohan's name, and the re-payments upon this loan were made in Mohan's name, and that the Challans showing these re payments are in Mohan's possession. Now all these papers may well be in the possession of the plaintiff without his having in the first instance received them. Kuber has not been put into the witness-box on either side. It is impossible to say on which side he is now standing, but common considerations of interest would suggest that he is siding with his brother. He has certainly nothing to gain by siding with the Zemindar, and if indeed he is siding with his brother, the fact that receipts which should in the first instance have been given to Kuber are now in the possession of the plaintiff is by no means proof that the plaintiff was in the first instance entitled to receive them. That they are in the name of the plaintiff is to my mind immaterial. The arrangement by which Kuber was in possession of Bhogra lands in Sargipali and collected the rents of Sargipali was not reported either to the Zemindar or to the Deputy Commissioner. The papers produced by the plaintiff prove no more than this that for some years after Karuna's death, Mohan's name remained in the Registers as the recorded Gauntia, and that after 1901 the brothers were sufficiently good friends for payments of rent and Takavi instalments to be made sometimes by the hand of Mohan and sometimes by the hand of Kuber. They throw no light at all upon the real nature of the agreement of 1901 by which Kuber was actually in possession of Sargipali. On the other hand the granting of rent receipts to *raiyats* in the name of Kuber, the record in the Jamabandi of 1903-1904 (Exhibit 1) of Kuber's name as Gauntia of Sargipali, the acquiescence of Mohan in the giving in 1905 of the rent roll of Sargipali to Kuber, and the acquiescence of Mohan in 1908 of Kuber's surrender of Sargipali are cumulatively conclusive proof that by the agreement of 1901 Mohan surrendered his rights to Kuber, and that the story that the agreement of 1901 merely constituted his agent in that village is entirely untrue.

The learned Subordinate Judge is of opinion that as Karuna died in 1900 and the agreement whereby Kuber entered into possession of Sargipali was not made till 1901, the transfer even if made would be void. Granting for the sake of argument, that Mohan Gauntia did not finally divest himself of all interest in the village until the settlement proceedings of 1905, I am of opinion that the final transfer confirmed by the proceedings during settlement in 1905 would be valid as against Mohan Gauntia. So much of section 65 (*a*)

as is necessary to this discussion runs as follows:—

"The tenure shall be heritable, but not transferable by sale, gift, mortgage or dower: when on the death of a Thiccadar there are two or more heirs bearing the same relationship to him, the eldest of such heirs shall succeed, provided that the eldest of two or more such heirs shall be at liberty at the time of succession to resign his rights in favour of another heir bearing the same degree of relationship to the deceased Thiccadar as he himself does."

It is suggested by the learned Subordinate Judge that the transfer made after possession had been taken by succession is not legal and that such a transfer would be void as against the transferor. The only penalty provided for such a transfer is that on contravention by the transferor of the condition of his tenure contained in clause (*a*) the Settlement Officer or Deputy Commissioner may with the previous sanction of the Chief Commissioner declare such Thiccadar, Gauntia, or farmer to have forfeited the protection previously conferred. The position I take is much the same as that of an occupancy right in Bengal. The transfer is good as against the transferor but not good as against the landlord. There is nothing in the Act to suggest that the transferor himself can recover possession of property transferred in contravention of the provisions of sections 65 A, 4 (*a*). On a perusal of the analogous sections of the Central Provinces Tenancy Act, 47, 48, 70 and 71, it will be apparent that the transferor of occupancy rights cannot deny his right to make such a transfer. The only persons who can sue to set such a transfer aside are the nearest heirs of the transferor or failing them, the landlord. That I take to be the position in the case before us. Mohan, at least, is not entitled to deny the validity of the transfer of his rights to Kuber. His suit must fail.

We are not concerned here with the question whether Kuber actually received Rs. 2,300 from the Barpali Zemindar as a consideration for the relinquishing of his rights. The Court of Wards is much to blame for failing to put Kuber into the witness-box and for failing to produce the account books of the estate in which might have been displayed the entry of this payment. It is sufficient for the purposes of the case before us to find definitely that at the time when Kuber did relinquish these rights the plaintiff had no interest in the village which would justify him in protesting against such a transfer. That the plaintiff had in 1907 no subsisting right in the village is, in my opinion, conclusively proved.

I hold that the suit is not on the merits maintainable by the plaintiff to deny Kuber's proprietorship of the tenure or to recover the property from the person to whom Kuber has transferred it.

I would, therefore, allow this appeal and direct that the plaintiff's suit be dismissed with costs throughout.

JWALA PRASAD, J.—I regret I am unable to agree with my learned brother, although it would have given me very great pleasure to be able to subscribe to his view of the case. I have carefully considered the evidence in the case and the law embodied in section 65A, which has been incorporated into the Central Provinces Land Revenue Act XVIII of 1881, regarding the incidence of the tenure of a Gauntia in the Sambalpur district to which the village in dispute appertains.

I entirely agree with the Subordinate Judge of Sambalpur who tried the case both as regards the findings of fact arrived at by him and the law applicable to the case. I must at once say that the plaintiff Mohan Gauntia, being the eldest son of his father Karuna, the previous Gauntia of the village, succeeded to the Gauntia right in the village in dispute in 1900 after the death of his father and that there was no relinquishment of his right in favour of his younger brother Kuber either "at the time of succession" or at any time, and that the deeds of surrender and agreement executed by Kuber in favour of defendant No. 1, the Zemindar of the village, in the year 1907 are invalid and illegal and do not confer any right on defendant No. 1 to take possession of the tenure as against Mohan the plaintiff his sons and the other members of the family who have vested rights in the tenure in dispute, being their ancestral family property, though only one of them was recognised and declared as a Gauntia thereof for the purpose of performing the duties of a Gauntia imposed upon

him by law. The plaintiff is, therefore, entitled to the declaration of his right to and recovery of possession of the village in claim including the *sir* and *khudkast* lands specified in the plaint. The suit has been properly decreed by the Court below and the appeal should, therefore, be dismissed with costs.

It is undisputed that Karuna, the father of the plaintiff, was the former Gauntia of the village Sargipali in dispute and of another village Bandapali, both appertaining to the Zemindari of Barpali of which the defendant No. 1 is the proprietor. In 1891 Karuna received a certificate as a protected Thiccadar of the two villages. He died in 1900 leaving him surviving three sons, Mohan the plaintiff, Kuber and Balaram. Mohan being the eldest son succeeded to both the villages under section 65, clause 4 (*b*), which enacts that "when on the death of a Thiccadar there are two or more heirs bearing the same relationship to him, the eldest of such heirs succeeds." Kuber, therefore, did not succeed being the second son of Karuna. On 5th October 1907, Kuber, however, executed a deed of relinquishment, Exhibit B, called "Wapsi Patta", surrendering the Gauntia right of village Sargipali in favour of the defendant No. 1. This was followed by a deed of agreement Exhibit F, executed by Kuber the next day, 6th October 1917, in favour of the Zemindar, defendant No. 1, which runs as follows :—

" That on 5th October 1917 I surrendered to you the entire 16-annas Gauntia interest of Mauza Sargipali in Baripali Zemindari, District Sambalpur, with all the Bhogra lands and my dwelling houses, etc., and delivered possession thereof to you. As I effected improvements of the Bhogra and the houses, etc., in the said Mauza Sargipali and constructed Kata and Band, etc., I take from you Rs. 2,300 in cash on account of these improvements. I shall have no claim in the said village. On receipt of Rs. 2,300 in cash in the presence of the witnesses, I do hereby execute the deed of agreement that it may be of use when necessary."

The Zemindar defendant No. 1 is in possession of the Gauntia right of village Sargipali on the basis of the aforesaid deeds of surrender and agreement executed by Kuber from the date of the execution thereof in 1907. The plaintiff's claim to recover possession is resisted solely on the aforesaid documents.

The question is whether Kuber had a right to surrender the village in question and whether the deed of surrender executed by him conferred any right upon the defendant No. 1 as against the plaintiff, and whether it is valid and operative in law and whether the plaintiff is bound by the surrender made by his younger brother Kuber.

As to the right of Kuber to surrender the village the defendant No. 1 in his written statement alleged as follows :—

(1) "It is admitted that Karuna, father of plaintiff, Kuber and Balram, was the protected Thiccadar of Mauza Sargipali. Karuna was also protected Thiccadar of Mauza Bandipali.

(2) After Karuna's death Mohan remained at Bandipali and acted as Thiccadar thereof whereas Kuber remained at Sargipali and acted as Thiccadar.

(3) The allegations in paragraph 3 of the plaint are not true. Kuber acted in Sargipali as Thiccadar on his own behalf, and not as agent of his brother Mohan."

N. B.—The allegations in paragraph 3 of the plaint referred to herein are that the plaintiff dwelt in Mauza Bandipali and in the year 1901 he appointed his younger brother Kuber, the defendant No. 2, as his agent to manage Mauza Sargipali on his bahalf and accordingly Kuber realised rents from the tenants on behalf of the plaintiffs.

"(4) That at the Dewar Settlement Mohan was recorded as Thiccadar of Bandipali and Kuber of Sargipali. This was on the application of Kuber and Mohan, not having accepted the Thiccadari of Mauza Sargipali and agreeing to the Record of Rights being in the name of Kuber, relinquished his right in favour of his younger brother."

From the above it is clear that in the written statement the right of Kuber as Gauntia of Sargipali is said to be based on the fact that Kuber acted as Thiccadar on his own behalf in the village and that at the time of the preparation of the Record of Rights Mohan did not accept the Thiccadari of village Sargipali and agreed

to the name of Kuber being recorded in the Record of Rights, and thus relinquished his right in favour of Kuber. There is no case made out in the written statement that Mohan resigned his right in favour of his younger brother Kuber at the time when succession ensued after the death of his father Karuna in terms of the proviso of section 65 A, clause 4, which runs as follows :—

"Provided secondly that the eldest of two or more heirs shall be at liberty at the time of succession to resign his right in favour of another heir bearing the same degree of relationship to the deceased Thiccadar as he himself bears."

Indeed the evidence on behalf of the defendants is that after the death of Karuna, Mohan became the Gauntia of Sargipali. Markund Singh, witness No. 1 on behalf of the defendant, says: "In Sargipali there is no co-sharer, Karuna was the sole Thiccadar of the village..... After his death Mohan became Gauntia of Sargipali.....Karuna had got a protected certificate in 1901 in respect of Sargipali. Mohan remained Thiccadar of Sargipali for about a year after the death of Karuna." This witness admitted Exhibit 1, the receipt granted to Mohan bearing his signature, with respect to which he says in his evidence: "We took Patwari and other cesses from the plaintiff Mohan on the 2nd November 1903 for the Sambat 1958 and 1959." There is no reason why this statement of this witness should not be accepted. He is a relation of the Zemindar defendant and is in his service since 1875 as his Am Mukhtar : and has been looking after the management of this village and also holds Bhogra lands after the surrender by Kuber. There is no evidence that Mohan resigned the Gauntia tenure in favour of Kuber at the time when succession ensued after the death of Karuna. On the other hand, the positive evidence is that Mohan succeeded to the Gauntia right and was recognised by the Zemindar defendant No. 1 as the Gauntia of the village.

The defendant No. 1 admitted that Mohan was the Gauntia of Sargipali in Exhibit 8, and a usufructuary mortgage bond, dated April 14th, 1902, executed by him in favour of Bairagi Dora for Rs. 6,000, wherein village Sargipali along with other villages of the Zemindar was mortgaged. The plaintiff was directed to pay the annual rent of Rs 149-3-0 of village Sargipali to the mortgagee Bairagi Dora. About the same time Mohan executed a registered agreement, Exhibit 6, agreeing to pay Thicca Jama of Sargipali to Bairagi Dora, the mortgagee, in accordance with the aforesaid mortgage bond.

The rent receipts Exhibits 3 to 3 C of the period 1903 to 1907 show that Thicca Jama of Sargipali was paid to Bairagi Dora for the Sambat 1959 to 1961 and 1963. All these receipts are in favour of Mohan Gauntia.

Exhibit 3 A mentions that the money was received on behalf of Mohan Gauntia through Kuber.

Exhibit 4 is a letter from Bairagi Dora the mortgagee to the plaintiff demanding rent from him for the village in dispute.

Exhibit 1, dated 2nd November 1903, a receipt for Patwari and other cesses, mentions that Mohan Gauntia paid these cesses for the Sambat 1958 and 1959. All the receipts granted by the Zemindar are in the name of Mohan, described as Gauntia, sometimes the money is said to have been received from Mohan himself and sometimes through Kuber.

The letters in the shape of Parwanas, Exhibits 5 series, IB and LE, issued from 1903 to 1907 by the Zemindar mention sometimes the name of Mohan and sometimes only the Gauntia of Sargipali without any name, but never the name of Kuber as Gauntia of the village.

The Government Treasury Challans 2 to 2 J show that money was paid by Government to Mohan as Gauntia of the village for effecting improvements of Sargipali and that the money was returned to Government from 1906 to 1912 by Mohan Gauntia personally. The words in the Challans are: "Brought by Mohan Gauntia tendered by self." In two instances the words are: "Brought by Mohan Gauntia of Sargipali tendered through Kuber (Exhibit 2)." In one instance, Exhibit 2G, the words are: "Brought by Mohan Gauntia, paid by Balaram Gauntia" (the youngest brother).

These documents clearly show that Mohan was recognised as the Gauntia of the village all through and held responsible for the

performance of the duties of a Gauntia of the village both by Government and by defendant No. 1, the Zemindar. Kuber's position was never recognised as being higher than that of an agent of Mohan. The rent receipts, Exhibits A to A 25, of four tenants of the village produced on behalf of the defendant as showing that Kuber collected the rents of the village, are not inconsistent with the case of the plaintiff, which is that Kuber was his agent and was collecting rents in the village on his behalf.

It is clear from the above that Mohan did never relinquish his right in favour of Kuber. There is no deed of relinquishment executed by Mohan in favour of Kuber in respect of the Gauntia tenure of the village in dispute or any other documentary evidence to show that Mohan did at any time resign his right in favour of Kuber.

Witness No. 1 Markund Singh, Am-Mukhtar of the defendant, says: "I do not know how the village was given to Kuber either by written (?) or verbally, as I was not present on that occasion."

The defendant examined 8 witnesses in this case, but none of them says a word about Mohan's having relinquished his right in favour of Kuber. The Mukaddam Gumasta of Sargipali, the only witness on the point, says that he is unable to say whether Kuber used to realise the rent of the village on his own behalf, or on behalf of Mohan, and is silent as regards any relinquishment by Mohan to Kuber. He was sued by Mohan in the Court of the Munsif in 1902 and in Paus last a criminal case was brought against him by Mohan for assaulting his son. This witness is of no value and is unreliable.

An attempt has been made to show that the name of Kuber was recorded in the settlement record, which terminated in 1907, with the consent of Mohan. It is said that Mohan even put in a petition stamped with 8-annas Court-fee before the Settlement Officer, asking that Sargipali might be recorded in the name of Kuber. The petition has not been produced, nor the register showing the entry of such an application. Witness No. 8, a Patwari Fund clerk, has been produced to show that he made a search for the document but could not find it. He admits that he is not in charge of the papers which remain in the record room, and that the record-keeper is in charge of them. The record-keeper is not produced. This witness made a search of his own accord. He says that these papers are not in his office but they might be in the record room and there is nothing to show that any such application ever existed.

The Khewat, Exhibit H, does not contain any note by the Assistant Settlement Officer that any petition was filed by Mohan or any statement was made by him that Kuber should be recorded as the protected Thiccadar of the village.

Markund Singh is too much interested to be relied upon on behalf of defendant No. 1, being his relation and his Am-Mukhtar, when he says that the plaintiff Mohan Gauntia agreed to the name of Kuber being recorded at the time of settlement.

I agree with the Subordinate Judge that the evidence on behalf of the defendant as to having relinquished his rights in favour of Kuber before the Assistant Settlement Officer is wholly unworthy of credence. Kuber, either of his own accord or in collusion with the defendant No. 1, might have got his name recorded before the Assistant Settlement Officer. Mohan had nothing to suspect that Kuber would get his own name recorded, for Kuber had never before done any act in breach of the confidence reposed in him by Mohan. Even if it be held that Mohan did actually consent either by a petition or verbally to Kuber's being recorded by the Settlement Officer as a Gauntia, it would be several years after his succession to the Gauntia right and the recognition of his right by the Zemindar and the Government as shown above. He had, in 1904, no right to relinquish the tenure in favour of his brother before the Settlement Officer, for it would then amount to a transfer of the right already accrued to, and enjoyed by, him, by way of gift in favour of Kuber. It was not a surrender to the Zemindar but a transfer to a third person as against the Zemindar. This is not permissible. Section 65, clause 4A, prohibits absolutely transfer of the Gauntia tenure in any way either by sale, gift or mortgage. The relinquishment, if any, made by Mohan in favour of Kuber in 1904, which had already been shown to have never taken

place, is wholly inoperative and invalid in law. No consent of the Zemindar in my opinion would validate the transfer declared by law to be illegal. It is admitted that this was the ancestral family property. Under the special rule of succession provided by section 65A, out of the several heirs bearing the same relationship to the deceased Gauntia the eldest of such heirs succeeds and is not liable to partition. The Gauntia tenure in question was an ancestral property in the hands of the father of the plaintiff and his brothers in which all of them had acquired an interest by birth. The tenure was created long before 1898, when section 65A was enacted after amendment. Karuna's ancestor Dhunda originally held the tenure, which in succession came to be held by Karuna and Gajadhar, son of Dhunda. Karuna alone was, however, granted a certificate in accordance with Act XVI of 1889. The effect of the certificate was not to take away the rights of other members in the family, as held by the learned Judicial Commissioner of the Central Provinces in *Fagwa* v. *Budhram* (1). The history of the tenure in that case is exactly similar to that in the present case. Prior to 1891, two brothers Sakhru and Pathari held the tenure for which in 1891 a certificate was given to Pathari alone. It was held that the certificate did not create two new rights personal to Pathari alone and that Pathari's nephew did not cease to have an interest in the tenure. Pathari, his sons and nephew were held to be joint owners of the Thiccadari village. The law regarding the rights of the person declared as protected in status by certificate in 1891 and the other members of the joint Hindu family has been summarised in that case as follows:—

"There is absolutely nothing in the Act of 1898 to suggest that the vested right was intended by the Legislature to be taken away from him. Property which is joint property and enjoyed as such does not cease to be joint property merely because a subsequent Act does not recognise the partition.....It cannot be seriously argued that these restrictions on the right to partition have taken away from the co-sharers in Sambalpur Khalsa villages all rights of property, and conferred them on the Lambardar Gauntia." The right recognised by the Settlement Officer is not merely a personal privilege. The learned Judges further held that the fact that the certificate was issued in the name of one member does not affect the rights of the other members and that the question of privity of contract between the Zemindar and the other members of the family does not affect the right as against each other.

In Second Appeal No. 2878 of 1914, in *Lal Narupraja Singh* v. *Bhabani Teli* (2), in connection with the suit brought by the Zemindar, after the surrender by Kuber in 1907, to eject some relations of Kuber from parcels of Bhogra lands held by them, the learned Chief Justice overruled the defendant's contention of law that a protected Gauntia is unable to relinquish his right. The question whether Mohan did as a matter of fact relinquish his right in favour of Kuber and whether Kuber on the strength of his name being entered in the Record of Rights could validly surrender the tenure to the prejudice of the plaintiff, was not raised and could not be investigated in that second appeal. It was for the purpose of that case, however, assumed that Kuber was a protected Gauntia of the village. Mohan was not a party to that litigation.

I regret the above authorities were not cited to us in the course of the arguments by the learned Vakils in Cuttack representing the parties.

In the present case, however, the plaintiff has been able to show that he himself did succeed as a Gauntia under the law and was recognised as such by defendant No. 1 and that he did not relinquish it in favour of Kuber. Hence Kuber was not competent to surrender it to the Zemindar.

It follows from the principles of the ruling in *Fagwa* v. *Budhram* (1) already cited that a Gauntia, having succeeded to the protected tenure under section 65 A of the Act, cannot transfer the rights by gift in favour of one to the prejudice of

(1) 24 Ind. Cas. 855; 10 N. L. R. 64.

(2) 37 Ind. Cas. 107; 1 P. L. W. 449; 1 P. L. J. 293.

the rights of the other members of the family in the property. In the present case Mohan, having succeeded to the tenure and having been recognised as such for a number of years could not transfer the right in favour of Kuber to the prejudice of the youngest brother and his own sons and the sons of the other brothers. Under the Hindu Law the transfer by one member, unless as a Karta of the family, is not binding upon his brothers and nephews, as the members of the family acquire vested rights by birth in the ancestral property. Under the special law a person succeeding to the Gauntia tenure in preference to the other members of the family has no right to transfer the tenure. In this view of the law the relinquishment by Mohan to Kuber before the Assistant Settlement Officer in 1904 was absolutely invalid and illegal and is not binding upon Mohan or the other members of the family. As a matter of fact it appears that there was no relinquishment at all.

The Record of Rights does not affect the right of the plaintiff, nor does it seem to have been acted upon. The documentary evidence already referred to shows that even after the alleged relinquishment by Mohan and the preparation of the Record of Rights, Mohan Gauntia continued to be recognised as the Thiccadar of the village and to pay rents and cesses to the Zemindar, and to his mortgagee, and also the Takawi dues to Government (*vide* the rent receipts of 1902 to 1907, Parwanas of 1903 to 1907 and the Treasury Challans of 1906 to 1914).

All these documents were produced by the defendant before the Court of Wards in 1909, and in the present suit, from his own custody. There is no reason why these documents would be with the plaintiff if he had parted with his rights in the village in favour of Kuber. I have no hesitation, therefore, in agreeing with the learned Subordinate Judge that there was no relinquishment of his rights by Mohan in favour of Kuber at any time and that his rights are not affected by the Record of Rights.

It is possible that Kuber being in charge of the village did in collusion with the defendant No. 1 get his name entered in the Records of Rights either for his own benefit or for the benefit of the Zemindar, to whom he is said to have surrendered soon after the Record of Rights was finally published. But the deed of surrender executed by Kuber in favour of defendant No. 1 on 5th October 1907, and followed by a deed of agreement on the 6th of October 1907, would not affect the rights of the plaintiff as he was no party to it.

It is not necessary for the plaintiff to show that the surrender made by Kuber in favour of defendant No. 1 is not a *bona fide* document or without any consideration, for the plaintiff has succeeded in proving that Kuber had no right to surrender. But it may be mentioned that the circumstances connected with the execution of the deed of surrender are suspicious enough to raise a reasonable doubt as to the *bona fides* of the transaction.

In order to bolster up the case, defendant No. 1 made some of his witnesses to say that Mohan was himself present at the time of the execution of the deed of surrender and the payment of Rs. 2,300 to Kuber. Markund Singh, the Am-Mukhtar of the defendant, however, gives up the show when he himself does not say that Mohan was present at the time of the execution of the deed of surrender. The deed of surrender was presented for registration by Markund Singh, the Am-Mukhtar of defendant No. 1. It does not mention any consideration for which the village is said to have been surrendered. The deed of agreement, however, mentions that Kuber received Rs. 2,300 in cash on account of the improvements made by him in the village.

As to the payment of Rs. 2,300 to Kuber, the evidence is most unreliable. It is admitted that money was not paid at the time of the execution of the deed of surrender, but it was paid afterwards. This witness No. 4 is the only witness who speaks as to the payment of Rs. 2,300 to Kuber, but he is contradicted by Markund Singh witness No. 1 as to the time of payment. Rs. 2,300 is said to have been paid in consideration of the improvements made by him in the village, but Markund Singh admits that Kuber did not make any improvements,

but that the improvements were made by his father. Markund further admits that the money paid to Kuber was entered in the account book of defendant No. 1, but no such account book has been produced. Then it is not shown why Kuber would, after the improvements made in the village which are estimated at Rs. 2,300, part with the village. It has not been proved nor is it the case of any party that the surrender was made for the interest of the family and it is doubtful if such a surrender would bind the plaintiff and the other members. I am personally inclined to hold that the tenure being ancestral the surrender by Kuber, even if he was a Gauntia of the village, would not bind the plaintiff and the other members of the family, as the surrender is not shown to be for the benefit of the family. In this I am supported by the ruling in *Fagwa* v. *Budhram* (1) cited above, which distinctly lays down that in case of such a tenure no privity of contract between the Zemindar and any member of the family would affect the rights of the other members. It would also, in my opinion, defeat the object and intention of the Legislature, which is to afford protection to the Gauntia against arbitrary ejectment by the Zemindar.

It is, however, needless to investigate further into this matter except for the purpose of showing that the transaction appears to be colourable, in which the hand of Markund is visible in order to secure to the Zemindar the Gauntia right of the village by the surrender. It is then said that when the Court of Wards took over charge of the village in 1908 after the surrender, the plaintiff himself applied for taking lease of the Bhogra lands of the village which was being settled by the Court of Wards and thus acquiesced in the surrender made by Kuber. There is no force in this contention, for when the Court of Wards was settling them with others, the plaintiff would naturally be too anxious to prevent strangers from taking settlement of the same. This does not militate against the right that he claims to hold the village as Gauntia. It only shows that he was anxious to secure to himself possession of the Bhogra lands, and does not show that he acquiesced in any way in the surrender made by Kuber, or that he is estopped from claiming his right in the suit. On the other hand it is clear that soon after the relinquishment and when the Court of Wards assumed charge of the village in 1908, the plaintiff did apply to the Court of Wards to be put in possession ascertaining his right as a Gauntia of the village, and repudiating the surrender made by Kuber as being collusive and illegal, and requiring the Court of Wards to give back possession to him. The plaintiff filed before the Court of Wards all the receipts and other documents in proof of his claim, which have already been noticed before. It has been shown already that he continued to pay the rent of the village to the Zemindar and the Zemindar continued to recognise him as a Gauntia even after the execution of the deed of surrender. The Parwana, dated the 25th December 1907, signed and issued by defendant No. 1 to the Sargipali Gauntia was received by the plaintiff and he has produced it in this case. It is admitted in evidence by the defendant that the Zemindari papers would show as to who actually paid the rents, but these papers have not been produced. The defendant has failed to prove that Kuber was recognised by him as the Gauntia of the village before the alleged surrender in 1907 by him, or that the plaintiff did lose his right in the village by virtue of that surrender. The plaintiff's claim, therefore, cannot be defeated.

A formal objection was taken by the appellant that the suit is bad for want of a proper notice under section 26 of Act XXIV of 1869 of the Central Provinces Court of Wards Act. This section is in all respects similar to section 80 of the Code of Civil Procedure, which requires that no Civil suit shall be brought until the expiration of two months after notice in writing stating the name and place of abode of the intending plaintiff, the cause of action, and the relief claimed has been delivered to and left at the office of the Court of Wards. The petition dated the 9th July 1910, Exhibit C4, satisfies the requirements of these rules. Therefore, the suit is not bad for want of notice.

In conclusion I agree with the learned Subordinate Judge that the plaintiff has conclusively established that he being the

eldest son was entitled to and did in fact succeed his father to the Gauntia right in the village, and that he never resigned his right in favour of Kuber, his younger brother, either at the time of the succession or thereafter in 1904 before the Assistant Settlement Officer, and that he was recognised all through as Gauntia of the village by the Zemindar and the Government, and that the position of Kuber was no better than that of an agent for Mohan in making collection of rents in the village, and that Kuber had no right to surrender the Gauntia right in favour of defendant No. 1 and that defendant No. 1 has not acquired any right to remain in possession of the village and to deprive the plaintiff of his right.

The suit has been rightly decreed by the learned Subordinate Judge. The appeal is dismissed with costs.

BY THE COURT.—As we are divided in opinion, the decree of the lower Court must be affirmed under section 98, clause (2), Civil Procedure Code; the appeal accordingly be dismissed with costs.

Mr. *Abani Bhusan Mukherjee*, for the Appellant.

Mr. *Umacharan Laha*, for the Respondent.

JUDGMENT.

CHAPMAN, J.—One Karuna Gauntia was the Gauntia of two villages named Bandipali and Sargipali. In 1891 he received a certificate under section 65A of the Central Provinces Land Revenue Act of 1881 declaring him to be protected for the purposes of that section. In 1900 Karuna died, leaving him surviving three sons named Mohan, Kuber and Balaram. In the Survey and Settlement of the district of Sambalpur which was concluded about the year 1906-07, Kuber, the younger son, was recorded as the Gauntia of the village of Sargipali, Mohan being recorded as the Gauntia of Bandipali. In October 1907, Kuber executed a document purporting to surrender the Gauntiaship of Sargipali to the Zemindar on receipt of Rs. 2,300, in consideration of the improvements which he alleged he had made in the village during his Gauntiaship. The Zemindari was taken charge of by the Court of Wards sometime in the year 1908. Mohan thereupon took a lease of the home farm in the village of Sargipali from the Court of Wards. Subsequently, in October 1909, he presented a petition to the Court of Wards claiming that he was entitled by inheritance to the Gauntiaship of Sargipali; that Kuber had no right to surrender the Gauntiaship to the Zemindar and that he should be restored to the Gauntiaship. This petition appears to have been rejected and in consequence Mohan instituted the suit out of which this appeal arises, asking for the recovery of the Gauntiaship of the village of Sargipali. The suit was instituted in the year 1913 and was decreed by the learned Subordinate Judge. On first appeal to this Court the learned Judges who heard the appeal differed: Mr. Justice Roe being of the opinion that the appeal should be allowed and Mohan's suit dismissed; and Mr. Justice Jwala Prasad being of the opinion that the learned Subordinate Judge was right in decreeing Mohan's suit and that the appeal should be dismissed. In accordance with the rules of the Court, the appeal was accordingly dismissed. Against that decree an appeal has been preferred under the Letters Patent and that is the appeal which we have now to consider.

It is desirable to state in the first instance what can be gathered in regard to the status of a protected Gauntia from the provisions of the Central Provinces Land Revenue Act of 1881; and for this purpose one must refer to section 65A of that Act. It appears from the provisions of that section that it was thought desirable to provide for the protection of certain selected Thiccadars, Gauntias and farmers of villages. "Gauntia" is the name ordinarily given to village headmen, but the use of the term in connection with Thiccadars and farmers indicates that the name was generally used in the Central Provinces for the person who was responsible for the collection of the rent in a village. Section 65A provides that where a Gauntia is able to prove that he has been in possession of a village or part of a village for a period of not less than 20 years, or where he is able to prove that he, or those from whom he has inherited, has or have established the village or substantially improved it, at his or their cost, he is entitled to claim the protection

provided for by that section. The protection consists partly of a protection against ejectment by the Zemindar except under certain conditions, and partly of protection against sub division or transfer of the Gauntiaship. It further provides that a protected Gauntiaship shall be heritable and not transferable by sale, gift, mortgage or dower, that it shall not be saleable in execution of any decree nor shall any decree be passed for the sale thereof, that it shall not be partitioned and that it shall devolve on one member only in the family. The protection further deals with the rights of a Gauntia to renew his Gauntiaship lease upon terms which may, in case of disagreement, be settled by the Deputy Commissioner. It is quite clear from the recitals in these provisions that the object of the enactment was not for the benefit of the Zemindar; but that the object was to retain, if possible, certain selected families in the Gauntiaships of their villages and to protect them against transfers and sub-divisions. It is important to bear this general intention of the law in mind in dealing with the facts of the present case.

As I have said, Karuna was the protected Gauntia of the villages of Bandipali and Sargipali. He died in the year 1900 leaving him surviving three sons: Mohan, Kuber and Balaram. There is no evidence that there was any separation in the family and the presumption is that the family remained joint. In these circumstances the law on the subject clearly is that Mohan succeeded to the Gauntiaship of the two villages of Bandipali and Sargipali, unless at the time of his succession he elected to resign his right in favour of one or other of his two brothers. This is clear from the provisions of sub-section (4) (*b*) of section 65A of the Central Provinces Land Revenue Act, which says that "when on the death of a Thiccadar there are two or more heirs bearing the same relationship to him, the eldest of such heirs shall succeed," provided that the eldest of two or more such heirs shall be at liberty, at the time of succession, to resign his right in favour of another heir bearing the same degree of relationship to the deceased Thiccadar as he himself bears. It is quite clear, therefore, that in the absence of evidence of resignation by Mohan at the time of his succession he was entitled to the Gauntiaship of the two villages of Bandipali and Sargipali and that his right was superior to that of his younger brother Kuber. Kuber would, therefore, not be entitled to make the surrender which he purported to make in the year 1907 in favour of the Zemindar. So far, therefore, as the provisions of this section are concerned, Kuber could only succeed upon evidence that at the time when Mohan succeeded to the Gauntiaship on the death of his father, he (Mohan) resigned his right in Kuber's favour. The question we have to determine, in the first place, is whether there was any such resignation. The appellant is met at this stage with a difficulty: The suit brought by Mohan out of which this appeal arises was not contested by Kuber himself; and Kuber was not called as a witness in the case. The suit was contested only by the Court of Wards on behalf of the Zemindar in whose favour the surrender had been made by Kuber in 1907. There is thus no statement or evidence by Kuber that there was any such resignation in his favour; and there is no other evidence of any kind bearing on this question. There is also no definite plea in the Zemindar's written statement that there was in fact any such resignation. We have been asked to infer that a resignation actually took place from the following circumstances:—

A series of rent-receipts commencing with the year 1901 proving payment by some four tenants of the village of Sargipali, most of which are signed by Kuber as "Kuber Gauntia." Reading these receipts together with the case of the plaintiff that Kuber did actually collect rents of the entire village of Sargipali, we may accept the fact that Kuber did collect rents of the village and that he did sign himself as 'Kuber Gauntia.'

There is also one instance of the year 1906 (Exhibit J) in which Kubar sued a tenant of Sargipali and obtained a decree for rent.

The appellant also relies upon the fact that Kuber was recorded as the Gauntia of Sargipali in the Khewat (Exhibit H) and that the Jamabandi prepared by the Settlement Officer was in accordance with that Khewat.

The appellant further relies upon the fact that after the Court of Wards had taken charge of the Zemindari in 1908, Mohan, without objecting to the surrender which had in the meantime been made by Kuber, applied to the Court of Wards for the settlement of the home farm. To some extent the appellant also relies upon the fact that Kuber made the surrender in 1907 describing himself as the Gauntia of the village. Some little inference may also be rightly drawn from the fact that Mohan in his evidence pretends that he was not aware of the entry in the Khewat until 1908.

A case was attempted to be made out in the first Court that the entry in the Khewat was made with the consent of Mohan and it was even suggested that Mohan put in a petition consenting to the entry of Kuber's name as the Gauntia of Sargipali. The only evidence, however, which was adduced to support this case was that of a witness who was discredited in cross-examination, and I agree with the learned Subordinate Judge and with the opinion expressed by Jwala Prasad, J., in this connection that the story is untrue. Even if this evidence were accepted as true, however, it would in my opinion be difficult to infer that it amounted to a resignation at the time of Mohan's succession.

There is a considerable body of evidence on the other side. It appears to be incontrovertable that so far as the Zemindar and the Government were concerned, Mohan succeeded to his father Karuna as Gauntia and was treated as the Gauntia from the time of the death of his father right up to the year 1912, within a short period of the institution of this suit. So far as the Zemindar is concerned, in respect of the period prior to the actual surrender by Kuber, there is a series of rent receipts showing payment by Mohan in his capacity as Gauntia; there is a mortgage bond of April 1902 executed by the Zemindar in favour of one Bairagi Dora in which the Zemindar recites that Mohan was the Gauntia of Sargipali and empowers Bairagi to realize rent from Mohan in discharge of the debt due by the Zemindar to Bairagi. Of about the same date there is an agreement executed by Mohan as Gauntia of Sargipali in favour of Bairagi Dora agreeing to pay him the annual rent of the two villages Bandipali and Sargipali. This is further supported by a series of receipts of 1903, 1904, 1905, 1906 and 1907 showing payments of rent by Mohan as Gauntia of Sargipali to Bairagi Dora. One of these receipts shows that the payment was made through Kuber. There is nothing to show that Kuber took any part in the payments of the other years. There is a letter written in 1908 by Bairagi Dora to Mohan Gauntia asking the latter to pay the rent and there are also demands made from time to time by the Zemindar. There is also a series of payments made to Government, apparently in discharge of a loan given by the Government for village improvement. These receipts run up to the year 1912 showing payments made by Mohan as Gauntia of the village.

From this evidence one thing is certain, and that is that upon the death of Karuna Mohan was treated as Karuna's sole successor as Gauntia of the two villages of Bandipali and Sargipali; Mohan accepted that position, and the Zemindari papers show that they were framed upon that understanding. It is, moreover, quite clear that there was no resignation in any sense of the term so far as the Zemindar and the Government were concerned. In these circumstances I think it is impossible to infer from the mere fact that Kuber was permitted to collect rent of the village and that he succeeded in getting his name recorded in the Survey and Settlement papers, apparently with a view to making the surrender in favour of the Zemindar, that any resignation by Mohan in favour of Kuber took place at the time of his succession. It is quite clear that after Mohan had once entered as the heir of his father, it was not open to him under the provisions of the Central Provinces Land Revenue Act to transfer by sale, gift or otherwise in favour of his brother Kuber. It has been suggested that if he did so, he would be estopped from pleading that he was not entitled to do so. It is in my opinion not necessary to expressly decide whether the law of estoppel would operate as a bar in such an event, having regard to the clear provisions of the Statute. The cases relied on by Mr. Justice Roe in this connection are distinguishable, in-

asmuch as they relate to transfers of occupancy rights the law in respect of which is expressly for the protection of the Zemindar. As I have pointed out, the law upon the subject of transfers of Gauntiaship has no concern whatsoever with the interest of the Zemindar. Moreover, the leading case on the subject of estoppel in a case of transfer of occupancy rights, *viz.*, *Bhagirath Changa* v. *Sheikh Hafizuddin* (3), itself expressly distinguishes a case in which a transfer had been made in a representative character. The fact is that in the present case I am unable to hold that there was any transfer by Mohan in favour of Kuber and if ever there was a case which would be excluded from the operation of the principle of estoppel, it is this one; for, in the first place, it is manifest that Mohan throughout held himself out as Gauntia of the two villages and in the next place, he was treated as Gauntia by the Zemindar right up to the date of the surrender by Kuber. It is, therefore, quite impossible for the Zemindar to plead that he was misled by Kuber in regard to the Gauntiaship of Sargipali. He appears to have been perfectly aware up to the date of Kuber's surrender that Mohan was the Gauntia; and it is certainly open to considerable doubt whether, when he knew that Mohan was entitled to succeed to his father and that there was an express provision of law forbidding Mohan from making a transfer in favour of his brother, he really believed that Kuber was the Gauntia in respect of Sargipali.

Some reference has been made to a judgment of this Court in which the late Chief Justice said that he could discover nothing in the incidence of the tenure of a Gauntia which showed that the Gauntia was not entitled to relinquish his rights [*Lal Narupraja Singh* v. *Bhabani Teli* (2)]. That observation was made only by way of *obiter dictum* and it appears to me that it is unnecessary for the present appeal that we should determine the point. At the same time it is desirable to mention that I am of opinion, having regard to the nature of the protection given to a protected Gauntia by section 65A, that if it were held that a Gauntia could surrender in favour of the Zemindar, it would be possible to render the provisions of the Central Provinces Land Revenue Act infructuous, inasmuch as the Zemindar could obtain a surrender from a Gauntia and thereafter lease the Gauntiaship to some other person and thus transfer the Gauntiaship to another, which is the result which the Act is intended to prevent.

I am of opinion, therefore, that the defendant-appellant has entirely failed to prove that there was any resignation by Mohan in favour of Kuber either at the time of his succession or subsequently. In these circumstances I am of opinion that the suit was rightly decreed.

Certain preliminary objections were taken by the learned Vakil appearing on behalf of the appellant. It was contended that the suit was not maintainable in the Civil Court by reason of the provisions of section 132 read with section 152 (*a*) of the Central Provinces Land Revenue Act. Section 132 enables the Deputy Commissioner to enquire into the claims of Gauntias and to declare them to be protected for the purposes of section 65A. Section 152 provides that no Civil Court shall entertain any suit concerning any matter which the Revenue Officer is empowered to determine or dispose of. It is contended that this was a suit for the enforcement of the claims of a Gauntia and that, therefore, the Deputy Commissioner was empowered to dispose of it: and that the Civil Court was prohibited by the provisions of section 152 from entertaining it. In my opinion, however, it is quite clear that the provisions of section 132 were drawn up with reference to section 65A and were intended to enable the Deputy Commissioner merely to determine claims to protection under section 65A and to enforce the provisions of that section. It was never, in my opinion, intended that the Deputy Commissioner should be empowered to deal with a suit for ejectment or for the recovery of a Gauntiaship.

In regard to the objection upon the ground of want of notice of suit I agree with the judgments of Mr. Justice Roe and of Mr. Justice Jwala Prasad.

Some argument has also been addressed to us upon the provisions of section 237

(3) 4 C. W. N. 679.

of the Indian Contract Act, which entitles a person dealing with an agent to believe that the agent is acting within his powers. Nobody has ever suggested in this case that the Zemindar was induced to believe that Kuber was empowered by Mohan to surrender his Gauntiaship and, therefore, the provision of the section referred to has no application to the present case.

Reference is also made to sections 68 and 82 of the Bengal Tenancy Act, which require Settlement Officers to record the fact of actual possession and provide that the entry regarding the fact of actual possession shall be presumed to be correct until the contrary is proved. Now, all that the entry in the Record of Rights shows is that possession of the Gauntiaship at the time of the publication of the Record of Rights was with Kuber. The presumption attaching to the entry in the Record of Rights is only in regard to possession, and it is sufficient to enable Mohan to succeed in this action that he should establish a better title than Kuber, whatever the fact of possession might have been in the year 1906-1907. Having regard to all the circumstances of the case and the fact that the surrender in favour of the Zemindar took place so soon after, I am of opinion that the presumption attaching to the entry has been sufficiently rebutted by the other evidence to the effect that Mohan was treated by the Zemindar and by the Government as the sole successor to the Gauntiaship upon the death of his father Karuna. Moreover the presumption as I have said, is only one in favour of possession and apart from the evidence as to possession Mohan would be entitled to succeed upon the evidence that he has a better title. In all the circumstances of the case I am of opinion that the suit was rightly decreed by the learned Subordinate Judge and I would, therefore, dismiss this appeal with costs.

ATKINSON, J.—I entirely agree in the conclusions arrived at by my learned brother. I desire, however, to add my own opinion as to what I believe to be the true construction of section 65A, clause (4) (*b*) of the Central Provinces Land Revenue Act, 1881, in so far as it concerns the question arising for our decision. Section 65A was mainly designed to afford protection to the class of persons owning a proprietary interest in land known as Gauntias, and to secure for them, in the enjoyment of their property rights, security of tenure, and subject to the incidents attaching to their tenure to save them from arbitrary eviction by capricious landlords. Thus by the Central Provinces Revenue Act of 1881, section 65A, the tenure of a Gauntia was declared to be heritable; but not transferable by sale, gift, mortgage or dower. The uncertainty which prior to the passing of this Act antecedently attached to the interest of a Gauntia tenure-holder ceased, and he acquired a perpetual estate or interest in the lands forming the subject-matter of his tenure subject to the conditions against alienation specified in section 65A. Once a Gountia received the certificate contemplated and provided for by the Act, he became what is termed a "protected Gauntia;" and thereupon he became, but not till then, vested with all the rights and benefits conferred upon a Gauntia by this Act. For obvious reasons it was thought desirable by the framers of the Central Provinces Revenue Act of 1881 to provide that the tenure should vest in one person only, even though he with others might have a joint interest therein; and accordingly the Act provided for the devolution of a protected Gauntia tenure upon the death of the first and each succeeding "protected Gauntia" by enacting that "when on the death of a Thiccadar there are two or more heirs bearing the same relationship to him, the eldest of such heirs *shall* succeed, provided that the eldest of two or more such heirs shall be at liberty *at the time of succession* to resign his rights in favour of another heir bearing the same degree of relationship to the deceased Thiccadar as he himself does."

In my opinion this section is mandatory in its terms. The eldest heir of the last protected Gauntia shall succeed to the tenure, unless *at the time of succession* he resigns his right to inherit as a Gauntia in favour of another heir of equal degree. The right of the eldest male heir to resign or renounce his rights as a Gauntia, with a view of giving up all claim to inherit the estate which has by statutory

devolution descended upon him must be exercised at the time when the succession opens, *viz.*, on the death of the last protected Gauntia. A right of election is conferred upon the eldest male heir; and a time is definitely specified when that election must be made by him. No chance for procrastination is allowed; but there and then when the right to succeed accrues the right of election must be exercised; and when the election is so made by the person upon whom the tenure devolves by inheritance, it is irrevocable in its operation; and automatically one heir of equal degree is substituted for another. Further in my opinion the right of election must be exercised in respect of the entire estate which devolves on the eldest male heir. If two or more villages form the protected tenure of a Gauntia, even though they may have been declared protected by separate certificates at different times, the eldest male heir must exercise his choice of resignation or adoption in respect of all or none of such villages; there can be in my opinion no splitting up of the estate or tenure into different parts having distinct entities. To permit of such a severance of the estate would be destructive of what appears to me to be the governing intention of section 65A, *viz.*, the concentration of the ownership of the entire protected Gauntia tenure in one person only. Section 65A, clause (4) (*b*), expressly says that the eldest male heir shall be at liberty at the time of succession to resign his rights in favour of another heir. I take the words "his rights" in that section to mean all the rights which have devolved upon such eldest male heir, and not merely some of them. Therefore, even if there was a resignation proved by Mohan in favour of Kuber of the village of Sargipali, only when the entire protected interest that devolved on Mohan was comprised of the two villages of Bandipali and Sargipali n my opinion such attempted resignation by Mohan would have been invalid and inoperative in law to extinguish the rights of Mohan in the village of Sargipali.

Karuna died in August 1900. Thereupon the rights of the plaintiff accrued in succession to the protected estate which devolved upon him. Upon the death of Karuna it is admitted that there was mutation of names in the landlord's rent register and books; and that Mohan was recorded by the landlord as the Gauntia in respect of Bandipali and Sargipali. This, in my opinion, was an unequivocal act of adoption by Mohan of his intention to accept the estate which had devolved upon him. But irrespective of this the evidence by no means satisfies me that Mohan ever at any time resigned his rights in the village of Sargipali in favour of Kuber. The onus is on Kuber and those who derive title through him to establish as an indisputable fact the factum of resignation by Mohan. In my opinion the defendant No. 1 has utterly failed to discharge this onus. I would just desire to add that though section 65A speaks of "resign" this in legal phraseology really means "release", which has an accepted legal meaning. The best proof of resignation would be the production of a deed of release, but no document in the nature of a deed of release has been produced to establish the fact of resignation by Mohan in favour of Kuber. We are asked to infer as an inference of fact from the evidence, documentary and oral, adduced by the defendant No. 1 that Mohan in or about the year 1902 resigned his rights in village Sargipali in favour of his brother Kuber. I for one unhesitatingly refuse to draw any such conclusion from the evidence; nor do I think that the facts relied upon by Mr. Justice Roe warrant the deduction that he deduces therefrom. But even if evidence had been adduced from which the inference could be fairly drawn that in or about the year 1902 the plaintiff resigned his rights in respect of the village of Sargipali in favour of defendant No. 2, it would be of no avail inasmuch as any such resignation would have occurred long subsequent to the time when the succession opened and the right to resign accrued, there having been in the meantime after the death of Karuna a deliberate adoption by Mohan showing an intention on his part to succeed to the lands in suit.

I agree, therefore, that the suit was rightly decreed and that this appeal must be dis-

missed with costs.

IMAM, J.—I am in entire agreement with the view expressed by my learned brothers that this appeal should be dismissed with costs. I, however, wish to add that I find nothing in section 65A of the Central Provinces Land Revenue Act to show that the protection afforded to the tenure of a Gauntia is to extend to a group of tenures. In the present case Karuna had two Gauntiaships vested in him, namely, one for Sargipali and the other for Bandipali, and in my opinion on his death it was open to Mohan to resign at the time of his succession in favour of his brother Kuber either both the Gauntiaships or one of them. On the evidence I hold that he did not do so. Upon the evidence on the record it is quite clear that upon the death of Karuna, Mohan succeeded to the Gauntiaship of the two villages; that his name was recorded as Gauntia in the Zemindar's books and that he continued as Gauntia all along. The position of his brother Kuber, after the death of the father, was, in my opinion, that of an agent of Mohan. There having been no valid resignation by Mohan in favour of Kuber at the time of the death of Karuna, Kuber had no right whatever to the Gauntiaship of the village of Sargipali. I am also of opinion that Kuber had no title whatever to make the surrender in favour of the Zemindar. I agree, therefore, with the decision of my learned brothers.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND APPEAL No. 56 OF 1915.

December 19, 1917.

Present:—Mr. Justice Oldfield and Mr. Justice Phillips.

GANAPATHY MOOPPEN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SUBBA NAYAKKAN *alias* NARAYANASAMY NAYAKKAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Public street—Caste procession, obstruction to—Declaration of right and injunction, suit for, whether maintainable—Special damage, proof of, requisites of—Obstruction, what constitutes—Specific Relief Act (I of 1877), ss. 42, 52, 54.

Where a marriage procession is obstructed from passing along a public road, an action lies, on proof of special damage, for a declaration of the right to pass along the road and for an injunction restraining the obstruction. [p. 835, col. 1.]

Subbayya Nadan v. *Aiyavoo Reddi*, 37 Ind. Cas. 977; (1917) M. W. N. 70; 5 L. W. 752, *Andi Moopan* v. *Muthuvirama Reddy*, 29 Ind. Cas. 248; 29 M. L. J. 91; 17 M. L. T. 453, *Baslingappa* v. *Dharmappa*, 7 Ind. Cas. 663; 34 B. 571; 12 Bom. L. R. 586 and *Kandasawmy Mudali* v. *Sabraya Mudali*, 1 Ind. Cas. 716; 32 M. 478; 19 M. L. J. 617, distinguished

In such cases, proof of actual obstruction or the use of violence is unnecessary. It is enough to show that owing to the hostile attitude of the obstructors, the procession was not able to start. [p. 835, col. 1.]

By special damage is not meant actual pecuniary loss. [p. 836, col. 2.]

The special damage may consist in the inconvenience or loss consequent on a postponement of the marriage or waste of time involved in taking another route, or it may consist in some damage peculiar to the community constituting the procession. [p. 835, col. 2.]

Second appeal against the decree of the District Court, Madura, in Appeal Suit No. 258 of 1913, preferred against that of the Court of the District Munsif, Tirumangalam, in Original Suit No. 601 of 1911.

Mr. *C. S. Venkatachariar*, for the Appellants.

The Hon'ble Mr. *S. Srinivasa Iyengar* (Advocate-General) and Mr. *S. Desikachariar*, for the Respondents.

This second appeal coming on for hearing on the 29th of November 1916 and having stood over for consideration till the 8th December 1916, the Court delivered the following

JUDGMENT.—The plaintiffs-appellants are members of the Muppan caste and sued for a declaration, injunction and damages, because defendants, members of other castes, prevented their taking a marriage procession by the street along which it is, they alleged, customary to take them. The lower Appellate Court in the decree appealed against confirmed the District Munsif's decision, dismissing the suit *in toto*.

An attempt was made to support this decision on the ground that the lower Appellate Court erred in finding that the procession was prevented. It is true that it did not start and that its progress was not actually obstructed. But, as the lower Appellate Court found, it did not start

owing to defendants' hostile attitude and we agree that so far as plaintiffs proved, (*sic*) sufficient proof of actual obstruction or the use of violence being unnecessary.

The next question raised was whether the road, the use of which was disputed, is public. But the lower Appellate Court did not decide it, holding as we understand that plaintiffs could not in any case succeed in the absence of proof of special damage and dealing with the question of special damage on the sole ground that their procession could in fact have gone by another route and that the postponement of the marriage was not entailed. This, it is urged, is too restricted a view, *firstly*, because proof of special damage is not necessary, *secondly*, because the lower Appellate Court should have found that proof of it was forthcoming.

As regards the first position we have been referred to a very recent unreported decision of this Court, *Subbayya Nadan* v. *Aiyavoo Reddi* (1) (Second Appeal No. 2315 of 1914), in which Napier, J. (Ayling, J., expressing general concurrence) doubted the validity of the contention that mere obstruction to a procession was insufficient to justify grant of an injunction without proof also of loss of property or personal injury, his doubts being founded on the apparent inconsistency between certain observations in *Andi Moopan* v. *Muthuvirama Reddy* (2) and *Baslingappa* v. *Dharmappa* (3) and the decision in *Kandasawmy Mudali* v. *Sabraya Mudali* (4). But firstly it is not clear that the learned Judge was dealing with the necessity for proof of special damage and not with the different question, to which I return, whether any had in fact been established. And next the three cases mentioned are distinguishable from the case which was before the learned Judge and from that now before us, because in each of the former there was a magisterial order obtained by the defendants forbidding the procession, whilst in the latter such orders were either not relied on or not established. This distinction being available, it is unnecessary to consider the ground of decision in these cases more closely and it is sufficient that in *Kandasawmy Mudali* v. *Sabraya Mudali* (4) and *Andi Moopan* v. *Muthuvirama Reddy* (2) the necessity for proof of special damage in the absence of a magisterial order was fully recognised. Such proof must, therefore, be required in this case.

The remaining question is whether the lower Appellate Court's finding that the postponement of the marriage was not rendered necessary exhausted the matter. It no doubt was conclusive as regards one head, under which plaintiffs claimed pecuniary damages, the loss incurred in consequence of their preparation on the day fixed becoming useless. But proof of actual pecuniary loss is not essential. *Vide*, *Abzul Miah* v. *Nasir Mahommed* (5), *Siddeswara* v. *Krishna* (6) and the judgment of Sundara Aiyar, J., in *Khaji Syyad Hussain Saheb* v. *Ediga Narasimhappa* (7). The true principle is that laid down in a case, which has been followed frequently in this country, *Winterbottom* v. *Derby* (*Earl*), (8) that "he only can maintain an action for an obstruction who has sustained some damage peculiar to himself, his trade or calling." The points for consideration in the present case are accordingly whether defendants' conduct caused plaintiffs only such damages as any member of the public would have suffered through loss of time or having to go by a way other than the one he preferred; or whether plaintiffs were, as they alleged, debarred, because they were Mooppans, from taking their procession by the road customarily used for that purpose by that community and, therefore, suffered damage peculiar to themselves as members of it.

We, therefore, call on the lower Appellate Court for a finding in the light of the foregoing on the issue "whether plaintiffs suffered any special damage?"; and we also ask it to return a finding on the District

(1) 37 Ind. Cas. 977; (1917) M. W. N. 70; 5 L. W. 752.

(2) 29 Ind. Cas. 248; 29 M. L. J. 91; 17 M. L. T. 453.

(3) 7 Ind. Cas. 663; 34 B. 571; 12 Bom. L. R. 586.

(4) 1 Ind. Cas. 716; 32 M. 478; 19 M. L. J. 617.

(5) 22 C. 551; 11 Ind. Dec. (N. S.) 367.

(6) 14 M. 177 at p. 180; 1 M. L. J. 321; 5 Ind. Dec. (N. S.) 126.

(7) 16 Ind. Cas. 962; 23 M. L. J. 539; 12 M. L. T. 491; (1913) M. W. N. 991.

(8) (1867) 2 Ex. 316; 36 L. J. Ex. 194; 16 L. T. 771; 16 W. R. 15.

GANAPATHY MOOPPEN v. SUBBA NAYAKKAN.

Munsif's issue No. 1, "whether the street is a private street?" Findings shall be returned on the evidence on record within six weeks and seven days will be allowed for filing objections.

In compliance with the order contained in the above judgment the District Judge of Madura submitted the following

FINDING.—The High Court has remanded this appeal to me for a finding as to (1) Whether the street is a private street, and (2) Whether plaintiffs suffered any special damage.

2. As to whether the street is a private street. The onus is clearly on the defendants to show it is not, as under the Local Boards Act all streets are presumed to be public streets, unless the contrary is shown. This particular street is shown in the survey plan, Exhibit J, as a cart-track, and that plan is more than 30 years old. Exhibit H, the Settlement Register, shows that 20 per cent. has been deducted for roads, channels, streets, etc., from all Pattas, and the Pattadars have no rights in such roads and channels merely because they happen to be shown in their Pattas. *Kandasawmy Mudali* v. *Subraya Mudali* (4) sets out the law on the point. In Exhibit B, the defendants all say that they are determined not to allow processions to pass. In a criminal case, Exhibit 1, they did not set up that it was a private road. D. W. No. 1's evidence before the Magistrate was that it was a public street. D. W. No 3, the Karnam, says that the street is partly Poramboke and partly a Patta land. The defendants have produced no Pattas to show that this street is private, and even if they did do so, Exhibit H would show that deduction had been made for the cart-track as it then was and that it was not a part of the Pattadar's private land.

My finding is that the street is a public street.

3. *Issue* No. 2.—The plaintiffs did not set up any special damage. They claimed that it is a public street and as such they were entitled to use it. It is not open to the public to file a suit for an injunction and declaration with reference to the obstructing of a street, unless special damage is proved. The plaintiffs have got to show that they have suffered special damage. Originally, they set up losses owing to the marriage being adjourned, also costs of the criminal cases and also loss of reputation making Rs. 536-4-0 in all and they sued for Rs. 350. In appeal, they claimed Rs. 200 only on the first two items, but in the High Court, they claimed only Rs. 10 as damages. As nothing is shown as to how this Rs. 10 is arrived at, presumably it is based on the lower Court's finding that had it had to assess damages, it would have fixed Rs. 10. Plaintiffs are certainly not entitled to damages for costs of the criminal cases and they have withdrawn their claim for loss of reputation.

Therefore, presumably they claim only on the first ground of losses owing to the marriage being adjourned in that they had to pay Rs. 25 for horses, Rs. 12 for flowers and Rs. 25 for a piper; but it is in evidence that they could have gone on horseback with the piper and with the flowers to the second temple by another route as they had already visited the first. Therefore, I do not consider that these items of expenditure can be regarded as special damages. The only damage that apparently they suffered was not being allowed to go on horseback through this particular street. I find it difficult to fix any monetary value on this obstruction.

I would, therefore, find that no special damage has been made out.

This second appeal coming on for final hearing after the return of the finding of the lower Appellate Court on the issues referred by this Court for trial, the Court delivered the following

JUDGMENT.—Defendants' objection to the finding that the street in question is public is not pressed. We accept the finding.

On the other point remanded we understand the District Judge to have found that plaintiffs suffered special damage in consequence of their not being allowed to ride on horseback through the street, although that damage was not assessable in money. We dissent only from the latter portion of this, for we can see no reason why compensation cannot be awarded on an estimate of the moral damage suffered. It is not, however, necessary for us to ask the District Judge to make such an award or to make one ourselves, since appellants

do not press for damages and their right to them is material only as justifying their claim to the other reliefs asked for, a declaration and injunction. As the street is public and special damage has been sustained, their right to these reliefs is established. We, therefore, allow the appeal to the exent that the lower Court's decisions are set aside; that plaintiffs will have a decree for declaration that they have a right to pass through the street lying east of the Tirumangalam road on horseback on the occasion of marriages and to a corresponding injunction.

The parties will pay and receive proportionate costs throughout.

Appeal allowed.

M. C. P.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2784 OF 1916.

May 31, 1917.

Present:—Mr. Justice Broadway.

MUHAMMAD BAKHSH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Musammat AMIR BEGAM—PLAINTIFF—RESPONDENT.

Registration Act (XVI of 1908), s 49—Unregistered sale-deed, admissibility of, to prove dower.

An unregistered sale-deed purporting to convey certain property of the value of Rs 1,000 to the plaintiff in lieu of her dower is admissible in evidence to prove two collateral purposes: (1) that the dower was fixed at Rs. 1,000 in cash and (2) that a certain person stood surety for the payment of the sum. [p. 838, col. 1.]

Second appeal from the decree of the District Judge, Jhelum, dated the 11th May 1916.

Mr. *Gobind Das*, for the Appellants.

Mr. *Abdur Rashid*, for the Respondent.

JUDGMENT.—The facts of this case are contained in the judgments of the Courts below and need not be repeated here at any length. *Musammat* Amir Begam, the plaintiff, instituted a suit on 8th November 1915 against Fazal Ilahi, her husband, and Muhammad Bakhsh, her father-in-law, for Rs. 1,000, alleging that this sum had been fixed as her dower at the time of her marriage with Fazal Ilahi, but had not been paid. Muhammad Bakhsh was stated to have stood surety for this amount.

The primary Court decreed the claim, and on appeal by the defendants, the decree was maintained by the learned District Judge.

Against the said decree the defendants have preferred this second appeal through Mr. Gobind Das and I have heard Mr. A. Rashid on behalf of the respondent *Musammat* Amir Begam. The marriage took place on 30th December 1906 at Gujrat. The plaintiffs' case was that Rs. 1,000 was fixed as dower in cash, while the defendants alleged (1) that the dower fixed was that prescribed by Muhammadan Law, *viz.*, Rs. 32, and (2) that in lieu thereof immoveable property to the value of Rs. 1,000 was agreed upon, but as this document was not registered the claim for dower was not maintainable.

It was also pleaded that the suit was barred by the Statute of Limitation.

The Courts below have held that the suit is within limitation and it will be as well to consider this question first. According to the plaintiff the demand was made and refused shortly before the institution. According to the defendants the time commenced to run in January 1907, when the registration of the document relating to the dower (of which more later) was finally refused. The limitation for a suit of this nature is 3 years as prescribed by Article 103 of the Indian Limitation Act—the question, however, is as to when the dower was demanded. It seems to me that so long as the plaintiff was living with her husband the likelihood of a demand being made was exceedingly remote. In the plaint it was averred that the plaintiff was turned out $1\frac{1}{2}$ years prior to suit. The plea of the defendants was that the plaintiff had not been turned out but had gone on a visit to her parental home, and had been prevented from returning.

The period of her departure, *viz.*, $1\frac{1}{2}$ years prior to suit was not contested or questioned. In these circumstances I see no reason for discrediting the plaintiff's assertion that no demand was made (or refused) until she left (or was turned out of) her husband's home and the suit must, therefore, be held to be within time.

The allegation in the plaint was that Rs 1,000 had been fixed as the dower in cash, and this is what has been held by the Courts

below. In arriving at this finding reliance has been placed on a deed of sale. This deed of sale was executed on the date of the marriage (30th December 1906), and purported to convey a shop and two houses situate in Rawalpindi to the plaintiff in lieu of the Rs. 1,000 fixed as dower.

The principal party to this sale was the father-in-law. The deed not having been registered objection was taken to its admissibility for any purpose whatsoever. The Courts below, however, held that it was admissible to prove two collateral purposes, (1) the fact that the dower was fixed at Rs. 1,000 in cash, and (2) that the father-in-law had undertaken to be surety for the payment of this sum. After a careful consideration of the document and Mr. Govind Das' arguments with regard to it, I am of opinion that the Courts below have rightly held that it was admissible for the purposes stated above. Mr. Govind Das referred me to *Pool* v. *Secretary of State* (1), *Ghansham Das* v. *Hemraj* (2) and *Buta Singh* v. *Gurdit Singh* (3), but these rulings are clearly distinguishable. The deed of sale in question was clearly written *after* the marriage ceremony had been performed. It follows, therefore, that it was executed after the dower had been fixed, and this is borne out by the deed itself, which recites that the dower had been fixed at Rs. 1,000 and then goes on to say that in lieu of this sum the property specified therein was sold to the plaintiff. It seems to me clear that the intention of the executants was to convey the said property as payment of the dower agreed upon and in that way to discharge the liability incurred at the time of the marriage. In other words, instead of paying the dower in cash they professed to pay it in immoveable property of equivalent value. As, however, this contract was not carried out the liability was not discharged, and it seems to me indisputable that this document can be used as evidence to show the amount of dower that had been agreed upon. Mr. Govind Das, however, contended that the dower had been fixed at one house and two shops as was entered in the marriage register. I see no reason for differing from the conclusion arrived at by the Courts below on this point, even if it were possible for me to go into this question. As to this it seems to me that the question is one of fact and is one that cannot be challenged in second appeal. No doubt under Muhammadan Law immoveable property may be fixed as dower but according to general practice a sum of money is usually fixed, and I see no reason to doubt that the general practice was followed in the present case as alleged by the plaintiff.

I have, therefore, no hesitation in holding that the Courts below are right in the view they have taken on this point and that Rs. 1,000 were fixed as dower payable in cash.

The next point for consideration is the liability of the father-in-law, and to this I have given most anxious thought. The house and shops mentioned in the sale-deed belong to the father-in-law. There seems to be no doubt that the question of dower was one of considerable importance at the time. Fazal Ilahi was obviously (and practically admittedly) not in a position to pay the sum fixed, *viz.*, Rs. 1,000. There is, therefore, nothing strange in the allegation that his father bound himself to pay the sum. The deed of sale is a strong piece of evidence that this was the case, for otherwise it is difficult to understand why the father should have executed this sale-deed.

Further the question whether or not he stood surety for the payment is one of fact and has been found in favour of the plaintiff.

I am unable to see any reason to differ from the Courts below as to this and the appeal must, therefore, fail. I accordingly dismiss it with costs.

Appeal dismissed.

(1) 68 P. R. 1886.
(2) 92 P. R. 1890.
(3) 10 P. R. 1896.

GOVINDASAMI PILLAI *v.* PETHAPERUMAL CHETTY.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 719 OF 1915.

September 18, 1917.

Present:—Mr. Justice Spencer, Mr. Justice Srinivasa Aiyangar and Mr. Justice Krishnan.

GOVINDASAMI PILLAI—DEFENDANT—APPELLANT

versus

PETHAPERUMAL CHETTY, DEAD, AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 96—Symbolical possession and paper delivery, distinction between—Mortgage—Lease by mortgagee—Redemption of mortgage by owner or purchaser of equity of redemption—Determination of lease.

Symbolical possession is given only in cases where the party in actual possession is entitled to remain in such possession as in cases of delivery under Order XXI, rule 96, Civil Procedure Code, and should not be confounded with cases where a party is entitled to actual possession but obtains only what is called a paper delivery, *i. e.*, where he gets no possession at all. [p. 840, col. 1.]

Obiter.—A lease created by a mortgagee determines *ipso facto* on redemption of the mortgage by the mortgagor or the purchaser of the equity of redemption. The position is, however, different where the mortgage is only assigned.

Second appeal against the decree of the Subordinate Judge, Tanjore, in Appeal Suit No. 388 of 1914, preferred against that of the Court of the District Munsif, Tiruvadi, in Original Suit No. 223 of 1913.

Mr. *G. S. Ramachandra Aiyar*, for the Appellant.

Mr. *T. Narasimha Iyengar*, for the Respondents.

The second appeal coming on for hearing on 28th March 1917, the Court (Spencer and Srinivasa Aiyangar, JJ.) delivered the following

JUDGMENT.—The facts are somewhat complicated, but when once they are apprehended it appears to be clear that there is no finding on the point now in dispute. The suit was for rent of certain lands for the years 1910-1911, 1911-1912, and 1912-1913. The defendant's plea was that he was dispossessed of the land by one Ramasami Mooppan who was the real owner and was not, therefore, bound to pay rent after the date of his dispossession to the plaintiff, who is the assignee of his landlord Subramania Josier. As regards the first two years there is a concurrent finding of fact by both the lower Courts that the defendant was not evicted by any body and we accept that finding. As regards the third year which began in March 1912, and ended with March 1913, it is said that evidence clearly proved eviction at least in May 1912 by Ramasami Mooppan. The first Court found it was not proved by the defendant that there was any eviction. In appeal the lower Appellate Court does not find definitely one way or the other. A certain amount of confusion has arisen owing to the history of the title to this property. The lands originally belonged to a Mahratta gentleman, who mortgaged them with possession to Chithambaram Chetty or to a predecessor of his in title. While Chithambaram was in possession as mortgagee, a suit was instituted against him for money by one Srinivasa Aiyangar who got the mortgage right attached before judgment, which he brought to sale in execution after obtaining a decree and purchased it himself. The attachment appears to have been made in 1904. The mortgagee Chithambaram Chetty leased the lands to one Alagiri, who in his turn leased to Subramania Josier, the landlord of the defendant. After the lease to Alagiri, Chithambaram appears to have sold the *othi* right to Kandasami Mooppan. Ramasami Mooppan had become the owner of the equity of redemption of the Mahratta gentleman and appears to have redeemed Kandaswami, the assignee of the mortgage, and appears to have claimed actual possession of the property from the lessees of Chithambaram on the ground that after redemption by him, there was no subsisting title in the mortgagee Chithambaram to sustain any lease by him. On this claim, Ramaswami Mooppan appears to have obstructed the defendant in cultivating the land and on his complaint his landlord Subramania Josier applied to a Magistrate under section 145 of the Criminal Procedure Code to protect the possession of his lessee, the defendant. This petition was, however, dismissed in August 1912 on the ground that the property had been delivered to Srinivasa Aiyangar who took certain proceedings in execution as purchaser against Chithambaram, the mortgagee. Ramasami Mooppan claimed the land against Srinivasa Aiyangar, the purchaser. The merits of that claim it is unnecessary to specify now. Ramasami Mooppan's claim

was disallowed and he filed a suit to establish his claim. In the meantime the execution-purchaser Srinivasa Aiyangar applied to be placed in possession of the lands as purchaser of the mortgage interest of Chithambaram. That application appears to have been opposed by Subramania Josier, the landlord of the defendant, but Srinivasa Aiyangar was according to the language of the receipt placed in possession in August 1912 (Exhibit V). Whether he was actually placed in physical possession of the land, who was then in possession, whether it was the *defendant* or Ramasami Mooppan who is said to have obstructed the defendant and taken possession in May 1912 is not found. The Pleader for the appellant contends that the defendant was evicted by Ramasami Mooppan at any rate by the end of May 1912 and that Ramasami Mooppan was the real owner as his title was established against Srinivasa Aiyangar, the purchaser, and if Srinivasa Aiyangar did get possession in August 1912 he got it from Ramasami Mooppan and so far as he the defendant was concerned, when once he was evicted by the real owner, (that is) Ramasami Mooppan, it did not matter to him, whether the real owner was subsequently ejected or not. The respondent's Pleader contends that the defendant was not ejected at all, and if he was ejected by Ramasami Mooppan, Ramasami must be considered to be a trespasser as he had agreed with Subramania Josier to allow him to continue in possession as lessee during the whole period of his lease. Whether this is so or not is again not found. Further it is not found whether as a matter of fact Srinivasa Aiyangar dispossessed any body when he is said to have obtained possession under Exhibit V. It is said he obtained symbolical possession. We must point out that symbolical possession is given only in cases where the party in actual possession is entitled to remain in such possession as in cases of delivery under Order XXI, rule 96, of the Code of Civil Procedure and should not be confounded with cases where a party is entitled to actual possession, but obtains only what is called a paper delivery, (that is), where he gets no possession at all. It is clear from the above statements of facts that there must be a finding on the following points:—

(1) Whether the defendant was actually ousted from the lands in May 1912 by Ramasami Mooppan.

(2) If he was, whether Ramasami Mooppan had a title paramount to that of Subramania Josier, the landlord of the defendant. The effect of the alleged agreement Exhibit C must also be considered.

(3) If the defendant was not evicted by Ramasami Mooppan, was he evicted in August 1912 by Srinvasa Aiyangar by reason of the delivery evidenced by the receipt Exhibit V? And if he was so evicted, had Srinivasa Aiyangar a paramount title?

(4) Did the defendant remain in possession without being evicted by anybody during the year 1912—1913?

The finding must be on the evidence on the record, except as to issue (2) on which any adjudication between Srinivasa Aiyangar and Ramasami Mooppan may be admitted. Finding is to be returned before the 17th July 1917 and seven days are allowed for objections.

In compliance with the order contained in the above judgment, the Subordinate Judge of Tanjore submitted the following

FINDINGS.

The four issues remitted to this Court for finding are :—

"I. Whether the defendant was actually ousted from the lands in May 1912 by Ramaswami Mooppan?

"II. If he was, whether Ramaswami Mooppan had a title paramount to that of Subramania Josier, the landlord of the defendant?

"III. If the defendant was not evicted by Ramasami Mooppan, was he evicted in August 1912 by Srinivasa Aiyangar by reason of the delivery evidenced by the receipt Exhibit V? and if he was so evicted, had Srinivasa Aiyangar a paramount title?

"IV. Did the defendant remain in possession without being evicted by any body during the year 1912-1913?"

2. The findings were directed to be on the evidence on record, except as to issue No. 2 in which any adjudication between Srinivasa Aiyangar and Ramaswami Mooppan was allowed to be received. The defendant pro-

duced a number of documents under that provision and Exhibits X to XIII were filed as they alone related to adjudication between Srinivasa Aiyangar and Ramaswami Mooppan.

3. Chidambara Chetti leased the lands while he was in possession as usufructuary mortgagee to Alagiri Chetti in 1905 and the latter is said to have leased the same to Subramania Josier in 1907. Subramania Josier leased to the defendant's father Perumilu Pillai for 3 years under Exhibit A, dated 2nd March 1910. Although the documents relating to the leases to Alagiri and Josier are not filed, it appears that the former obtained a lease for 10 years from 1905 and that the latter obtained his lease for 8 years under a registered deed, dated 10th August 1907 (*vide*, Exhibits IV and C). The lease would, therefore, expire in April 1915.

4. The plaintiff derived his interest from Josier on 21st March 1911. A mistake has been made by the first Court and also my predecessor in reading this document as one of transfer of lease. It appears to be a transfer of debt in favour of the plaintiff, because the assignee merely gets the right to recover the rent due under the lease Exhibit A and nothing more.

5. The date of the sale of the equity of redemption in Original Suit No. 372 of 1906 under which Muthayya Chetti the decree-holder purchased it is not in evidence, but Ramaswami Mooppan purchased it from him on 21st April 1911. The agreement Exhibit C was made on 29th May 1911 between Subramania Josier and Ramaswami Mooppan, under which the latter agreed that Josier should enjoy his lease-hold for the remaining 4 years according to the lease in his favour and deliver it to Ramaswami Mooppan on 13th April 1915. The sale of the mortgage interest of Chidambara Chetti in favour of Kandaswami Mooppan was on 25th September 1910. Ramaswami Mooppan purchased this interest on 2nd September 1911. Upon the strength of it he filed a claim petition in Original Suit No. 234 of 1904 on the 30th of September 1911, which was dismissed on 11th October 1911 on the ground that the attachment was in 1904 and the claim was made late. There was no investigation. The purchase under the Court sale in Original Suit No. 324 of 1904 which followed upon this was on 6th December 1911. Immediately Ramaswami Mooppan filed his suit, Original Suit No. 6 of 1912, on the 18th December 1911. In April 1912 Ramaswami Mooppan and Subramania Josier were parties to some obstruction proceedings in respect to the delivery of property as per this sale (see Exhibits VI*a* and VI*b*). The obstruction was evidently overruled, because delivery was made to Srinivasa Aiyangar on 23rd August 1912 (Exhibit V).

6. On the 1st June 1912 Subramania Josier applied under section 145 of the Criminal Procedure Code against Ramaswami Mooppan complaining of disturbance of possession and for establishing him in possession of the property free from interference of Ramaswami Mooppan. Ramasawmi Mooppan on the other hand applied to the Court in Execution Appeal No. 1088 of 1912 in Original Suit No. 234 of 1904 that his possession may not be disturbed by Srinivasa Aiyangar, the purchaser in Original Suit No. 234 of 1904, pending disposal of the suit Original Suit No. 6 of 1912 (Exhibits II). The petition to the Criminal Court was dismissed on 31st August 1912 on the representation of the petitioner Subramania Josier that the properties had gone into the possession of a third party under a Civil Court sale. The delivery receipt Exhibit V shows that Srinivasa Aiyangar obtained delivery of possession on 23rd August 1912.

7. Ramaswami Mooppan failed to obtain a decree (in Original Suit No. 6 of 1912) in his favour in the first and second Courts, but their Lordships of the High Court set aside those judgments and remanded the suit for disposal on the other issues which were raised in the case. The contention of Ramaswami Mooppan in that suit was that the attachment (in Original Suit No. 234 of 1904) made in 1904 was invalid and had ceased to exist when Chidambara Chetti transferred his interest in the mortgage to Kandaswami Mooppan in 1910. Their Lordships held that the attachment was invalid as not having been made under section 268 of the old Civil Procedure Code, and a payment to the mortgagee or his representative by the person who held the equity of redemption was not in contravention of any attachment validly subsisting.

8. The further trial was held by the District Munsif of Tiruvadi who raised an-

other question, that the validity of the attachment did not invalidate the subsequent sale held upon it and that the *bona fides* and validity of the transfer to Kandaswami Mooppan should be decided before the Court sale in favour of Srinivasa Aiyangar could be held null and void as against Ramaswami Mooppan, the assignee from Kandaswami Mooppan. He held that the transfer was not void or in fraud of creditors and upheld the plaintiff's contention in the revised judgment in Original Suit No. 6 of 1912 (Exhibit XII). That decision was confirmed in appeal by the Sub-Court of Kumbakonam (Exhibit XIII). The position, therefore, is that Ramaswami Mooppan became the owner of the property free of all incumbrances on the 2nd September 1911.

9. The case of the defendant in the present suit is that Ramaswami Mooppan disturbed his possession in 1911. The evidence of D.W. No. 1, Ramaswami Mooppan, shows that the sub-lessees of defendant obstructed him when he went to take possession in Purattasi of 1911, that Sundarappayyar (co-owner with or agent of Subramania Josier) also claimed title and obstructed him and that they carried away the crops. But in the Masi following he took possession of the land and defendant or his father did not enjoy it afterwards. He raised *Cumbu* in Vaikasi of 1912 and harvested the crops. His surety Govinda Mooppan raised it and it was harvested in the presence of the Police Inspector. Evidently this refers to the possession proceedings which took place about that time. D. Ws. Nos. 2 and 3 state that from Chitrai 1912 Ramaswami Mooppan was in possession and that though Subramania Josier claimed from the cultivator Govinda Mooppan, he did not get any share of the crops. P. Ws. Nos. 2 and 3 also admit that from Chitra 1913 Ramaswami Mooppan was in possession.

10. From the several judicial proceedings referred to above it is clear that Ramaswami Mooppan would have no *locus standi* if he had not possession. He gave security and had delivery to Srinivasa Aiyangar stayed. It is unlikely that he would not have taken possession in order to substantiate the case which he was then fighting against Srinivasa Aiyangar. He had no doubt undertaken under Exhibit C in May 1911 that he would allow Subramania Josier to continue in possession till the expiry of the term of the lease in his favour and it was argued on plaintiff's behalf that it is unlikely that he would have broken his agreement so soon after. It was pointed out that defendant's case was that Ramaswami Mooppan trespassed upon the land in Purattasi 1911 and dispossessed defendant and that there is a change of case now about dispossession in Chitrai 1912 The explanation about the change of case is found in the evidence of Ramaswami Mooppan as D. W. No. 1. As to his breaking the agreement so shortly after it was made, a reference to the dates of the proceedings recited above clearly shows the motive and renders his action in taking the matter into his own hands, instead of leaving Subramania Josier to fight out Srinivasa Aiyangar and perhaps to jeopardise his interests, quite intelligible. When he made the agreement Exhibit C Srinivasa Aiyangar was not in the field. So long as it was a matter between himself and the tenant Subramania Josier, Ramaswami Mooppan might have been quite willing to continue the lease, because in putting an end to the lease there may be questions of re-payment of premium and so forth and Ramaswami Mooppan actually appears to have paid Rs. 400 for certain improvements effected by Subramania Josier. But when Srinivasa Aiyangar came forward with his claim under an old attachment of 1904, which if substantiated would render invalid the transfer of mortgage by Chidambara Chetti in favour of Kandasami Mooppan, he could not be expected to sit idle and let Subramania Josier continue in possession throwing suspicion on the sale to himself by leaving room for the argument that Ramaswami Mooppan was not even in possession of the land, as he ought to be if he was a real purchaser.

11. On the 1st issue, therefore, I find, that Ramaswami Mooppan actually dispossessed the defendant in May 1912.

12. On the 2nd issue, I find that Ramaswami Mooppan had a title paramount to that of the landlord of the defendant, because in him had become vested in

September 1911 both the usufructuary mortgage and its equity of redemption.

13. Turning now to the effect of the agreement Exhibit C upon this title, I have to point out that it is an agreement entered into between Subramania Josier and Ramaswami Mooppan. Plaintiff became a transferee in March 1911, while this agreement was made in May 1911 to enure beyond the period of defendant's interest. The defendant or his father was not a party to this agreement. There was, therefore, no privity of contract between the two and I cannot see how defendant can claim the benefit of that agreement. It rested on defendant to show that he was ousted by a person having a paramount title and Exhibit C is put forward in answer by the plaintiff to depreciate it. If he is not bound by the agreement I cannot see how he could claim benefit under it.

14. It was suggested by the defendant's Vakil in argument that when the paramount title was proved, it mattered little whether the holder of such title actually dispossessed the defendant or not, because an incumbrance created by the usufructuary mortgagee had come to an end when the mortgage was redeemed. Leases created by him would not stand on any higher footing. It may be that a tenant will have the right to emblements or there may be an apportionment of the rent, but apart from such rights and liabilities specially created by the law for the current agricultural year, the tenant holding over was at the best but a trespasser who would be liable to pay the mesne profits to the person who was entitled in ownership Subramania Josier's title to recover rent terminated with the redemption and, therefore, the assignee of Josier could be in no better position. It is unnecessary to say anything about this argument, because I have found that Ramaswami Mooppan did as a matter of fact take possession of the land from the tenant. I refer to this argument only because the Vakil further argued that Exhibit C was inoperative or ineffective, because it was entered into by Ramaswami Mooppan at a time when he was not the owner of the mortgage rights. He was only the owner of the equity of redemption and had, therefore, no title to immediate possession. Any agreement entered into by him in respect of future possession was, therefore, invalid. I am unable to accept this argument because the owner of the equity of redemption, as he is called, is in reality the owner of the land. The mortgage is only a subsidiary interest and subordinate to ownership. The owner could always enter into agreements with tenants in possession holding under precarious titles so as to confirm them in their possession at his pleasure. Moreover, even if Ramaswami Mooppan was not full owner capable of giving effect to the agreement into which he entered, it is clear that when the estate came into possession he would be bound by such agreement. The argument, moreover, contains a fallacy that the agreement was not to have future effect. Ramaswami Mooppan could not have entered into any agreement about present possession but only about the future and what he did was, therefore, perfectly valid. I, therefore, find on the 2nd issue that Ramaswami Mooppan had a paramount title.

15. The Vakil for defendant informed me that he did not press issues Nos. 3 and 4, that it was not his case that he was dispossessed by Srinivasa Aiyangar and that no findings need, therefore, be recorded upon them.

This second appeal coming on for final hearing after the return of the findings of the lower Appellate Court upon the issues referred by this Court for trial, the Court delivered the following

JUDGMENT.—On the findings now returned the decrees of the lower Courts must be modified. It is argued, however, that the finding that Ramaswami Mooppan had a title paramount is not correct, because it is alleged that he having obtained the equity of redemption took an assignment of the usufructuary mortgage right from the mortgagee and as such assignee he was bound by the lease in respondent's assignor's favour which had been created by the mortgagee prior to the assignment of the mortgage itself. This argument depends entirely on the position that Ramaswami Mooppan was an assignee; but this is not clear. The appellant states that he, the

Mooppan, redeemed the mortgage and thus became the full owner, in which case, of course, the lease created by the mortgagee will not bind the Mooppan. Respondent has raised this question for the first time now; as the facts are not clear in his favour, we cannot allow him to take it. If he had intended to rely on the point he should have laid a proper foundation for it by proving the necessary facts at the proper time.

Accepting the findings, the decree of the lower Court must be modified by substituting Rs. 1,152-4-0 and interest on it for Rs. 2,041-8 0 and interest on it. Parties will pay and receive proportionate costs throughout.

Decree modified.

M. C. P.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 295 OF 1917.

August 4, 1917.

Present:—Mr. Justice Broadway.

MAJJU AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

TEJA SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Common land– Shamilat abadi—*Co-sharers, rights of—Co-sharer building on* shamilat—*Injunction, suit for—Damage.*

The mere circumstance of a building being erected on common land without the consent of the co-sharers and even despite their protest, is not sufficient in itself to entitle the aggrieved co-sharers to claim the demolition of the building so erected, unless it can be shown that the erection of the building has caused such material and substantial injury as cannot be remedied on a partition of the joint land. [p. 845, col. 1.]

Second appeal from the decree of the District Judge, Gurdaspur, dated the 18th January 1917.

Mr. *Brij Lal*, for the Appellants.

Messrs. *Sant Ram* and *Tek Chand*, for the Respondents.

JUDGMENT.—This is an appeal from a decree of the District Judge of Gurdaspur reversing a decree passed by the Munsif, 1st Class, in that District It appears that the land in suit is Abadi Shamilat of Patti Bakhta, and the proprietors of this Patti are the two appellants Majju and Ishar Singh and defendants-respondents Nos. 1—14. The total area of this Abadi Shamilat is 18 Kanals 19 Marlas, of which the two appellants claim to be entitled to a half. On the 12th May 1909 defendants respondents Nos. 1—14, the other co sharers in this Patti, executed a mortgage deed of 4 Kanals 3 Marlas of this common land. The appellants sought to get this mortgage set aside, but failed. They now have instituted the suit out of which this appeal has arisen, alleging that the respondents- mortgagees have erected a wall round the land mortgaged to them which they have no right to do and praying that a mandatory injunction be issued directing the removal of the said wall. The first Court decreed the plaintiffs' claim, but, as has been stated above, on appeal the learned District Judge reversed that decree and dismissed the plaintiffs' suit.

On behalf of the appellants I have heard Mr. Brij Lal and Mr. Tek Chand has addressed me on behalf of the respondents. Mr. Brij Lal referred me to paragraphs 225 and 235 of Rattigan's Digest of Customary Law and contended that inasmuch as the appellants were co-sharers, the mortgagees were not entitled to alter the condition of the joint property without their consent, and further that the appellants were entitled to restrain the mortgagees from appropriating the vacant site to their own exclusive use. Mr. Tek Chand, while admitting the force of paragraphs 225 and 235 above referred to, referred me to Explanations 2 and 3 to paragraph 225, more particularly laying stress on Explanation 3. Now, the mere circumstance of a building being erected on common land without the consent of the co-sharers and despite their protest even, has been held not sufficient in itself to entitle the aggrieved co-sharers to claim the demolition of the building so erected, unless it could be shown that the erection of that building had actually caused such material and substantial injury as could not be remedied on a partition of the joint land. This proposition is amply supported by authority, and my attention was drawn to *Sodhi Jowala Singh* v. *Sodhi Nagar Singh*

(1), *Ghulam Muhammad Khan* v. *Buta* (2) and *Hidayat Ali Khan* v. *Basit Ali Khan* (3). The last of these rulings appears to me to be directly in point. In that case one of the proprietors in the village had erected a Pakka building on a portion of the *abadi deh*; the moment the building was commenced objection had been taken to it and it was completed in spite of protest, and the objecting co-sharers had moved the Revenue Authorities for assistance. It was thus evident that there had been no acquiescence on the part of the objecting co-sharers who were 16 in number. They instituted a suit asking, as in the present case, to have the building demolished but they failed to prove any substantial damage from the building, and it was held that no substantial mischief having been satisfactorily established from the completed building the lower Court had exercised a wise discretion in refusing to order its demolition. It seems to me that the present case is very similar to the case of 1892. Here this piece of land was taken on mortgage by the mortgagees for a sum of Rs. 1,200, clearly with a view to erecting a walled enclosure, which they have now erected on it, in which to keep their cattle. The appellants had a perfectly simple and obvious remedy at their disposal, *viz.*, they could move the Revenue Authorities to partition the common land. Instead of doing this they attempted to have the mortgage set aside as stated above. Having failed in this up to this Court, they have now attempted to gain their object in this roundabout manner. They have entirely failed to show that any appreciable injury has been occasioned to them by the erection of this walled enclosure, and certainly no injury has been shown which could not be remedied on a partition of the joint land.

In these circumstances I am of opinion that the learned District Judge has exercised a wise discretion in refusing to order the demolition of this walled enclosure. I, therefore, reject this appeal with costs.

Appeal dismissed.

(1) 54 P. R. 1888.
(2) 187 P. R. 1889
(3) 54 P. R. 1892.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 561 OF 1915.
January 2, 1918.

Present:—Mr. Batten, A. J. C.

SUMERA—PLAINTIFF—APPELLANT
versus
PEMCHAND AND ANOTHER—DEFENDANTS—RESPONDENTS.

C. P. Tenancy Act (XI of 1898), s. 2 (3)—Landlord and tenant—Tenancy of undefined land, whether permissible.

There can be no tenancy within the meaning of the Central Provinces Tenancy Act of a share of land, if that share is not defined by metes and bounds. [p. 847, col. 1.]

Appeal from the decree of the District Judge Chhindwara, dated the 30th June 1915, in Appeal No. 57 of 1915.

Messrs. *M. Gupta* and *S. Ramdass*, for the Appellant.

Mr. *P. G. Misra*, for the Respondents.

JUDGMENT.—The plaintiff Sumera, appellant, brought the suit out of which this appeal arises in the Court of a Subordinate Judge who was a Revenue Officer, to recover possession of land from which he had been ejected, alleging that he was the ordinary tenant of the land in suit and that he had illegally been dispossessed by the defendants who were his landlords. The first Court held that the perpetual lease on which the plaintiff based his tenancy was not for the benefit of the first defendant, Pemchand, who was a minor at the time of the execution of the lease by his mother Sunderia, the 2nd defendant, and dismissed the suit. The learned District Judge dismissed the plaintiff's appeal on the sole ground that the plaintiff's suit as framed does not lie since, whatever rights the plaintiff may have as against the defendants, he is not the ordinary tenant of the land in suit. The only question raised in appeal to this Court is whether the District Judge was right in holding that the plaintiff is not a tenant. The plaintiff bases his claim to tenancy on a deed, dated the 6th April 1908, executed by the 2nd defendant on behalf of herself and of her minor son, the 1st defendant, the consideration mentioned in the deed being Rs. 1,500. The deed purports to be a perpetual lease. It states that the lessors have 7 *sir* fields with an area of 23·29 acres and 3 Khudkaskt fields with

an area of 13·99 acres. The area of each field is also given. But the whole of the fields are *not leased* out; of the total area of 37·28 acres, 24·42 are given on lease, *i.e.*, 15·55 acres of the 23·29 acres of *sir* and 8·87 acres of the 13·99 acres of Khudkasht. The area leased in each individual field is also given, amounting, as the District Judge observes, to about two-thirds of each field. The deed recites: "We have for the above Nazrana of Rs. 1,500 leased 24 42 acres of the undermentioned fields in perpetuity to Sumera on an annual rental of Rs. 9 and have put him in joint possession with us. The tenant has the right either to allow the 24·42 acres of *sir* and Khudkasht to remain in joint possession with us, or to get the same partitioned." It is not alleged that a partition was effected, and the dispossession complained of is dispossession from joint possession.

The learned District Judge has dealt with the subject as follows: —

"The question regarding tenancy is the real crux of the case. The plaintiff bases his claim to tenancy rights upon the lease of the 2nd April 1908. No definite piece of land was leased out, but only a certain undefined area out of a larger area. The terms of the lease gave the lessees two alternatives. Either he could apply for partition, in which case the area leased would be delineated by metes and bounds, and he would become an ordinary tenant of the land so *delineated*, or he could remain in joint possession of the whole with the lessor. As already stated there is no evidence that such a partition was effected. We must, therefore, assume that, if effect was given to the lease at all, Sumera remained in joint possession with the defendants of the entire home-farm. No single square yard of land did Sumera hold from the defendants, but in respect of each and every square yard of the home-farm he was in cultivating partnership with them. Sumera may have been in physical possession of the entire home-farm, but if so he was in possession partly as manager of Pemchand and Sunderia and partly on his own behalf as partner. Be this as it may, it is clear that he was never in possession of the area mentioned in the plaint as a separate entity. It follows that there was a cultivating partnership of the sort contemplated in *Kisan Sukal* v. *Jaiwant Rao Misar* (1) and *Khoshal Chowdhry* v. *Nanhu* (2) and that the plaintiff was not thereby constituted a tenant. There is a further question whether Pemchand as a 5 annas 4 pies co-sharer was competent to create a tenancy, into which it is not necessary to go. From what has been written above it is clear that no tenancy right was created in the plaintiff's favour. Whatever other rights he might have against the defendants, it follows that he could not maintain a suit in the Court of the Additional Subordinate Judge in the capacity of a tenant who had been ejected by the landlord.....The question whether the appellant has any, and if so, what remedy against the defendants is one with which I have now no concern. It suffices for the determination of this appeal to decide that the appellant had not the remedy of suing as a tenant to recover possession of a holding from which he had been dispossessed by the landlord."

It is to be noted that no notification under section 62 (2) of the Central Provinces Tenancy Act has been made for the Chhindwara District, and the appellant does not contend that he is a tenant because he cultivated in partnership with the defendant. Nor is it argued for the respondents that the Court of first instance had no jurisdiction to entertain a suit of any character since, under the proviso to section 97 of the Tenancy Act, while only a Revenue Officer can entertain a suit between landlord and tenant as such, the jurisdiction of a Civil Court presided over by a Revenue Officer is not expressly restricted to suits between landlords and tenants. The suit has been dismissed on the ground that the plaintiff claims as a tenant, and is not a tenant, and the sole question before me is whether the District Judge is right in holding that the plaintiff is not a tenant. It is argued for the appellant that he was made a tenant of 42·42 acres by the deed of lease, and that, therefore, he is an ordinary tenant of that area.

The problem may be simplified without any essential alteration by considering only

(1) 3 C. P. L. R. 180.
(2) 6 C. P. L. R. 117.

one of the fields. Khudkasht Field No. 91 measures 20 acres, of which only an area of 14 acres was leased, or roughly speaking three-quarters. Does a lease of an unspecified ¾ share of a field constitute the lessee an ordinary tenant of that share within the scope of the Tenancy Act? To answer this question we must look to the definitions in the Act. With reference to the definition of tenant we have to see whether the plaintiff is a person, who, under the deed, holds "land" from the defendants. To be a tenant a person must be the holder of land; that is to say, the land of which he claims to be the tenant must be a "holding." A "holding" means a parcel of land held by a tenant from a landlord under a lease. I do not see how a share, not defined by metes and bounds, can be described as a "parcel" of land. A "parcel" of land must be a definite piece of land. To parcel means to divide into portions and what is not divided off cannot be a parcel. For these reasons I am of opinion that there can be no tenancy, within the meaning of the Tenancy Act, of a share of land if that share is not divided off by metes and bounds, and that the learned District Judge has taken a correct view of the law. As the plaintiff claims to be a tenant within the meaning of the Tenancy Act, and as he is not such a tenant, his suit has rightly been dismissed.

The appeal is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL NO. 4 OF 1912.

November 15, 1912.

Present:—Sir Arnold White, KT., Chief Justice, and Mr. Justice Sankaran Nair.

K. HAJEE ABDUL LATEEF SAHIB AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

THE OFFICIAL ASSIGNEE OF MADRAS —DEFENDANT—RESPONDENT.

Presidency Towns Insolvency Act (III of 1909), s. 7, order under—Suit to set aside order, maintainability of—Appeal.

No suit lies to set aside an order passed under section 7 of the Presidency Towns Insolvency Act. The proper remedy for the party aggrieved is to appeal against the order.

Appeal from the following judgment of Mr. Justice Wallis, in Civil Suit No. 206 of 1911 :—

"The order was made by the Insolvency Court exercising jurisdiction under section 7, which corresponds to section 102 of the Bankruptcy Act. No case has been cited in which it was ever attempted to set aside an order under the English section by a suit. No right to set aside the order by suit is given as in the case of claims under the Civil Procedure Code. The proper remedy, in my opinion, is by way of appeal and this is the remedy resorted to in the English cases. I hold that the plaint discloses no cause of action and dismiss it with costs."

Mr. *A. Krishnasami Ayyar* for Mr. *C. P. Ramasami Aiyar*, for the Appellants

Messrs. *M. D. Devadoss* and *M. K. Ramasami Ayyar*, for the Respondent.

JUDGMENT.—The appellants made an application in the insolvency of A. S. Mahomad Oosman Sahib and Co. and asked for a declaration that certain goods, which had been seized by the Official Assignee after adjudication, were their property and not the property of the insolvents. This application was dismissed on the merits. The appellant then brought a suit against the Official Assignee for the declaration which he had asked for in his application in the insolvency. No authority has been cited in support of the contention that such a suit will lie. In our opinion it will not.

We see no reason for interfering with Wallis, J.'s order refusing leave to amend the plaint.

The appeal is dismissed with taxed costs.

Appeal dismissed.

M. C. P.

PUNJAB CHIEF COURT.

CIVIL APPEAL No. 1381 OF 1917.

August 1, 1917.

Present:—Mr. Justice Broadway.

GOKAL CHAND AND OTHERS—APPELLANTS

versus

THE OFFICIAL LIQUIDATORS, DOABA BANK, LIMITED—RESPONDENTS.

Company—Liquidation—Deposit receipt in name of several joint holders—Liquidator, whether bound to pay dividend to some holders.

Where a fixed deposit receipt issued by a Bank which has since gone into liquidation is in the name of several persons and is not payable to "either or survivor", the liquidator is not bound to pay the dividend on the receipt to any one or more of the joint holders of the receipt without obtaining a discharge from all the holders.

Miscellaneous first appeal from the order of the Additional Judge, Lahore, dated the 27th April 1917.

Mr. *Madan Gopal*, for the Appellants.

Mr. *S. K. Mukerji*, for the Respondents.

JUDGMENT.—This is an appeal from an order of the Additional Judge, Lahore, refusing to pass an order for payment of dividends to the applicants, the present appellants, on monies due by the Doaba Bank, Limited, in liquidation.

The facts of the case are as follows:—

The Doaba Bank, Limited, in liquidation, was liable to pay Messrs. Gokal Chand, Bishen Das, Daya Ram, Jaikishen Das and Sunder Singh monies on a fixed deposit receipt in their favour. This fixed deposit receipt is in the name of all the five persons named, and is not payable to "either or survivor." Of these five persons Messrs. Bishen Das and Jaikishen Das have died and Sunder Singh has been declared an insolvent. The liquidator of the Bank objected to pay a second dividend that has fallen due, and which amounts to a sum of Rs. 23,000, on the ground that the deposit is in the joint names of the five persons and that a payment to Messrs. Gokal Chand and Daya Ram would not be a valid discharge, the representatives of the deceased persons having failed to produce any succession certificate or Probate of Wills said to be executed by the deceased gentlemen. Further, in the case of the insolvent the Official Receiver has not as yet joined in the application for payment of the dividend. Finally, it was objected that against some of these five persons the liquidator had a counter-claim on account of monies due by them as partners of a concern known as the Phagwara Mills. The liquidator claims an equitable set-off in connection with this claim. Neither Mr. Madan Gopal for the appellant nor the liquidator Mr. S. K. Mukerji has been able to give me sufficient material as regards the equitable set-off claimed to enable me to express any opinion whether it can be allowed or not. Mr. Madan Gopal, however, referred me to Order XXI, rule 15, Civil Procedure Code, by way of analogy and argued that his clients could insist on being paid these dividends on their furnishing the liquidator with an indemnity bond indemnifying him against all claims that might be made by any of the representatives of the deceased gentlemen or the Official Receiver. No authority has been cited in support of this contention and I am unable to accede to it. In *Mathra Das* v. *Nizam Din* (1) it was held by a Full Bench of this Court that payment of the mortgage-money to one of several co-mortgagors without the consent of the other co-mortgagors is not a complete discharge of the mortgage-debt binding on all the mortgagees, and it seems to me that the liquidator is not bound to pay this dividend to any one or more of the joint holders of these fixed deposit receipts without obtaining a discharge from all of the said holders of the fixed deposit receipts. Apparently the heirs or legal representatives of the deceased gentlemen object to take out Probate of the Wills executed, admittedly, by Messrs. Bishen Das and Jaikishen Das. In these circumstances I am unable to say that the order of the learned Additional Judge is illegal or incorrect, and I accordingly reject this appeal, leaving it to the parties to come to such an arrangement as may be possible and legal subject to the sanction of the District Judge in charge of the liquidation proceedings. Parties will pay their own costs in this Court.

Appeal rejected.

(1) 41 Ind. Cas 921; 68 P. R. 1917; 107 P. L. R. 1917; 81 P. W. R. 1917.

PONNUSAMI PILLAI *v.* CHIDAMBARAM CHETTIAR.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 39 OF 1917.

December 19, 1917.

Present:—Mr. Justice Spencer and Mr. Justice Kumaraswami Sastri.

M. PONNUSAMI PILLAI AND ANOTHER—RESPONDENTS—APPELLANTS

versus

CHIDAMBARAM CHETTIAR AND OTHERS—PLAINTIFF No. 2 AND PETITIONERS Nos. 3, 5 TO 20—RESPONDENTS.

Execution—Decree, assignment of, pending appeal—Assignee, right of, to execute decree in appeal—Hindu Law—Joint trading family—Power-of-attorney granted by two members, whether terminates on death of one—Contract Act (IX of 1872), s 253 (10).

When a decree is assigned, what is transferred is not the decree itself but the interest of the decree-holder in the decree as may be finally determined. [p. 849, col. 2.]

An assignment of a decree, therefore, during the pendency of an appeal against it carries with it the right to execute the decree passed in appeal. [p. 849, col. 2.]

A power-of-attorney granted to a person by two or more members of a Hindu trading family is not terminated by the death of one of them where the interest of the deceased member passes to the surviving member. The analogy of section 253 (10) of the Contract Act does not apply to such cases. [p. 849, col. 2.]

Appeal against the order of the Court of the District Judge, Tanjore, in Appeal Suit No. 375 of 1915, preferred against that of the Court of the Principal District Munsif, Kumbakonam, in Miscellaneous Appeal No. 1125 of 1913, in Original Suit No. 40 of 1911.

Mr. *G. S. Ramachandra Aiyar*, for the Appellants.

Mr. *K. Ramachandra Aiyar*, for the Respondents.

JUDGMENT.—The first question to be decided in this appeal is whether the assignment *pendente lite* of the decree of an original Court carried with it the right to execute whatever decree may be passed in appeal. We hold that it did in this case, under the present Code of Civil Procedure at any rate.

The change of language in Order XXI, rule 16 compared with section 232 in the old Code is significant. It evidently arose out of the decision in *Muthunarayana Reddi* v. *Balakrishna Reddi* (1).

It shows that what is really transferred when a decree is assigned is not the decree itself but the interest of the decree-holder in the decree. The word 'interest' must mean interest as finally determined' Order XXII, rule 10 (1), contemplates such an assignment of interest being made during the pendency of a suit (suit including appeal, *vide* sub-clause 2 and rule 11) and the continuance of the suit or appeal by the assignee. The mention in Exhibit A, the deed of assignment, of the fact that the decree was under appeal clearly indicates the intention of the parties that all rights under the decree should pass. The assignees (respondents Nos. 2 to 23 in this Court) in this case, having in fact been brought on record as parties to the appeal, must be deemed to have succeeded to all the rights and liabilities of their assignors [see *Chunni Lal* v. *Abdul Ali Khan* (2)]. In this view it is unnecessary to invoke the doctrine of *lis pendens* which applies under section 52 of the Transfer of Property Act to immoveable property, a class of property into which a simple money-decree cannot be treated as falling.

The next question is whether a power-of attorney given by two members of a Hindu trading family must be deemed to be terminated by the death of one of the members.

Section 253 (10) of the Indian Contract Act declares that a partnership is dissolved by the death of the partner. There is no principle of Hindu law that a joint family is extinguished by the death of one member, but if one member dies without effecting a partition, his undivided share passes by survivorship to the surviving members of the family. In the present case the uncle Venkatachallam Chetty died without other heirs than his nephew Chidambaram Chetty, with whom he was joint till the day of his death. The whole of his interest, therefore, devolved on the survivor whose authority to the agent contained in the power-of-attorney remained unaffected by the death of one of the principals [see *Re Sital Prosad* v. *Raja Brijnarain Roy* (3)]. It is not suggested

(1) 19 M. 306; 6 M. L. J. 172; 6 Ind. Dec. (N. S.) 919.

(2) 23 A. 331.

(3) 41 Ind. Cas. 288; 21 C. W. N. 620.

that the surviving principal (first respondent) has revoked or attempted to revoke his authority under Exhibit B. The objection is a technical one coming only from the judgment debtors. The 1st respondent, after being made a party to these proceedings, has taken no part in supporting this objection. On both points the District Judge's decision was right. We must, therefore, dismiss the appeal with costs.

M. C. P.

Appeal dismissed.

PUNJAB CHIEF COURT.
CIVIL REVISION NO. 143 OF 1917.
July 17, 1917.
Present:—Mr. Justice Broadway.
MEHR SINGH—JUDGMENT-DEBTOR—PETITIONER
versus
DAYA NAND COLLEGE, LAHORE, AND OTHERS—CREDITORS—RESPONDENTS.

Provincial Insolvency Act III of 1907, ss. 6 (3), 15, 47—Petition of insolvency, dismissal of, on ground that debtor is able to pay debts—Revision.

Where a debtor, who fulfils either of the conditions laid down in section 6 3 of the Provincial Insolvency Act, presents a petition to be adjudged an insolvent, the Court is not entitled to dismiss the petition on the ground that the petitioner is well able to pay his debts and that the application is made really to defraud creditors. [p. 851, col. 1.]

Revision from the order of the District Judge, Lahore, dated the 13th January 1917.

Mr. *Bhagwan Das*, for the Petitioner.

Messrs *Tek Chand*, *M. N. Mukerji* and *Mohsin Shah*, for the Respondents.

JUDGMENT.—This petition for revision has arisen out of an application filed by Bhai Mehr Singh to be adjudicated an insolvent. The insolvent alleged his liabilities as amounting to Rs. 3,450 and available assets totalling a sum of Rs. 1,580. His application was dismissed on the 10th June 1916 by the Insolvency Judge, on the ground that he was well able to pay his debts and that the application was made really to defraud creditors. He preferred an appeal against this order to the District Judge, Lahore, who on the 13th January 1917 upheld the decision of the primary Court, holding that the application was made falsely and that the Court had power to refuse adjudication. Against this decision Bhai Mehr Singh has preferred this petition of revision through Mr. Bhagwan Das and I have heard Messrs. Tek Chand, Mohsin Shah and Mukerji on behalf of the principal creditors.

Mr. Bhagwan Das has referred me to *Rattan Malik* v. *Tirath Ram* (1) and *Nga Naing* v. *Mi Bu* (2) and he has also pointed out a fact that has a very material bearing on the question which has been apparently entirely overlooked by both the Courts below, namely, that the petitioner had actually been arrested in execution of a decree passed against him in favour of the D. A. V. College and at the instance of Mr. Tek Chand's client. Counsel for the creditors referred me to *Girwardhari* v. *Jai Narain* (3), *Samir-ud-Din* v. *Kadar Moyee Dassi* (4), *Dial Shah* v. *Miran Bukhsh* (5), *Malchand* v. *Gopal Chandra Ghoshal* (6) and *Nathu Mal* v. *District Judge, Benares* (7), and it has been urged that *Rattan Malik* v. *Tirath Ram* (1) is distinguishable and that even if it is not, the law laid down in it is not sound. With regard to this I may say at once that *Rattan Malik* v. *Tirath Ram* (1) has been followed by other judgments of this Court and that in my opinion the law laid down in it is perfectly sound. It has been urged that section 47, Insolvency Act, read with section 151, Civil Procedure Code, gives the Courts power to reject a petition in insolvency made by a debtor when that petition is found to be entirely false or to have been made for improper objects. Doubtless, there are authorities which mention the possibility of the Courts having this power, but it seems to me that it is unnecessary to consider

(1) 29 Ind. Cas. 361; 28 P. R. 1915; 34 P. L. R. 1916.
(2) 11 Ind. Cas. 745; U. B. R. (1911) I, 86.
(3) 7 Ind. Cas. 39; 7 A. L. J. 835; 32 A. 645.
(4) 7 Ind. Cas. 691 at p. 694; 12 C. L. J. 445; 15 C. W. N. 244.
(5) 39 Ind. Cas. 745; 21 P. W. R. 1917; 23 P. L. R. 1917.
(6) 33 Ind. Cas. 199; 25 C. L. J. 83; 21 C. W. N. 298; 44 C. 899.
(7) 6 Ind. Cas. 870; 7 A. L. J. 602; 32 A. 547.

this question in the present case inasmuch as it seems to me that on the facts the petitioner is entitled to present an application. Under section 4 (*f*) a debtor commits an act of insolvency if he petitions to be adjudged an insolvent under the provisions of this Act. In section 6 (3) of the Insolvency Act it is provided that a debtor shall not be entitled to present an insolvency petition unless—

(*a*) his debts amount to five hundred rupees; or (*b*) he has been arrested or imprisoned in execution of the decree of any Court for the payment of money.

From the petition it is clear that the petitioner was entitled to present an insolvency petition on both the grounds (*a*) and (*b*), for he certainly owes more than Rs. 500 and he has been arrested in execution of a decree for the payment of money. In these circumstances the Courts below acted with material irregularity in the exercise of their jurisdiction in dismissing the petitioner's insolvency petition and I accordingly accept this revision and setting aside the orders of the District and Insolvency Judges return the case to the Insolvency Judge for disposal in accordance with law. In the circumstances I leave the parties to pay their own costs in this Court.

Revision accepted.

BOMBAY HIGH COURT.

CIVIL APPEALS NOS. 327 AND 395 OF 1914.

September 11, 1917.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

HUCHRAO TIMMAJI—DEFENDANTS—APPELLANTS

versus

BHIMRAO GURURAO DESHPANDE—PLAINTIFFS—RESPONDENTS.

Hindu Law—Adoption—Presumption Dvyamushyayana *form—Limitation Act (IX of 1908), s. 7—Manager of joint family, whether can give discharge—Minority effect of.*

In the absence of any express agreement to the effect that an adoption is to be in the *dvyamushyayana* form, it must be presumed to be an ordinary adoption. [p. 851, col. 2.]

An elder brother, who is in the position of a manager of a joint Hindu family, can give a valid discharge within the meaning of section 7 of the Limitation Act without the concurrence of his minor brothers who are joint with him in interest. [p. 852, col. 1.]

Appeals from the decision of the District Judge, Bijapur, in Appeals Nos. 107 and 111 of 1912, varying the decree passed by the Additional Subordinate Judge at Bagalkot, in Civil Suit No. 677 of 1910.

Mr. *Coyaji* (with him Mr. *G. S. Mulgaokar*), for the Appellants.

Mr. *Jayakar*, (with him Messrs. *K. H. Kelkar* and *R. A. Jahgirdar*), for the Respondents.

JUDGMENT.—The first point urged in support of these appeals relates to the share of the plaintiffs in the cash allowance in dispute The plaintiffs contend that they are entitled to three-fourths of the whole allowance and the defendants contend that the plaintiffs are entitled only to one-half. This point entirely depends upon the question whether the plaintiffs' father Gururao was adopted by Bhimrao in the *dvyamushyayana* form or in the ordinary (*i.e.*, *kevala*) form. The trial Court found that he was adopted in the simple form and not in the *dvyamushyayana* form. The Appellate Court, however, came to the conclusion that he must be presumed to be the *dvyamushyayana* son of Bhimrao and Kattapa. The learned District Judge, however, has pointed out that there is no evidence of any stipulation that Gururao was to be treated as the son of both fathers made at the time of the adoption; but he relied upon a certain observation in Sarkar's Hindu Law and the case of *Krishna* v. *Paramshri* (1), cited by the learned author, in support of his observation. This observation and the case referred to by the lower Appellate Court were considered in the case of *Laxmipatirao Shrinivas* v. *Venkatesh Tirmal* (2), and for the reasons given there we are of opinion that in the absence of any express agreement to the effect that the adoption was to be in the *dvyamushyayana* form it must be presumed to be an ordinary adoption. It is clearly stated by the lower Court that there is no evidence of any such stipulation. It is urged in support of the view taken by the lower Appellate Court that the property has

(1) 25 B. 537; 3 Bom. L. R. 73.

(2) 38 Ind. Cas. 552; 41 B. 315; 19 Bom. L. R. 23.

been enjoyed in a manner which would show that Gururao was treated as a *dvyamushyayana* son. There is no evidence, however, to that effect; and it is not denied that the allowance in question has never been divided before on the footing of Gururao being a *dvyamushyayana* son. The lower Appellate Court has proceeded on a certain admission supposed to have been made by the defendant No. 1 (Exhibit 105). But the statement of the defendant is clear that the property has been enjoyed half and half. In any case it is sufficient that there is no evidence whatever of the adoption of Gururao having been in the *dvyamushyayana* form. The conclusion of the lower Appellate Court on this point cannot be accepted.

The result is that the plaintiffs are entitled only to a half share in the cash allowance.

The second point relates to the arrears of the allowance. The plaintiffs claim arrears for six years and the defendants contend that the arrears for three years only should be allowed. Both the lower Courts have allowed arrears for six years. It is clear that the plaintiffs were jointly entitled to sue and that plaintiff No. 1 was in a position to give a discharge on behalf of himself as well as his minor brother, plaintiff No. 2, within the meaning of section 7 of the Indian Limitation Act. The minority of plaintiff No. 2, therefore, cannot help the plaintiffs. Mr. Kelkar has not been able to cite any authority in support of the view that an elder brother, who is in the position of a manager of a joint Hindu family, cannot give a valid discharge without the concurrence of his minor brother, who is joint with him in interest. The case of *Ganpat* v. *Sheshgiri* (3) referred to by the lower Courts is a case of joint decree-holders, which stands on a somewhat different footing. It follows that the plaintiffs are entitled to arrears for three years only.

The result, therefore, is that the decree of the lower Appellate Court is reversed and that of the trial Court restored, subject to the modification that the defendants are to pay Rs. 243 instead of Rs. 486 as arrears of cash allowance.

The parties to bear their own costs throughout.

Decree reversed.

(3) 6 Bom. L. R. 647.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1846 OF 1916.

December 19, 1917.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Napier.

PISUPATI VENKATA RANGAYYA—PLAINTIFF—APPELLANT

versus

GANDAVARAPU NARASAMMA (DEAD) AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Decree against person impleaded as legal representative of deceased defendant, whether binding on persons claiming through deceased.

A suit was brought for specific performance of a contract to sell certain property against the vendor and on his death pending the suit, his widow, daughter-in-law and mother were impleaded as legal representatives. The daughter-in-law did not appear or contest the suit, which was decreed by ordering the widow as legal representative to execute a conveyance. The other defendants being exonerated, the suit was dismissed as against them. In a subsequent suit for mesne profits of the property which remained in the possession of the daughter-in-law after the date of the first suit, she contended that she was in possession as legatee under a Will of the vendor and that as the first suit was dismissed as against her she was not liable:

Held, (1) that having been a party to the first suit she should have raised her contentions in that suit; [p. 853, col. 1.]

(2) that the decree passed in that suit against the widow as legal representative of the vendor was binding on all who claimed through him. [p. 853, col. 2.]

Kadir Mohideen Marakkayar v. *Muthukrishna Ayyar*, 26 M. 290; 12 M. L. J. 368, applied.

Khiarajmal v. *Daim*, 32 C. 296; 1 C. L. J. 584; 32 I. A. 23; 8 Sar. P. C. J. 734; 9 C. W. N. 20; 2 A. L. J. 71; 7 Bom. L. R. 1, distinguished.

Second appeal against the decree of the Court of the Additional Temporary Subordinate Judge, Guntur, in Appeal Suit No. 3 of 1916 (Appeal Suit No. 214 of 1915 on the file of the District Court, Guntur), preferred against the decree of the Court of the Principal District Munsif, Bapatla, in Original Suit No. 192 of 1914.

Messrs. *T. V. Venkatrama Iyer* and *R. Rajagopala Iyer*, for the Appellant.

Mr. *V. Ramesam*, for the Respondents.

JUDGMENT.—The plaintiff, who is the appellant in the second appeal, had brought a suit against the husband of the first defendant for specific performance of an agreement to sell the property in dispute. The husband of the first defendant died pending the suit, and the 1st, 2nd and 3rd defendants were brought on record by the plaintiff as the deceased's legal representatives, the 1st defend-

ant being the widow, the 2nd defendant the daughter-in-law, and the 3rd defendant the mother of the deceased. The plaintiff, in making the application, stated that he was informed that there had been a Will executed by the deceased owner of the property in favour of the 2nd and 3rd defendants. The 2nd defendant, however, did not appear and the 1st and 3rd defendants alleged in their written statement that they were not liable to any decree inasmuch as the property had been bequeathed solely to the 2nd defendant. The District Munsif who tried the suit, however, held, that it was not proved that the 2nd defendant derived the property under the Will of the deceased, and, as we gather, no Will was in fact put into evidence. There was a decree given to the plaintiff for specific performance as against the 1st defendant as representative of the deceased and the 2nd and 3rd defendants were exonerated, the suit against them being dismissed with costs. The present suit is brought against all these persons for mesne profits.

Against the 2nd defendant the suit has been dismissed on the ground that the decree obtained by the plaintiff in a suit for specific performance gave no relief against the 2nd defendant who in fact was exonerated, and the Subordinate Judge says that, as the plaintiff adduced no evidence independently of the decree of his right to the property, he is not entitled to mesne profits. It ought to be mentioned that the mesne profits claimed are subsequent to the suit for specific performance, and the 2nd defendant, it is admitted, has been in possession of the property. The argument on behalf of the 2nd defendant is that she was the proper legal representative of the deceased as she was the sole legatee under the Will, and as the suit for specific performance was dismissed against her, the decree which the plaintiff obtained for specific performance did not bind her. We cannot hold this contention to be sound. She was brought on record and it was for her to claim that she represented the estate of the deceased, but she failed to do so and a decree was passed against the widow of the deceased as representing his estate in that suit. The decree for specific performance was with respect to this very property in a suit which had been instituted against the owner of the property, and we are of opinion that the decree will bind all persons claiming through the owner. The principle of law laid down in *Kadir Mohideen Marakkayar* v. *Muthulrishna Ayyar* (1) applies to the facts of this case, and we do not think that the decision in *Khiarajmal* v. *Daim* (2) of the Privy Council has any application. In the last case the person who successfully contended that he was not bound by the decree had not in fact been properly brought on the record in the suit. We hold, therefore, that the second appeal must succeed, and there will be a decree as against the 2nd defendant also for the amount claimed in the plaint with costs throughout.

Appeal allowed.

M. C. P.

(1) 26 M. 230; 12 M. L. J. 338.
(2) 32 C. 296; 1 C. L. J. 534; 32 I. A. 23; 8 Sar. P. C. J. 734; 9 C. W. N. 201; 2 A. L. J. 71; 7 Bom. L. R. 1 (P. C.).

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 3455 OF 1916.

February 4, 1918.

Present:—Mr. Justice Scott-Smith.

HAZARA SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

BISHEN SINGH AND OTHERS—PLAINTIFFS AND RULIA SINGH—DEFENDANT—RESPONDENTS.

Custom — Succession — Self-acquired property—Daughters versus *collaterals—Gariwal* Jats *of Ludhiana District.*

Among Gariwal Jats of the Ludhiana District there is a special custom, contrary to general custom, whereby daughters are excluded from succession to self-acquired property by collaterals. [p. 854, col. 2.]

First appeal from the decree of the District Judge, Ludhiana, dated the 30th June 1913, dismissing the suit but directing the parties to bear their own costs.

Dr. *Nand Lal*, for the Appellants.

Mr. *N. C. Mehra*, for the Respondents.

JUDGMENT.—This judgment disposes of the two connected appeals Nos. 3455 and

3471 of 1916. The suit out of which the appeals arise was brought by the plaintiffs Achal Singh and others for the land of Fateh Singh, whose collaterals they claimed to be. Besides them there were two other sets of claimants, (1) *Musammat* Mohan Kaur, defendant No. 1, daughter of Fateh Singh, and (2) defendants Nos. 2 to 31, Hazara Singh and others, who alleged that the land in suit was gifted to Fateh Singh's grandmother *Musammat* Chandan by her brother Bhanga Singh. They say that they are collaterals of Bhanga Singh and as the male line of the donee, *Musammat* Chandan, is now extinct they are entitled to succeed as reversionary heirs of the donor. The case was tried by Lala Shibbu Mal, District Judge of Ludhiana, who on the 30th of June 1913 dismissed the plaintiffs' suit holding that they had no right to succeed to non-ancestral property in the presence of Fateh Singh's daughter, but that they had a superior right to defendants Nos. 2 to 31 who, in his opinion, were not proved to be the collaterals of Bhanga Singh. From this order both plaintiffs and defendants Nos. 2 to 31 filed appeals which were decided by Mr. Craik, District Judge of Ludhiana, on the 17th March 1915. This Court by its order of the 21st October 1916 in Civil Appeal No. 1968 of 1915 set aside Mr. Craik's order, holding that it had been passed without jurisdiction having regard to *Meugens* v. *Sutlej Flour Mills, Ferozepore* (1). The appeals of the plaintiffs and defendants Nos. 2 to 31 from the order of Lala Shibbu Mal have, therefore, been now argued before me.

Out of defendants Nos. 2 to 31 Hira Singh and *Musammat* Nandi have died, and Mr. Manohar Lal on behalf of the plaintiffs-appellants says that there is no necessity to bring their legal representatives on the record in the plaintiffs' appeal as their dispute is only with *Musammat* Mohan Kaur, the lower Court having held that his clients' rights are superior to those of defendants Nos. 2 to 31. I agree with him that Hira Singh and *Musammat* Nandi were not necessary parties in his clients' appeal.

The appeal filed on behalf of defendants Nos. 2 to 31 may be disposed of in a few words. Dr. Nand Lal who appears for them frankly admits that the only evidence in support of their contention that they are collaterals of Bhanga Singh is that of the Hardwar Prohat, who has been disbelieved by the lower Court. He has not shown any reason why I should disagree with the finding of that Court in regard to this man's evidence. I think it would be extremely unsafe to hold upon the uncorroborated evidence of this single witness that the alleged relationship is proved. Dr. Nand Lal also admits that the alleged gift by Bhanga Singh to *Musammat* Chandan of the land in suit is not proved. Under these circumstances his client's appeal must fail and is hereby dismissed with costs to Mr. Manohar Lal's clients.

With regard to the plaintiffs' appeal Mr. Manohar Lal relies upon *Partab Singh* v. *Panjabu* (2), in which it was held that among Gariwal Jats of the Ludhiana District there is a special custom, contrary to general custom, whereby daughters are excluded from succession to self acquired property by collaterals. The Court followed in this decision the case of *Musammat Ishar Kuar* v. *Raja Singh* (3), which has been reported as 29 Punjab Record 1911. These authorities were not quoted in the lower Court, but they are clearly applicable to the present case. Mr. Nihal Chand on behalf of *Musammat* Mohan Kaur is unable to cite any authority to the contrary. His contention is that had *Partab Singh* v. *Panjabu* (2) been shown to the lower Court, the onus should have been shifted and his client would have produced evidence in proof of a special custom in her favour. He, therefore, asks that the case should be remanded for further enquiry. The onus was placed upon the plaintiffs by the lower Court and they discharged that onus partly by oral evidence and partly by citing authorities. The mere fact that a particular ruling was not cited in the lower Court does not, in my opinion, give the defendant any right to claim a remand. In her pleas *Musammat* Mohan Kaur relied generally on custom and did not allege that there was any special custom in the family of the parties. In the case reported as *Musammat Ishar Kuar* v. *Raja Singh* (3) the question was gone into exhaustively, and

(1) 27 Ind. Cas. 625; 30 P. R. 1915; 42 P. L. R. 1915; 25 P. W. R. 1915.

(2) 13 Ind. Cas. 177; 25 P. R. 1912; 41 P. L. R. 1912; 125 P. W. R. 1912.

(3) 9 Ind. Cas. 608; 29 P. R. 1911; 94 P. L. R. 1911; 124 P. W. R. 1911.

it is extremely unlikely that *Musammat* Mohan Kaur could prove any special family custom in her favour.

I, therefore, accept plaintiffs' appeal and give them a decree for possession of the land and the house in suit with costs throughout against all the defendants.

Appeal accepted.

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

December 14, 1917.

Present:—Lord Buckmaster, Sir John Edge, Sir Walter Phillimore, BART, and Sir Lawrence Jenkins.

C. GANAPATHY MUDALIAR—PLAINTIFF—APPELLANT

versus

N. KRISHNAMACHARIAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss 60, 88, 89—Mortgage, suit on—Decree, sale under, not in compliance with Transfer of Property Act—Redemption, right of—Civil Procedure Code (Act XIV of 1882), s. 244—Questions arising between auction purchaser at sale under mortgage decree and mortgagor, whether to be decided in execution—Suit, maintainability of.

In a mortgage suit for sale the decree made did not specify a day for payment as prescribed by sections 86 and 88 of the Transfer of Property Act. In execution of the decree the mortgaged property was attached, sold and purchased (with the permission of the Court) by the decree-holder. The sale was confirmed. The mortgagor thereafter sued for redemption:

Held, that as the property and all right, title and interest of the defendants in the suit for sale had in fact been sold under the decree of a competent Court, and such decree had not been appealed against, it was immaterial whether or not the provisions of the Transfer of Property Act were complied with and that even though such provisions had not been complied with, the mortgagor was debarred from a right to redeem ; [p. 858, col. 2.]

Held, also, that the present suit was barred by section 244 of the Code of Civil Procedure, 1882, inasmuch as the questions now raised could and should have been raised before the sale was confirmed and, if so raised, would have been decided by the Court executing the decree. [p. 859, col. 1.]

Prasunno Kumar Sanyal v. *Kali Das Sanyal*, 19 I. A. 166; 19 C. 683; 6 Sar. P. C. J. 209; 9 Ind. Dec. (N. S.) 898 (P. C.), followed.

Appeal from a decree of the Madras High Court (Miller and Tyabji, JJ.), dated February 17, 1914, reported as 24 Ind. Cas. 187, affirming that of the District Judge, North Arcot, dated February 9, 1910.

FACTS.—One Kumaraswami Mudaliar, a Hindu governed by the Mitakshara Law, executed three mortgages of ancestral property: (1) in 1876 in favour of Varadappa, (2) in 1879 in favour of a Vakil named Vijayaraghavachariar and (3) on the 10th May 1881 in favour of Narasingha. Subsequently two sons were born to the mortgagor, namely, the plaintiff-appellant and his brother since deceased, in 1881 and 1882 respectively. The first and third mortgages were assigned to the Vakil. Subsequently the Vakil sued on the third mortgage for sale of the mortgaged property and made the father and his two sons defendants. At the trial the father objected that he was not the guardian of his two sons, but the Judge overruled the objection and made a decree dated 15th April 1886 for sale of the mortgaged property. On the 16th August 1886 the decree-holder applied for execution by attachment and sale of the mortgaged property. On the 28th September 1886 Govindaraju, an uncle of the minors, applied to be appointed guardian of the minors and for an order setting aside the decree, on the ground that the minors were not represented. The Court granted the application and ordered a new trial. But Govindaraju did not file any written statement and the case was heard *ex parte* and the Court made a decree, dated 15th November 1886, against the defendants for sale of the mortgaged property. On further proceedings under the application of the 16th August 1886 the properties were subsequently sold in execution and were purchased by the decree holder with the leave of the Court. The plaintiff's father died in 1894 and in 1904 the plaintiff obtained the release of his brother's rights and instituted the present suit in 1907 to redeem all the three mortgages in suit. The District Judge held that the plaintiff was properly represented and was bound by the decree and by the execution proceedings and that the suit was barred by section 244 of the Code of Civil Procedure, 1882. Plaintiff's appeal to the Madras High Court was dismissed. He thereupon preferred the present appeal to the Privy Council.

Sir *W. Garth*, for the Appellant.

Sir *Erle Richards*, *K. C.*, and Mr. *Kenworthy Brown*, for Respondents Nos. 1 to 5 (representatives of the mortgagee who had died).

The remaining respondents, who had purchased portions of the mortgaged property from the mortgagee, did not appear.

Sir *W. Garth*, for the Appellant.—The minors here were not parties to the sale proceedings. The sale was in execution of the decree dated April 15, 1886; it was only under that decree that attachment was made on the application of August 14, 1886. But that decree was set aside; and in the subsequent proceedings the minors were described as under the protection of their father; they were not properly on the record and are not bound: *Khiarajmal* v. *Daim* (1) and *Rashid-un-nisa* v. *Muhammad Ismail Khan* (2).

In any case the right to redeem has not been extinguished. Under section 60 of the Transfer of Property Act that right continues until it is extinguished by act of the parties or by order of a Court. The right can only be barred if certain steps are taken under the Act, and those steps have not been taken. Transfer of Property Act, (Act IV 1882), sections 58, 60, 85, 86, 88 and 89. There is no authority for the proposition that the mere sale under a decree bars the right to redeem, even though the provisions of the Act have not been complied with.

Reference was made to *Mallikarjunadu* v. *Lingamurti Pantulu* (3)

Sir *Erle Richards*, *K. C.*, for Respondents Nos. 1 to 5.—A sale of ancestral property in execution of a decree conveying the right, title and interest of the father of a joint family is binding on the sons. *Sripat Singh* v. *Prodyot Kumar* (4).

The minors were properly represented and the second decree of the 15th November was substituted for the first decree on the 15th April. The attachment and sale really took place under the second decree. Govindaraju was fully aware of the pending sale. In any case the plaintiff was a party to the re-trial of the suit, and is bound by the decree and the execution proceedings therein. A separate suit is barred by section 244 of the Code of Civil Procedure, 1882. *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (5) is conclusive on the point. The questions now raised could and ought to have been raised before the sale was confirmed under that section.

Sir *W. Garth* in reply.—The sale really took place under an attachment made under the first decree In order to see what was sold at a judicial sale the Court must look at the proceedings which culminated in the sale. *Raja Thakur Barmha* v. *Jiban Ram Marwari* (6).

Section 244 of the Code has no application, because the minors were not parties to the execution proceedings and were not properly represented therein.

JUDGMENT.

SIR JOHN EDGE.—This is an appeal from a decree of the High Court at Madras, dated the 17th February 1914,* which affirmed a decree, dated the 9th February 1910, of the District Judge of North Arcot, by which the suit was dismissed. The plaintiff is the appellant.

The suit was brought in the Court of the District Judge of North Arcot on the 16th November 1907, to redeem three mortgages dated respectively the 12 h December 1876, the 7th January 1879 and the 10th May 1881. The mortgages were of ancestral property, and were made by the father of the plaintiff before the plaintiff or his brother, since deceased, were born. The mortgage of the 7th January 1879 was in favour of N. Vijayaragavachariar, Vakil, to whom their Lordships will refer as the Vakil. The mortgages of the 12th December 1876 and the 10th May 1881 vested by assignment in the Vakil. The plaintiff in this suit was born in September 1881; his brother was born in May 1882.

On the 19th March 1886 the Vakil

(1) 32 I. A. 23; 1 C. L. J. 584; 32 C. 296; 8 Sar. P. C. J. 734; 9 C. W. N. 201; 2 A. L. J. 71; 7 Bom. L. R. 1 (P. C.).

(2) 3 Ind. Cas. 864; 36 I. A. 168; 13 C. W. N. 1182; 10 C. L. J. 318; 6 A. L. J. 822; 11 Bom. L. R. 1225; 6 M. L. T. 279; 31 A. 572; 19 M. L. J. 631 (P. C.).

(3 25 M. 244 (F. B.).

(4) 39 Ind. Cas. 252; 44 I. A. 1; 32 M. L. J. 133; 15 A. L. J. 147; (1917) M. W N. 193; 21 C. W. N. 442; 25 C. L. J. 220; 21 M. L. T. 222; 19 Bom. L. R. 290; 44 C. 524 (P. C.).

(5) 19 I. A. 166; 19 C. 683; 6 Sar P. C. J. 209; 9 Ind. Dec. (N. s.) 898 (P. C.).

(6) 21 Ind. Cas. 936; 41 I. A. 38 at p. 43; 18 C. W. N. 313; 15 M. L. T 137; 12 A. L. J. 156; 19 C. L. J. 161; 26 M. L. J. 89; 16 Bom. L. R. 156; 41 C. 590; (1914) M. W. N. 118 (P. C.).

*See 24 Ind. Cas. 187—*Ed.*

brought in the District Court of North Arcot, a suit for sale on the mortgage of the 10th May 1881, against the plaintiff's father, the plaintiff, aged 4 years, and his brother, aged 3 years, the brothers being described as "maintained by the first defendant," who was their father. The suit was entered on the files of the Court as Original Suit No. 5 of 1886. Their father, who had not been appointed as their guardian for the suit, objected that he was not their guardian, but the District Judge overruled the objection, and on the 15th April 1886 made a decree in the following terms:—

"It is ordered that plaintiff do recover Rs. 10,891 together with further interest at 6 per cent. per annum from date of plaint to date of payment and costs, to be recovered from the 1st defendant personally, and by sale of the mortgaged property."

That decree was doubtless intended to be in compliance with the provisions of "the Transfer of Property Act, 1882," but it did not comply with those provisions.

On the 16th August 1886 the Vakil presented to the District Court his petition, under section 230 of the Code of Civil Procedure, 1882, for execution of the decree of the 15th April 1886. The petition was entered on the files of the Court as "Execution Petition No. 57 of 1886 in Original Suit (Original Suit) No. 5 of 1886," and by it the petitioner prayed "that the amount may be recovered with further costs, together with further interest, by the attachment and sale of immoveable property set out in the schedule herewith filed." In that petition the present plaintiff and his brother were described as minors, defendants "by their guardian the first defendant." In the schedule the Vakil disclosed the fact that there existed the mortgages of the 12th December 1876 and the 7th January 1879. On the 18th August 1886 the warrant of attachment was issued, and on the 13th September 1886 a notice of sale was issued.

On the 28th September 1886 one Govindaraju Mudali, who was a maternal uncle of the present plaintiff and his brother, applied to the District Court to be appointed their guardian and to have the decree of the 15th April 1886 set aside on the ground that their father was not their proper guardian. Govindaraju Mudali apparently contended in support of his application that the debt in respect of which the mortgage of the 10th May 1881 had been given was not one which the minors or the properties were liable to discharge. On the 10th November 1886 the District Judge held that the appointment of the father as guardian had been illegal, and in his place appointed Govindaraju Mudali as guardian of the minors, and set aside the decree of the 15th April 1886 as against them. Govindaraju was ordered to put in a written statement on the 15th November 1886 on behalf of the minors, but he failed to do so and did not appear. On the 15th November 1886 the District Judge made a decree that the plaintiff (the Vakil) "do recover 10,891 rupees, together with further interest at 6 per cent. per annum from date of plaint to date of payment, and costs, to be recovered from the first defendant personally and by sale of the mortgaged property." That decree did not comply with the provisions of "The Transfer of Property Act, 1882," but it was not appealed and it became final. It was obviously intended to be in supersession of the decree of the 15th April 1886 and must be regarded as having superseded that decree.

On the 24th January 1887 the Court of the District Judge caused a proclamation of the intended sale to be made under section 287 of the Code of Civil Procedure, 1882. The proclamation is described on the face of it as in Original Suit No. 5 of 1886, Application No. 57 of 1886, and proclaimed that—

"Whereas the immoveable property mentioned in the list attached hereto and belonging to the said defendants (the father and his two sons) has been attached upon a petition being presented for execution of the decree passed in the above suit. Take notice that if the amounts specified below be not paid into this Court, or if no other steps be taken to satisfy the decree, the said property shall be sold in public auction in this Court on the 19th September 1887, and that in that sale the right, title and interest possessed by the above defendants alone in respect of that property shall be sold."

So far as appears from the documents in the record, the only attachment which had issued was that of the 18th August 1886.

It appears that Govindaraju Mudali, as the guardian of the minors, had appealed to the High Court at Madras from some order which the District Judge had made on the 20th December 1886 in Original Suit No. 5 of 1886. What the order appealed from was does not appear, nor is there anything in the record which suggests what the nature of the order was. However, that appeal not having been disposed of, Govindaraju Mudali, at some time between the 24th January 1887 and the 2nd March 1887, applied to the High Court for an order to stay the sale of the property attached in execution of the decree of the District Court of North Arcot in Original Suit No. 5 of 1886. That application was dismissed by the High Court on the 1st August 1887.

On the 28th February 1887, the District Court made an order permitting the Vakil to bid at the sale. On the 19th September 1887, the immoveable properties in question were sold, subject to incumbrances, by public auction, and the Vakil became the purchaser.

The sale was confirmed by the District Judge on the 13th December 1887, and he, on the 1st February 1888, gave the sale certificate under his hand and the seal of the Court. The Vakil died before this present suit; the first respondent is his son. The other respondents are purchasers from the Vakil. The father of the present plaintiff died in May 1894. The plaintiff's brother died in September 1904. The present plaintiff, his brother and their father had constituted a Hindu joint family.

On behalf of the appellant here it was contended that the sale took place in execution of the decree of the 15th April 1886, and not in execution of the decree of the 15th November 1886, and that under such circumstances only the right, title, and interest of the father were sold. That contention is based on the fact that the attachment of the 16th August 1886 was made under the decree of the 15th April 1896. The sale must have been under the decree of the 15th November 1886. No one was or could have been misled as to the decree under which the sale was taking place. The proclamation of sale of the 24th January 1887 was made subsequent to the decree for sale of the 15th November 1886, and must have been made consequent on that decree, with the knowledge of all parties and without challenge, and that proclamation shows that what was to be sold by auction was the right, title and interest in the property of the defendants to the suit of the 19th March 1886, and the certificate of sale shows that the right, title and interest in the property of the defendants to that suit were sold to the Vakil. The present plaintiff and his brother were defendants to that suit, under the guardianship of Govindaraju Mudali, at the time when the decree of the 15th November 1886 was made and at the time when the sale took place, and thence until the sale was confirmed and the certificate of sale was made.

It has also been contended on behalf of the appellant here that as the provisions of "The Transfer of Property Act, 1882," were not complied with in the suit for sale of the 19th March 1886, and as no day was fixed by the Court on which payment might be made within six months from the date of declaring in Court the amount due, the defendants to the suit of the 19th March 1886 were not debarred from a right to redeem. It appears to their Lordships that the answer to that contention is that whether or not the provisions of "The Transfer of Property Act, 1882," were complied with, the property and all right, title and interest of those defendants in it were in fact sold to the Vakil in execution of a decree of a Court which had jurisdiction to entertain the suit in which the decree was made, and that decree was not appealed.

By section 244 of the Code of Civil Procedure, 1882, it was enacted that:—

"244. The following questions shall be determined by order of the Court executing a decree and not by a separate suit (namely):—

"(c) Any other question arising between the parties to the suit in which the decree was passed, or their representa-

tives, and relating to the execution, discharge, or satisfaction of the decree, or to the stay of execution thereof."

This Board decided in *Prosumno Kumar Sanyal* v. *Kali Das Sanyal* (5) that section 244 had been rightly held in India to apply in a case in which the question raised concerned the auction-purchaser at an auction sale as well as the parties to the suit. In this case the Vakil was the auction-purchaser and was also a party to the suit. The questions raised in the present suit could have been raised before the sale was confirmed, and, if so raised, would have been determined by the Court which was executing the decree of the 15th November 1886.

Their Lordships will humbly advise His Majesty that this appeal fails, and should be dismissed.

The appellant must pay the costs of this appeal.

Appeal dismissed.

Solicitor for the Appellant: Mr. *Douglas Grant.*

Solicitors for the Respondents: Messrs. *Chapman, Walker* and *Shephard.*

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 2368 OF 1914.

February 15, 1918.

Present:—Mr. Justice Scott-Smith and Mr. Justice Shadi Lal.

MADAN MOHAN LAL AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

FIRM OF MESSRS. B. BOROOAH AND COMPANY OF DELHI—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Matter expressly excluded from decision, whether res judicata*—Registration Act (XVI of 1908), s. 17 (1) (d)—Lease, parol—Subsequent memoranda, whether compulsorily registrable Landlord and tenant · Tenant holding over—Suit for damages for use and occupation—Damages, measure of.*

In deciding the validity or otherwise of the defence of *res judicata*, the Court is concerned with what was actually decided and not with what ought to have been decided in the previous suit. [p. 860, col. 2; p. 861, col. 1.]

Plaintiffs let the ground floor of their house to defendants from 1st January 1909. In the summer of 1911, a dispute arose between the parties with regard to the term of the tenancy and the extent of the property leased and the plaintiffs brought a suit for ejectment of the defendants from the house as well as two plots of land which, according to the plaintiffs, did not form part of the property leased. The defendants thereupon instituted a counter-suit for the specific performance of an agreement to lease the property for a period of 3 years. The litigation dragged on till the defendants vacated the premises on the 7th March 1912 and informed the Court accordingly, which consequently declined to adjudicate upon the various issues arising between the parties and simply granted the plaintiffs a decree for possession of the property, expressly stating that the said issues might be determined in the suit for damages which was to be instituted by the plaintiffs The present suit was then brought for damages for use and occupation on the allegations that the defendants were monthly tenants, that their tenancy was determined at the end of June 1911 by a notice to quit served on them in April 1911 and that thereafter they were in wrongful possession of the demised premises. It appeared that the parties had written to each other on the 15th and 22nd January 1909 with regard to the matter of the lease and it was contended that these letters amounted to a lease for a term exceeding one year and not having been registered were inadmissible in evidence:

Held, (1) that inasmuch as the Court dealing with the former suit expressly refused to adjudicate upon any of the matters covered by the issues in the subsequent suit, the plaintiffs could not avail themselves of the doctrine of *res judicata* and the Court was competent to determine the issues on the merits between the parties: [p. 861, col. 1.]

(2 that the contract between the parties was entered into orally and the letters subsequently exchanged between the parties were merely memoranda of a *fait accompli* and could not, therefore, be excluded from evidence on the ground of want of registration; [p. 861, col. 2.]

(3) that the tenancy was for three years from 1st February 1909 to 31st January 1912 and the plaintiffs had no right to eject the defendants from the premises before the expiry of that period. [p. 861, col 2.]

(4) that the defendants were liable to pay damages for use and occupation for the period subsequent to 31st January 1912. [p. 862, col. 2.]

In the case of a tenant holding over wilfully and contumaciously damages for use and occupation are assessed at double the ordinary rent. [p. 862, col. 2.]

First appeal from the decree of the Divisional Judge, Delhi, dated the 20th June 1914, decreeing Rs. 921 2 0 in plaintiffs' favour and directing the plaintiffs to pay the defendants' costs on the amount disallowed, *viz.*, Rs. 13,074-5-6.

Messrs. *Raj Narain*, *K. Santanam* and Lala *Madan Gopal*, for the Appellants.

Lala *Moti Sagar*, R. S., and Babu *S. N. Bose*, for the Respondents.

JUDGMENT.—The plaintiffs are the owners of a house situate on the Lothian Road inside the Kashmiri Gate, Delhi. It is common ground that the ground floor of the house was let to the defendants, Messrs. B. Borooah and Company, from 1st February 1909 at a monthly rent of Rs. 111-11-6; and that in the summer of 1911 the parties fell out, the dispute relating to the term of the tenancy and the property compromised in the lease. The plaintiffs thereupon brought an action for the ejectment of the defendants from the house as well as two plots of land which, according to the plaintiffs, did not form part of the property leased to the defendants and had been wrongfully taken possession of by them. The defendants replied by instituting a counter-suit for the specific performance of an agreement to lease the property for a period of three years. This suit was obviously a counterblast, the object being clearly to prevent the decision of the plaintiffs' suit before the commencement of the Coronation Durbar held in December 1911. In this object the defendants were successful, the litigation dragged on until after the Durbar, with the result that they themselves vacated the premises on the 7th March 1912 and then informed the Trial Judge accordingly. The latter consequently declined to adjudicate upon the various issues arising between the parties, and simply granted the plaintiffs a decree for possession of the property, expressly stating that the said issues might be determined in the suit for damages which was to be instituted by the plaintiffs.

The present suit is for damages for use and occupation on the allegations that the defendants were monthly tenants, that their tenancy was determined at the end of June 1911 by a notice to quit served on them in April 1911 and that thereafter they were in wrongful possession of not only the two plots of land referred to above and a verandah constructed by the plaintiffs in November 1910, but also of the house itself. The plaintiffs consequently claimed about Rs. 14,000 by way of damages from the defendants. The Trial Judge has given his decision against the plaintiffs upon all the matters in controversy between the parties, and has passed a decree for Rs 921 2-0, the rent due from 1st July 1911 to 7th March 1912, which rent was tendered by the defendants but was not accepted by the plaintiffs.

Against this decree the plaintiffs have preferred an appeal to this Court, and we have listened to the elaborate arguments advanced by Mr. Raj Narain for the appellants and Mr. Moti Sagar for the respondents. Upon the question of *res judicata* we have no hesitation in endorsing the opinion of the learned Divisional Judge, upon the short ground that the Court dealing with the former suit expressly refused to adjudicate upon any of the matters which are covered by the first three issues framed in this case.

As observed already, the decree for possession was passed in that suit, because the defendants stated that the period of tenancy had expired on the 31st January 1912 and that they had consequently vacated the premises. In these circumstances the Court held that it was unnecessary to determine the points relating to the nature of the tenancy, the property actually leased to the defendants, and the property alleged to have been trespassed upon by them; and expressed its opinion that these matters might be determined in the subsequent suit. Nor did the Appellate Court, to which the plaintiffs went upon appeal, accede to their request for a decision on the merits. The judgment delivered by that Court shews that it confined itself to the question of costs, and that the remarks made therein apportioning the blame between the two parties were made with the sole object of deciding that question.

There is considerable force in the contention that the Court, which tried the former suit, should have, before decreeing possession, determined whether the plaintiffs had a cause of action on the date of the institution of that suit, and that it should not have awarded possession merely upon the strength of the circumstances which came into existence subsequent to that date. Now, the ground upon which the Court proceeded may be wrong, but there can be no manner of doubt that in deciding the validity or otherwise of the defence of *res judicata* we are concerned with what was actually decided in the

previous litigation, and not with what ought to have been decided. The following observations of their Lordships of the Privy Council in *Parsotam Gir* v. *Narbada Gir* (1) are pertinent here :—

"The question is not whether the judgment of the High Court in 1886 was right, but whether it did or did not finally decide the present question as between Nipal Gir and Narbada Gir. It would be a contradiction in terms to say that the Court had finally decided matters which it expressly left 'untouched and undecided.'"

Mr. Raj Narain for the appellants relies upon Explanation IV to section 11 of the Civil Procedure Code, which prescribes that any matter, which might and ought to have been made ground of defence or attack in the former suit, shall be deemed to have been a matter directly and substantially in issue in such suit. But the explanation does not place a constructive issue referred to therein upon any higher footing than the issues actually drawn in the case, and does not do away with the necessity of due compliance with the essential requirements of the rule of *res judicata* laid down in the section itself. There is, however, no scope for the application of this explanation to the present case, because it is clear that the parties had put forward all the grounds of attack and defence, which were duly embodied in clear and distinct issues. But the Court not only did not decide them but expressly excluded them from decision. It is, therefore, manifest that nothing was decided in that case which can be treated as *res judicata*.

We accordingly hold that the plaintiffs are not entitled to avail themselves of the doctrine of *res judicata*, and we proceed to determine the issues on the merits. The first question, which requires decision, is the term of the tenancy. Now, we may say at once that there is no reliable evidence in support of the plaintiffs' contention that the tenancy was a monthly one; indeed, all the evidence oral and documentary goes to show that it was for a period of three years. The plaintiffs, however, contend that the letters, dated 15th January and 22nd January 1909 respectively, exchanged between the parties amounted to a lease for a term exceeding one year, and were consequently compulsorily registrable under section 17 of the Registration Act. The documents not having been registered are inadmissible in evidence; and oral evidence relating to the terms of the contract, which was reduced to writing, is shut out by the Evidence Act. We have examined this contention in the light of all the circumstances of the case, and we are of the opinion that it has been satisfactorily established that the parties entered into a parol contract with respect to the lease of the property for three years, and that the letters in question should be regarded as merely memoranda of a *fait accompli*. It appears that negotiations in connection with the lease of the property began some six months before the letters in question were written, and the evidence of Colonel Z. Ahmad shows that it was the plaintiff Madan Mohan Lal who wanted the tenancy to last for three years and that it was at his request that the witness suggested that period to the defendants. Further, B. K. Borooah, the manager of the defendants' firm, who settled the matter with the plaintiff Madan Mohan Lal, swears that the contract between the parties was an oral one and that the letter of confirmation was taken with the object of forwarding it to their Head Office at Calcutta. It will be observed that Madan Mohan Lal, who was the only other person cognizant of the affair, has not gone into the witness-box; and in these circumstances we see no valid reason why we should not accept the version given by B. K. Borooah. Accepting his testimony, which receives support from other circumstances of the case, we hold that the contract between the parties was entered into orally, and that the letters cannot be excluded on the ground of want of registration.

These documents and the oral evidence make it absolutely clear that the tenancy was for three years from 1st February 1909 to 31st January 1912, and that the plaintiffs had no right to eject the defendants from the tenement before the expiry of that period. We are equally clear that the only property let to the defendants was the ground floor of the house described variously as a square or oblong consisting of ten rooms and two verandahs, and that the defendants were not entitled to occupy either the vacant plot of land on the north or the triangular area

(1) 21 A. 505; 1 Bom. L. R. 700; 3 C. W. N. 517; 26 I. A. 175; 7 Sar. P. C. J. 538; 9 Ind. Dec. (N. S.) 1028.

on the east marked M. N. P. on the plan. They were no doubt entitled to a passage to the building, but this could have been easily secured without any interference with the two plots. As regards the verandah on the north, constructed in November 1910, it is true that it was not expressly included in the premises let to the defendants; but this omission was due to the obvious reason that it did not exist at the time the tenancy was created. It is, however, clear that the verandah could not be separated from the main building, and any attempt to let it to another tenant would have resulted in shutting up the rooms of the building on the northern side and in materially interfering with the proper enjoyment thereof. The verandah, when constructed, became an integral part of the building, and the defendants were, in our opinion, justified in occupying it.

A comparison of the pleadings in the previous suit leaves no doubt whatsoever that the defendants claiming both the plots of land as forming part of the premises leased to them not only brought them under their occupation but prevented the plaintiffs from making any use of them, *vide, inter alia*, the defendants' written statement, paragraphs 1, 3 and 5 (page 19 of the paper-book). This act of theirs, which was wholly unwarranted, prevented the plaintiffs from utilising the property for Durbar purposes. There can be little doubt that the plaintiffs could have easily let the plots either as building sites or after erecting shops thereon, and realised a handsome rent. There is a mass of evidence on the record that there was considerable demand for business premises in this part of the town, and that shops were fetching from ten to fifteen times their ordinary rent. The learned Pleader for the respondents argues that the damages, if any caused to the plaintiffs, were not the direct consequence of his clients' act, as there is nothing to show that the Municipal Committee would have granted permission to build on the plots in question. We are unable to accede to this argument, which proceeds upon an assumption that the Municipal Committee would have refused an application for permission to build, an assumption for which there is no foundation. It is clear that the defendants prevented the plaintiffs from having access to these plots, and it would, therefore, have been a useless formality on the part of the latter to make such an application. As already observed, there was a great demand for business premises, and the evidence also shows that the shops and sites in the neighbourhood fetched very high rents. At the same time we consider that the amount of Rs. 8,000 claimed by the plaintiffs in respect of the plots is excessive Upon the record there is some evidence to the effect that certain prospective tenants or their agents were prepared to pay fairly large sums of money for acquiring the lease of the sites or the buildings if constructed thereon, and though we are not inclined to accept these offers at their face value, we are not prepared to hold that they must all be characterised as bogus offers. The learned Divisional Judge was inclined to think that the verandah and the shed on the northern plot of land would have realised about Rs. 2,500 and we consider that Rs. 2,000 would probably be a fair estimate of the rent, which the plot alone would have fetched. As regards the triangular plot M. N. P., we would, in view of the evidence adduced by the plaintiffs, assess damages at the round figure of Rs. 1,000.

Upon our finding as to the period of the tenancy, it is clear that the defendants were entitled to occupy the ground floor of the house up to the 31st January 1912, and for the period subsequent to that date they are liable to pay damages for the use and occupation, which in the case of a tenant holding over wilfully and contumaciously is usually assessed at double the ordinary rent, *Vide, Ganga Singh* v. *Musammat Shib Devi* (2) and *Pirbhu Dial* v. *Ram Chand* (3). The learned Divisional Judge takes the 7th March 1912 as the date on which the premises were vacated; and in view of the plaintiffs' notice, dated the 3rd February 1912, asking the defendants to quit the building, and of other evidence, we are inclined to concur in that view. Further, we agree with him that the fans and lamps removed by the defendants at the time of vacating the house were not the property of the plaintiffs.

(2) 33 P. R. 1898.
(3) 5 P. R. 1904; 42 P. L. R. 1904.

The result is that we grant the plaintiffs a decree for

	Rs.	A.	P.
(a) rent from 1st July 1911 to 31st January 1912 at Rs. 111-11-6 per mensem ...	782	0	6
(b) damages for the use and occupation of the ground floor of the house from 1st February 1912 to 7th March 1912 at Rs. 223-7-0 per mensem ...	274	0	0
(c) damages for the wrongful occupation of the two plots of land ...	3,000	0	0
Total ...	4,056	0	6

We accordingly accept the appeal, and modifying the decree of the lower Court direct that the defendants do pay to the plaintiffs the aforesaid sum. In the circumstances we leave the parties to bear their own costs throughout the litigation.

Appeal accepted

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 171 OF 1917.

December 20, 1917.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Kumaraswami Sastri.

SUBBARAYA CHETTY—PLAINTIFF—APPELLANT

versus

NACHIAR AMMAL—DEFENDANT—RESPONDENT.

Cause of action, accrual of, after suit—Relief, whether can be granted.

Courts have power, in certain circumstances, to grant a decree in a case, where the cause of action arose subsequently to the filing of the plaint.

In a suit for money, where the money becomes payable to the plaintiff only after the filing of the suit the Court should pass a decree in favour of the plaintiff and not compel him to institute another suit, for the purpose.

Second appeal against the decree of the Court of the District Judge of Tanjore, in Appeal Suit No. 874 of 1915, preferred against that of the Court of the District Munsif of Valangiman at Kumbakonam, in Original Suit No. 71 of 1913.

Mr. *M. D. Devadoss*, for the Appellant.

Mr. *M. O. Parthasarathy Aiyangar*, for the Respondent.

JUDGMENT.—On the finding of the District Judge it is clear that the defendant did receive the money. The learned Judge has, however, found that the suit was premature because of the terms of the unregistered mortgage bond. Granting that the terms of the bond are binding on the parties, having regard to the fact that immediately after the suit the money became payable, we think that it is undesirable that the plaintiff should be compelled to institute another suit for the money. The principle of *Chinta Hararan Das* v. *Radha Charan Poddar* (1) and of the decision of this Court in *Sethrucherla Rama Chandra* v. *Maharajah of Jeypore* (2), in which it was held that Courts have power to grant a decree where a cause of action arose subsequent to the suit, is applicable to this case. Following these decisions and having regard to the special circumstances of this case, we reverse the decree of the District Judge and restore that of the District Munsif, except as to costs. Each party will bear his own costs throughout.

Appeal allowed.

M. C. P.

(1) 37 Ind. Cas. 962.

(2) 34 Ind. Cas. 411; (1916) M. W. N. 354; 19 M. L. T. 260.

PUNJAB CHIEF COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 608 OF 1915.

June 20, 1917.

Present:—Mr Justice Broadway.

SITA RAM AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

RAM CHANDRA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 20 (c)—Civil Procedure Code (Act XIV of 1882), s. 17, Expl. III—Jurisdiction—Cause of action—Contract, execution of, within jurisdiction, effect of.

Explanation III to section 17 of the Civil Procedure Code of 1882 has not been re-enacted in the Code of 1908, but owing to the addition of the words "wholly or in part" in section 20 (c) of the latter Code no change has been made in the law. [p. 864, col. 1.]

Where a contract on the basis of which a suit is brought was entered into within the jurisdiction of a certain Court, that Court has jurisdiction to try the suit notwithstanding that the place where the contract was to be performed and the place where the breach alleged in the plaint occurred are both outside such jurisdiction. [p. 864, col. 1.]

The making of the contract is part of the cause of action within the meaning of section 20 (c) of the Civil Procedure Code.

Miscellaneous first appeal from the order of the Senior Subordinate Judge, Ambala, dated the 15th January 1915.

Mr. *Manohar Lal*, for the Appellants.

Mr. *Beni Parshad* Khosla, for the Respondents.

JUDGMENT.—On 27th April 1914, the plaintiffs-appellants instituted this suit claiming Rs. 14,000 from the defendants-respondents as due and payable under a contract made and registered in Jagadhri. The contract was to be performed at Tehri or in any case outside the jurisdiction of the Ambala Courts, and the breach or breaches alleged in the plaint occurred also outside the Ambala District.

The Senior Subordinate Judge ordered that "the plaint "and enclosures be returned to the plaintiff to be presented at the proper Court", holding that the Ambala Courts had no jurisdiction to try the suit, the mere execution or making of the contract at Jagadhri not giving him jurisdiction. The plaintiffs-appellants have appeared and for them I have heard Mr. Manohar Lal, while Mr. Khosla has addressed me on behalf of the defendants-respondents. In my opinion the matter is perfectly clear. It is admitted that under Explanation III to section 17 of the Civil Procedure Code of 1882, the Senior Subordinate Judge, Ambala, had jurisdiction because the contract was made at Jagadhri. This explanation has not been re-enacted in the Civil Procedure Code of 1908, but owing to the addition of the words "wholly or in part" in section 20 (c) no change has been made in the law.

The making of the contract clearly is a part of the cause of action and *Salig Ram* v. *Chuba Mal* (1) is clearly in point. Mr. Khosla argued that the suit was for a refund of monies advanced at Chakrata, but it is clear that these advances were made in pursuance of the contract entered into at Jagadhri. I accordingly accept this appeal and return the case to the Trial Court for disposal.

Costs in this Court will be costs in the cause.

Appeal accepted.

(1) 11 Ind. Cas. 712; 34 A. 49; 8 A. L. J. 1160.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No.1742 OF 1916.

December 13, 1917.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Sadasiva Aiyar.

CHAMPYIL KOPPAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KOLASSERI KELAPPAN NAMBIYAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 63—Claim allowed—Suit, subsequent, by judgment-debtor against claimant decreed—Sale by judgment-debtor—Re-attachment of property—Claim by judgment-debtor's vendee, dismissal of—Suit to establish claim, maintainability of.

A claim preferred to property attached in execution of the respondent's decree having been allowed, the judgment-debtor sued the claimant to set aside the settlement which was the basis of the claim and obtained a decree for possession. He then sold the property to the appellant. The respondent having re-attached the property, appellant put in a claim and, having failed in it, he filed a separate suit for possession:

Held, (1) that the first attachment was not revived as the result of the judgment-debtor's suit; [p. 865, col. 1.]

(2) that the appellant's suit was not barred by section 47, Civil Procedure Code. [p. 865, col. 1.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Palghat at Calicut, in Appeal Suit No. 126 of 1916, preferred against the decree of the Court of the First Additional District Munsif of Calicut, in Original Suit No. 898 of 1913.

Mr. *C. Madhavan Nair*, for the Appellants.

Mr. *K. P. M. Menon*, for the Respondents.

JUDGMENT.—The respondent attached the suit property as the property of his judgment-debtor. A third party put in a claim that the property was his and succeeded. The judgment-debtor sued to set aside the settlement by virtue of which the claimant had succeeded in his claim and for possession and obtained a decree. This was not a suit under Order XXI, rule 63, of the Civil Procedure Code, which confers a right of suit only on the party against whom an order has been made rejecting his claim or his objection to another's claim. The person who objects to a claim is the attaching decree-holder. He (the judgment-debtor) then sold the suit property to the appellant. The respondent then again attached the property and the appellant put in a claim petition, and

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having failed in it, brought the present suit. It is practically admitted that the Subordinate Judge was wrong in holding that the suit was barred by section 47 of the Code of Civil Procedure. See *Arasayee Ammal* v. *Sokkalinga Mudali* (1). Nor can we agree with Mr. Menon's contention that the first attachment was revived by the result of the judgment-debtor's suit above referred to.

We must allow the appeal, reverse the decrees of the lower Courts and give the plaintiff a decree as prayed, with costs throughout.

Appeal allowed.

M. C. P.

(1) 33 Ind. Cas. 84; (1916) 1 M. W. N. 287; 3 L. W. 289.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 147 B OF 1915.

June 17, 1916.

Present:—Mr. Prideaux, A. J. C.

SHAM RAO KUNBI—PLAINTIFF—APPELLANT

versus

Shri SITARAMMAHARAJ—DEFENDANT—RESPONDENT.

Landlord and tenant—Ante-Jagir tenant, position of—Fruit trees planted by tenant—Tenant, right of, to share in fruit.

An ante-Jagir tenant is the owner of his land subject to the payment of the rent to the Jagirdar As long as this is paid the Jagirdar cannot evict him. [p. 866, col. 1.]

Any trees planted in his ante-Jagir holding by such tenant or planted with his permission by any one else do not affect the Jagirdar who, so long as the rent is regularly paid, cannot claim either the land or the trees. [p. 866, col. 1.]

In the absence of an express agreement to the contrary the proprietorship of the land carries with it the ownership of the trees thereon. [p. 866, col. 2.]

There is no custom in Berar that a lessee planting fruit trees on his holding is entitled to half the fruit of the trees even after the termination of his lease. [p. 866, col. 1.]

Appeal from the decree of the Additional District Judge, East Berar, dated the 2nd January 1915, in Appeal No. 332 of 1914.

Mr. *V. R. Pandit*, for the Appellant.

Dr. *H. S. Gour*, for the Respondent.

JUDGMENT.—One Balaji obtained from the defendant, a Wahiwatdar of Walgaon Jagir, a lease of Survey No. 68 of the village, for 15 years, in 1886. During the period of that lease Balaji planted between 1887 and 1889 some 48 mango trees in the field. About 1893 Mr. Francis, the Director of Land Records in Berar, who was settling the village, declared that this field belonged to one Bhagwan, and declared him to be an ante-Jagir tenant. The lease which was in Balaji's favour was not, however, disturbed but Bhagwan was to get possession on expiry of the same. Balaji died some two years after his lease expired and on the 6th October 1906 the present plaintiff appellant took a sale-deed from Balaji's brothers, Nathoo and Ramchandra, conveying an 8-annas share in the mango trees. The appellant now sues for possession of 24 out of the 48 trees on the strength of this sale-deed. He states that the defendant had obstructed him in collecting the fruit of his trees.

The defence is that the trees having been planted by Balaji as the defendant's lessee he had no ownership over them and that the defendant had been in possession of the trees claimed for over 12 years prior to the institution of the suit in his own right. The plaintiff's case is that the person planting on another's land is by customary right entitled to a half share in the trees, the other half share going to the owner of the soil. The Trial Court has held that the plaintiff has failed to establish the special custom set up and that where a lessee plants fruit trees, the property in this is by the general law vested in the proprietor of the land. The Judge held that Balaji merely by reason of his having planted the trees in suit could not be the owner of the trees. On expiry of the lease in his favour, the owner of the soil became the owner of the trees.

It is unnecessary for the purposes of this appeal to enter into the other questions decided by the first Court.

Against the decisions of the first Court the plaintiff appealed to the Court of the Additional District Judge, Amraoti, and the

defendant filed cross-objections. The defendant *inter alia* objected to the finding of the first Court that the *kararnama* filed by him was a forgery. The lower Appellate Court has confirmed the finding of the first Court that Balaji was joint with his brothers, the plaintiff's vendors, and also agreed in the finding that there was no evidence in support of the allegation that by a custom in Berar the tenant may plant trees on his tenancy land and acquire a right to the trees for ever afterwards. The Judge held that though Bhagwan was an ante-Jagir tenant, yet the land primarily belonged to the defendant and so also the property in the trees and that the plaintiff had no title, as his vendors had no title to sell the trees. The Judge, though finding that the *kararnama* relied on by the defendant was a very suspicious document, came to no express decision that it was a forgery and held that it was immaterial for the present case. He confirmed the dismissal of the suit.

I cannot support the lower Appellate Court's opinion as to the position of an ante-Jagir tenant. An ante-Jagir tenant is the owner of his land subject to the payment of the rent to the Jagirdar. As long as this is paid the Jagirdar cannot evict him. Any trees planted in his ante-Jagir holding by such tenant or planted with his permission by any one else is not a question that affects the Jagirdar who, as long as the rent is regularly paid, cannot claim either the land or the trees.

In the present case it is admitted that Bhagwan was the ante-Jagir tenant, but it is shown that his tenancy was not declared until after the Jagirdar had been in possession and had leased the fields to Balaji. When the lease expired, those fields with the trees thereon would go to the ante-Jagir tenant.

Both the lower Courts have held that the plaintiff has failed to prove the special custom alleged, whereby a lessee planting trees in the leased land, at the expiry of his lease, has a half share in the trees. The contention is absurd. In some 25 years' experience of the Province from which the case comes, I have never heard such contentions advanced before. I do not say that a lessee by express agreement with his lessor could not claim a half right in the trees but until that express agreement is established, the general law that proprietorship of the land carries with it ownership of the trees thereon must prevail. Unless Balaji had a right to the half share claimed, it is obvious that his brothers had no right to sell it. Balaji might during the lease take the fruit and the defendant may have allowed him to take such share in the produce until his death. It is obvious that the period between the expiry of the lease and the filing of the present suit is insufficient to give Balaji or his brothers the right of ownership by adverse possession. Whether Bhagwan or his representatives at his death or the Jagirdar are the real owners of the trees is immaterial in the present suit. What is clear is that Balaji had no right to half the trees and his brothers, therefore, could not sell that share to the present appellant. This short ground disposes of the appeal.

The appeal fails and is dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 2134 OF 1916.

February 18, 1918.

Present:—Mr. Justice Scott Smith and Mr. Justice Le Rossignol.

MOHAN LAL—DEFENDANT—APPELLANT

versus

DAMODAR DAS AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), Sch. II, para. 17—Application to file agreement for reference—Death of some arbitrators before application—Agreement, whether can be filed.

An agreement to refer to arbitration becomes *ipso facto* inoperative by the death of an arbitrator before the agreement is made a rule of the Court. [p. 868, col. 1.]

Where, therefore, five arbitrators were named in an agreement to refer to arbitration and two of them had died before an application was made for the filing of the agreement in Court:

Held, that the agreement became incapable of performance and could not be filed in Court. [p. 868, col. 1.]

MOHAN LAL *v.* DAMODAR DAS.

Jones v. *Ledgard*, 8 A. 340; A. W. N. (1886) 107; 5 Ind. Dec. (N. S.) 123, *Bala Pattabhirama Chetti* v. *Seetharama Chetti*, 17 M. 498; 6 Ind. Dec. (N. S.) 345, *Sadik Husain* v. *Kaniz Zehra Begam*, 12 Ind Cas. 15; 33 A. 743; 15 C. W. N. 1005; (1911) 2 M. W. N. 132; 10 M. L. T. 173; 13 Bom. L. R. 826; 14 C. L. J. 313; 8 A. L. J. 1164; 14 O. C. 289; 21 M. L. J. 1151 (P. C.), distinguished.

Brooke v. *Surdyal*, 12 B. L. R. App. 13, *Ma Ba U* v. *Maung Pe Lan*, 42 Ind. Cas. 911, relied upon.

First appeal from the order of the District Judge, Delhi, dated the 13th July 1916, directing the agreement to be filed in Court.

Lala *Moti Sagar*, R. S., for the Appellant.

Messrs. *C. Bevan Petman* and *Santanam*, for the Respondents.

JUDGMENT.—This is an appeal from the order of the District Judge of Delhi directing an agreement to be filed in Court under paragraph 17 of the Second Schedule of the Civil Procedure Code. The appeal was first argued before a single Judge of this Court who has referred it to a Division Bench, the particular question referred being whether an agreement to refer to arbitration becomes *ipso facto* inoperative by the death of an arbitrator before the agreement is made a rule of Court. In the present case there were five arbitrators named in the agreement and two of them had died before an application was made for the filing of the agreement in Court. Counsel for the respondents relied upon *Jones* v. *Ledgard* (1), *Bala Pattabhirama Chetti* v. *Seetharama Chetti* (2) and *Sadik Husain* v. *Kaniz Zeohra Begam* (3). In our opinion these authorities are distinguishable. *Jones* v. *Ledgard* (1) had reference to an application to file an award in Court. In *Bala Pattabhirama Chetti* v. *Seetharama Chetti* (2) one of the arbitrators refused to act after the agreement had been filed in Court, whereas in the present case two of the arbitrators died before even the application to file the agreement in Court was made. In *Sadik Husain* v. *Kaniz Zeohra Begam* (3) there was no application for the filing of the agreement in Court; it was already in Court, being incorporated in a compromise upon which a decree had been passed, and it was subsequent to this that one of the arbitrators refused to act.

For the appellant *Brooke* v. *Surdyal* (4) and *Ma Ba U* v. *Maung Pe Lan* (5) were relied upon.

Brooke v. *Surdyal* (4) was a case in which there had been an agreement for reference to three arbitrators, one of whom had refused to act and the other two had decided to go on with the reference. Pontifex, J., remarked:—"After an agreement such as that now before me has been executed, any person who is a party to it is entitled to apply to the Court to have such agreement filed, and no party to such an agreement could hope successfully to oppose such application if all the arbitrators named in it were alive and willing to act. But it is quite a different thing when, upon making such an application, a party to the agreement is able to come in and show that before the application was made, one of the arbitrators named in the deed had in fact died or as in this case had refused to act in the matter. In such a case I think the contention is right that the reference to the arbitration agreed upon between the parties no longer exists so as to enable the Court to direct that it should be filed, and if it were filed, I do not think the Court could exercise the powers of appointing a new arbitrator, because the arbitrator, who has refused to act, refused before the order of reference, directed by section 326, was made by the Court."

That ruling was under the Code of Civil Procedure of 1859, but the provisions of that Code in regard to an application to file an agreement were not materially different from those of the present Code. The case reported as *Ma Ba U* v. *Maung Pe Lan* (5) is a decision of the Lower Burma Chief Court under the present Code, in which it was held that apart from any enactment an agreement to refer a matter to certain specified arbitrators becomes void and of no effect if one or more of the arbitrators die or refuse to act, and thus make the agree-

(1) 8 A. 340; A. W. N. (1886) 107; 5 Ind Dec. (N. S.) 123.

(2) 17 M. 498; 6 Ind Dec. (N. S.) 345.

(3) 12 Ind Cas. 15; 33 A. 743; 15 C. W. N. 1005; (1911) 2 M. W. N. 132; 10 M. L. T. 173; 13 Bom. L. R. 826; 14 C. L. J. 313; 8 A. L. J. 1164; 14 O. C. 289; 21 M. L. J. 1151 (P. C.).

(4) 12 B. L. R. App. 13.

(5) 42 Ind. Cas. 911.

ment incapable of performance. It was held that in such a case the Court had no jurisdiction under clause (4) of paragraph 17 of Schedule II of the Civil Procedure Code to make a reference to the arbitrators. In our opinion the reasoning contained in this ruling is sound. Sub-clause (4) of clause (17) of the 2nd Schedule of the Civil Procedure Code is as follows :—

"Where no sufficient cause is shown the Court shall order the agreement to be filed and shall make an order of reference to the arbitrator appointed in accordance with the provisions of the agreement."

In the present case certain specified arbitrators are named in the agreement and we fail to see how an order of reference could be made to those arbitrators if one or more of them had died before the agreement was filed in Court. The actual agreement to refer the matter in dispute to five specified arbitrators became incapable of performance when one of those arbitrators died. This, in our opinion, is a sufficient reason for refusing to file the agreement in Court. Clause 19 has been referred to by Counsel for the respondents, but as pointed out by the Burma Chief Court, clause 19 only comes into operation when an order of reference has been made under clause 17. Mr. Petman for the respondents has not cited any authority in support of the proposition that an agreement should be filed in Court if one or more of the arbitrators named therein have died prior to the making of the application.

We, therefore, accept the appeal and setting aside the order of the lower Court reject the application for filing the agreement with costs in both the Courts.

Appeal accepted.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 26 OF 1917.

January 29, 1918.

Present:—Mr. Batten, A. J. C.

LAXMAN—PLAINTIFF—APPELLANT

versus

TUKIA AND OTHERS—DEFENDANTS—RESPONDENTS.

Easements Act (V of 1882), s. 24, ill. (d)—Public paths—Dedication, nature of—Easement, indeterminate body of persons, whether can claim—Public path closed—Right of deviation, extent of.

Public rights of way are not easements. Public, differing from private, rights of way originate from a dedication to the public by the owner of the soil over which they pass. Dedication means a gift not necessarily by a deed or any written document, and it is more often implied from custom and user than from any definite act of the owner of the land. Even when no such overt act can be shown, if the public use a way for some time to the knowledge of a land-owner and without resistance, dedication will be inferred and a right gained. [p. 869, col. 1.]

There can be no right of easement in favour of an indeterminate body of persons. [p. 869, col 2.]

If a person encloses a public path over his land and allows a new one to be opened in its place, he must be presumed to have made a fresh grant to the public of the new path. [p. 870, col. 1.]

When the owner of the land renders a way impassable, the persons entitled to use the way may deviate from it and pass over the adjoining land of the owner provided that the deviation is reasonable. [p. 870, col. 1.]

Selby v. *Nettlefold*, (1874) 9 Ch. 111; 43 L. J. Ch. 359; 29 L. T. 661; 22 W. R. 142, followed.

A cultivator, *prima facie*, has a right to the exclusive use of his own field and very strong evidence is necessary before it can be held that other people have a right of way, public or private, over his land. [p. 870, col. 2.]

Appeal from the decree of the Court of the District Judge, Wardha, dated the 24th October 1916, in Appeal No. 174 of 1916.

Mr. *M. R. Bobde*, for the Appellant.

Mr. *D. T. Mangalmurti*, for the Respondents.

JUDGMENT.—Appeal by the plaintiff. The plaintiff brings this suit against three persons, as representing the village of Hingni under Order I, rule 8 of the first Schedule of the Civil Procedure Code, to get an injunction preventing the use of a footpath through his field. The plaintiff's field lies between two villages and the plaintiff objects to foot passengers going through his field. The First Court wrongly treated the case as one of easement, that is, of a private right of way. The District Judge has looked at the case from a right point of view. He has held that the evidence shows that the public have been passing through the plaintiff's field for many years by immemorial village custom. The law as to public rights of way has been summed up in the Encyclopædia of the Laws of England* as follows —

"Public rights of way are rights, belong-

*See Vol. 14, pages 633 & 634—*Ed.*

ing to the public and exercisable by every member of the community of passing over land. They are not easements, though they are sometimes so called in error....These ways sometimes take the form of highways and public roads.....At other times they are merely footways or bridle paths leading across fields.....Public, differing from private, rights of way originate from a dedication to the public by the owner of the soil over which they pass. Dedication, as the word implies, means a gift, not necessarily by a deed or any written document, and it is more often implied from custom and user than from any definite act of the owner of the land.....Even when no such overt act can be shown, if the public use a way for some time to the knowledge of the landowner and without resistance by him, dedication will be inferred and a right gained".

It is a well-known fact that there are public foot-paths through fields in the villages of the Central Provinces. On this subject I may quote an extract from the instructions recently issued by the Chief Commissioner under section 62 of the Land Revenue Act, 1917, regarding the preparation of the *wajib ul-arz*:—

"Village roads, paths and rights of way. There are usually to be found in every village certain general principles which form part of the almost universal communal rights and liabilities of village life. These are the rights of every cultivator to pass along the boundaries of any field or area in the village, taking with him his plough, cattle and agricultural implements on the way to his own field, and the obligation on the Malguzar and villagers to keep all village roads in order, and the right of passage to and from ploughing and threshing, grazing and water. In some districts the custom prevails that at certain seasons of the year the field embankments are cut so as to allow access with carts across the fields. In some cases these communal rights are exercisable at all times and in some cases only during certain seasons of the year. Enquiry should be made into the customs which prevail regarding all these points and the result should be carefully recorded.

"A schedule showing the Khasra numbers of existing roads, permanent or seasonal, or where such have no separate Khasra number, the Khasra numbers of the areas across which they pass should be included.

"All recognised public rights of way, including footh-paths for men only, where such paths are permanent and recognised should be entered, and a note should be made where a special Goha or road for cattle exists, showing which of the roads scheduled constitutes the Goha.

"At the checking of the village map, care should be taken that all roads are surveyed and shown, not only where they cross areas occupied for cultivation, but also where they cross unoccupied areas and especially the village waste."

In this case there is no mention of the path in question in the *wajib-ul-arz* nor is it marked in the village map. But no presumption against the defendants can arise from this, as the instructions had not been issued at the time of settlement. The sole question in this case is whether the defendants have proved that there is a public path across the plaintiff's field by immemorial village custom. The District Judge has not expressly referred to the principles of law enunciated in the first of the above quotations, but nevertheless his judgment proceeds upon correct lines. Even the plaintiff admits that a public right of way can exist through a private field, for his case is that the public right of way, the existence of which he does not deny, lies not through his field No. 41, but through the neighbouring field No. 42 belonging to the first defence witness Radhakisan. The learned District Judge has held on the evidence adduced by the defendants that there has been a public foot path through field No. 41 since time immemorial. This foot-path was obstructed by the plaintiff about 7 years ago, and the direction of the path was, therefore, somewhat changed into the position which it occupied at the time the suit was brought.

The case having been decided on proper lines I will proceed to discuss the grounds of appeal. It is correctly contended in the first ground that there can be no right of easement in favour of an indeterminate body of persons, but the case has not been decided on these lines by the learned District

Judge who has dismissed the plaintiff's suit because the path is public path. The 2nd ground that the question is one of license has not been argued. In the 3rd ground of appeal it is urged that the defendants in their pleadings stated that the existing right of way had been in existence over 60 years while their evidence is that the direction of foot path was changed 7 years ago and it is alleged that the findings are, therefore, not in accordance with the pleadings. On examining the record I find there is no genuine cause of complaint on this score. The pleadings of the parties could not be understood until the Commissioner went to the spot to make a map and the defendants made it clear in their representations to the Commissioner, which in these circumstances must be taken to be part of the pleadings, that the original path had been shifted 7 years ago into a new position because the then existing path was blocked by the plaintiff. The positions of the two paths are marked in the plans prepared by the Commissioner. In the 4th ground of appeal it is urged that even if the public had a right to use the old path, they have lost their right by abandonment and have no right to use the new path. There is a double answer to this contention. The first is that under the principles of law applying to public paths the plaintiff must be presumed by his action in enclosing the old path and allowing a new one to be opened in its place to have made a fresh grant to the public of the new path. Also under the principles recognised in illustration (*d*) to section 24 of the Indian Easements Act, when the owner of the land renders a way impassable, the persons entitled to use the way may deviate from it and pass over adjoining land of the owner provided that the deviation is reasonable. This principle has been clearly set out in *Selby* v. *Nettlefold* (1). The 5th ground says that the lower Court should have made a distinct finding as to exactly how many years the public had used the path. There is a finding that it has been in use for over 60 years. The 6th ground of appeal is not very clearly worded, but it has been argued on the assumption that it means that the defendants have not proved that the public used the path as of right. The nature of the evidence shows that the foot-path has always been recognised as a public foot-path.

A cultivator *prima facie* has a right to the exclusive use of his own field and very strong evidence is necessary before it can be held that other people have a right of way, public or private, over his land. This seems to have been recognised by the learned District Judge who has held that the evidence adduced by the defendants is insufficient. I may add that the suit appears to be the outcome of a quarrel between the plaintiff and Radhakisan. The appeal is dismissed with costs.

Appeal dismissed.

(1) (1874) 9 Ch. 111; 43 L. J. Ch. 359; 29 L. T. 661; 22 W. R. 142.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1699 OF 1914.

March 9, 1917.

Present :—Mr. Justice Fletcher and Mr. Justice Smither.

SARADENDU MUKERJEE, SOLE EXECUTOR TO THE ESTATE OF HIS LATE FATHER HARENDRA NATH MUKERJEE UNDER HIS WILL—PLAINTIFF—APPELLANT

versus

CHARU CHANDRA DUTTA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 35—Costs—Appellate Court, power of, to interfere with costs awarded by Trial Court—Appeal on question of costs, maintainability of.

Under section 35, Civil Procedure Code, the costs of, and incident to, all suits are in the discretion of the Court and where the primary Court has exercised its discretion in dealing with the costs, it is an unusual course for the Appellate Court to interfere with that discretion of the primary Court. [p. 871, col. 2.]

Where costs are in the discretion of the Judge, the Court of Appeal will assume that the Judge exercised his discretion unless it is satisfied that he has not exercised it. The Appellate Court will not interfere with an exercise of the discretion of the primary Court unless it has proceeded on a manifestly wrong ground [p 871, col. 2.]

It was never intended by the Legislature that the award of costs by a Court should form the subject of an appeal, unless some question of principle is

involved on which that Court failed to exercise its discretion. [p. 871, col. 1; p. 872, col. 2.]

Appeal against the decree of the Additional District Judge, 24-Pergannas, dated the 5th February 1914, reversing that of the Subordinate Judge, 2nd Court of that District, dated the 17th August 1912.

Dr. *Dwarka Nath Mitter* (with him Babus *Profullah Chander Bose* and *Promotho Lal Dutt*), for the Appellant.

Babus *Baranasibasi Mukherjee* for Babu *Mohini Mohan Chatterjee*, for the Respondents.

JUDGMENT.

FLETCHER, J.—This is an appeal from a decision of the learned Additional District Judge of the Twenty-four Pergannas, dated the 5th February 1914, reversing the decision of the Subordinate Judge of the same place. The appeal before the learned Additional District Judge involved only one question on the merits, namely, as to the manner in which the Judge in the primary Court had dealt with the costs of the defendants Nos. 1 and 2. The learned Judge in the primary Court, considering all the circumstances, in the exercise of his discretion made a partial award to the defendants Nos. 1 and 2 of their costs in the suit. As to the remainder of their costs, he made no order and left them to bear them themselves. Against that decision, an appeal was preferred to the learned Additional District Judge, who reversed the decision of the learned Subordinate Judge and awarded to the defendants Nos. 1 and 2 the whole of their costs. The present appeal is preferred against that decision. The facts are these so far as they are material:—One Suresh Chunder Gangully died in February 1907, having by his Will, made a few days before his death, dedicated the whole of his properties to a goddess to be installed at Benares. The form of the bequest which formed the subject of judicial decision has been held to be valid. The defendants Nos. 5 and 6 on the 29th September 1908, alleging that they had a 2/5th share of the properties left by Suresh Chunder, mortgaged it to the predecessor of the present plaintiff. That mortgage was transferred subsequently on the 27th September 1909 to the plaintiff who obtained a mortgage decree against the defendants Nos. 5 and 6. Then the plaintiff brought the present suit and the Subordinate Judge held that the plaintiff under his mortgage decree was entitled only to the benefit of certain annuities that had been given to the mortgagors and that the rest of the property had been validly dedicated to the deity which was to be installed at Benares; and taking into consideration all the facts, the learned Judge made a partial award of costs to the defendants Nos. 1 and 2. Against that award, the defendants Nos. 1 and 2 appealed to the learned Additional District Judge and the learned Additional District Judge decreed the appeal. The learned District Judge has altogether overlooked the provisions of section 35 of the Code of Civil Procedure. Section 35, Civil Procedure Code, provides that the costs of and incident to all suits shall be in the discretion of the Court; and where the primary Court has exercised its discretion in dealing with the costs, it is an unusual course, to say the least of it, for the Appellate Court to interfere with that discretion of the primary Court. This, I think, is well laid down by Sir Lawrence Jenkins, Chief Justice of Bombay, and Mr. Justice Candy in the case of *Parshram Bhawoo* v. *Dorabji Pestonji* (1), where, having stated the general rule, the learned Chief Justice states that, where costs are in the discretion of the Judge, the Court of Appeal will assume that the Judge exercised his discretion unless it is satisfied that he has not exercised it and, *secondly*, that the Appellate Court will not interfere with an exercise of the discretion of the lower Court unless it has proceeded on a manifestly wrong ground. Those two propositions are amply established by the cases in England and, so far as I know, it is the general rule that has been consistently followed in this country. There are grounds of public convenience which render such a rule as one which ought to be adhered to. In many cases, it is an extremely difficult thing for a Judge to review all the circumstances to say how and in what manner the costs ought to be borne by and between the parties and, if the discretion of the Court in such a matter is interfered with by the Appellate Court, the number of appeals that would be preferred to the Appellate Court would be stupendous. It was never intended that a matter of that nature should form the subject of an appeal. Some question of principle must be involved

(1) 2 Bom. L. R. 254.

on which the Judge failed to exercise his discretion. I think in this case that the learned Judge of the lower Appellate Court was not justified in interfering with the discretion of the primary Court in the award of costs.

The other question that has been urged as to the suit being barred by limitation is an interesting point. It is not necessary for us to decide that matter in the present appeal. A matter of such importance ought not to be decided unless it is necessary for the decision of the case. I always have a strong objection to decide a point that is not necessary for the purpose of the decision of the case before the Court. It tends to tie the hands of the Court on subsequent occasions when the matter becomes perhaps of more importance and perhaps the only question to be considered. I think the learned Judge was altogether wrong in allowing the appeal from the decision of the learned Subordinate Judge with reference to this question of costs only, which had been fully dealt with by the learned Subordinate Judge in the exercise of his discretion. In my opinion, therefore, the present appeal should be allowed, the decree of the learned District Judge should be set aside and the decree of the Subordinate Judge restored. The respondent must pay to the appellant his costs in this Court and in the lower Appellate Court.

SMITHER, J.— I agree.

Appeal allowed.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 251 OF 1914.

September 10, 1917.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

SADASHIV PARSHARAM RISBUD— PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA — DEFENDANT—RESPONDENT.

Khoti lands Survey and revised settlements—Kabuliyats *passed by* khots—Khots, *right of, to trees on* varkas *land Bombay Survey and Settlement Act* (*I Bom of* 1865), *ss.* 37, 38—*Bombay Land Revenue Code* (*Act V of* 1879), *s.* 40.

Certain villages to which Dunlop's Proclamation of 1824 applied were originally surveyed about 1855 and the survey settlement was introduced into them in 1865-66. In the settlement register the land in dispute was described as Varkas and particular Survey and Falni Numbers were given to it. A revision survey settlement was introduced in 1902. After 1870 the Khots passed annual *kabuliyats* to the Government. The Khots had to pay a certain fixed amount in respect of the Varkas lands of these villages every year to the Government and they used to recover the customary dues from those who used or were in occupation of the Varkas lands prior to the settlement of 1865-66. After the settlement the dues payable to the Khots by the occupants in respect of the Varkas land were the fixed assessment and the Fayda. Under one of the clauses of these *kabuliyats* the Khots were entitled to one-third of the value of teak trees standing on the Varkas lands. The Government sold certain teak trees to the Khatedars and the Khots sued to establish their right to the entire value of the trees under Dunlop's Proclamation or alternatively to one-third of the value under their *kabuliyats*:

Held, (per *Heaton, J.*), that as between the Khots and the Government the matter in dispute was concluded by the *kabuliyats* and that the Khots could not, therefore, obtain more than one-third of the proceeds of the sale of the trees. [p. 875, col. 1.]

Per *Shah, J.*—(1) That Dunlop's Proclamation may apply even to Varkas lands, provided the person who claims the benefit of the Proclamation can prove that the land, on which the trees stand, is his in a popular sense, *i. e.*, it is sufficiently marked out as being in his permanent occupation in his own right so as to make it properly describable as his land; [p. 877, col. 1.]

(2) that the Khots in this case were not in permanent occupation of the lands in question nor did they have such interest in the lands as would enable them to obtain the benefit of Dunlop's Proclamation; [p. 878, col. 2.]

(3) that if the Proclamation applied to the lands in question, the Khot's rights to the trees were not affected by the *kabuliyats*, inasmuch as the *kabuliyats* regulated only such rights to trees as a Khot enjoyed only as a Khot and which would come to an end if he ceased to be a Khot; [p. 878, col. 1.]

(4) that the Khots had no claim to the teak trees under section 40 of the Bombay Land Revenue Code [p. 879, col. 1.]

First appeal from the decision of the District Judge, Thana, in Suit No. 9 of 1912.

Mr. *P. V. Nisure*, for the Appellant.

Mr. *S. S. Patkar*, for the Respondent.

JUDGMENT.

HEATON, J.—This suit relates to the right to some teak trees which grew on certain Khata lands in the Khoti villages of Girne and Nanavali in the Mangaon Taluka of the Kolaba District. These trees were sold by the Government to the Khatedars and were cut and removed by the latter. The Khots claimed the pro-

ceeds on the ground that they were the owners of the trees. They also claimed alternatively one-third of the proceeds on the strength of a clause in the Kabuliyats which they signed year by year. They made the Secretary of State for India in Council the sole defendant, having previously unsuccessfully brought suits against some of the Khatedars.

The two villages of Girne and Nanavali are Khoti villages. In 1865-66 a survey settlement was introduced into these villages and under the provisions of sections 37 and 38 of Bombay Act I of 1865 the position of the tenants was secured. A Kabuliyat for the period of the settlement was not given to the Khots who as before signed annual Kabuliyats. Later, in 1902, when a revised settlement was made, the position of the tenants continued to be secured and Kabuliyats continued to be signed annually by the Khots. These Kabuliyats are, except as to details, substantially the same as that set out in the report of the case of the *Secretary of State* v. *Sadashiv Abaji Bhat* (1) and contained a clause similar to clause 10 there set out. It is under this clause that the Khots claim in the alternative one-third of the proceeds. The Government Pleader who appeared for the respondent-defendant admitted that this alternative claim was in itself irrefutable, though he argued that it must in this case be dismissed on the technical ground that due notice of the claim was not given as required by section 80 of the Civil Procedure Code.

Prior to the Settlement of 1865-66 annual Kabuliyats were signed which were materially different from those subsequently approved and which did not contain any clause relating to trees. When the first of the Kabuliyats was signed we do not know, but they were an annual incident for a good many years prior to the settlement. I have spoken of the lands on which the trees stood as Khata lands, because at the settlement they appear as Falni Numbers incorporated in Survey Numbers, each Falni Number bearing a consecutive number, being of a stated area and bearing a definite assessment: and each Falni Number was entered in the name of a particular person. Prior to the settlement, except possibly for a short period between the survey and the settlement, the lands in question formed part of what is still described as Varkas land. This Varkas land was then unsurveyed and not assessed at any definite rate. The Khots paid a lump assessment for the whole Varkas land year by year, for there was, and for long had been, a certain amount of cultivation of the land; and in respect of it the cultivators paid to the Khots the customary share of the produce.

The facts I have so far stated are either admitted or so clearly appear from the record as to be really outside the field of controversy.

Another important circumstance equally incontrovertible is that the villages of Girne and Nanavali were included in the area to which Dunlop's Proclamation of 1824 applied.

The case made for the plaintiffs in the trial Court is thus stated in the District Judge's judgment:—"The plaintiffs claim title to the timber or to the portion of the sale-proceeds of the timber on four different grounds. *First*, they say that as Vatandar Khots of the village they are entitled to all the timber trees in occupied or waste land not being Government forest. *Secondly*, they are entitled to them by virtue of Mr. Dunlop's Proclamation. *Thirdly*, they aver that the trees having been once felled in 1862 they are entitled to the aftergrowth under certain Resolutions of Government by which the right to aftergrowth has been conceded to the occupants, and *fourthly*, that under the Kabuliyats they passed to Government they are entitled to one-third of the sale-proceeds of the timber for doing duty in connection with the watching of the jungle." The District Judge held that the first contention failed as the Khots are not proprietors of the soil. That is indubitably true in this case, as the Khots do not occupy a position better than that of the Khot in the case of *Tajubai* v. *Sub-Collector of Kulaba* (2).

He held on the evidence that the third contention was not made out. I think that the evidence is almost conclusive that

(1) 14 Ind. Cas. 434; 14 Bom. L. R. 77; 36 B. 290.

(2) 3 B. H. C. R. A. C. J. 132.

there was not a previous cutting in the lands in suit in or about 1852 or at any other not very remote date. This part of the case was realized by the appellant's Pleader to be very weak and was not, for it could not be, strenuously pressed.

The main contest both in the Court below and here turned on the application and effect of Dunlop's Proclamation. In the trial Court the decision was against the Khots.

The alternative claim also was rejected not, as I gather, on the merits but on the technical ground that due notice of the claim was not given.

So the suit was dismissed, with costs and one of the Khots has appealed.

As I have already indicated, the only matters which demand our further serious consideration are: (1) the application and effect of Dunlop's Proclamation; (2) the effect of the Kabuliyats both as to the main claim and as to the alternative claim; and (3) the question of notice.

I will deal with the second contention first and will assume that the appellant has a reasonable chance of establishing that in virtue of Dunlop's Proclamation the right to the trees was his. Nevertheless the right was not an established but an uncertain right and in any event was a right which the Khots could bargain away. It seems to me that they did for the time being bargain it away or surrender it when they signed the Kabuliyat; for the legal relations between the Khot and the Government for the time being are those established by the Kabuliyat. It is, however, said on behalf of the appellant (the Khot), as was said in the case of *Collector of Ratnagiri* v. *Antaji Lakshman* (3), that "the Kabuliyats... can only be regarded as formal agreements by which the Khot engages to make good the fixed sum at which the revenue is assessed."

There may be cases in which the Kabuliyats are mere formal documents, but there are others in which they are not: witness the case of *Nagardas Sanbhagyadas* v. *Conservator of Forests, Bombay* (4), which went up to the Privy Council, and also the case of *Secretary of State* v. *Sadashiv Abaji Bhat* (1). The latter seems to me to be a case of the greatest importance, though it is not reported in the Indian Law Reports* and was not referred to in argument until we ourselves called attention to it.

In the case before us Kabuliyats were signed annually by the Khots for many years; they are the only written evidence of the conditions on which the plaintiffs have the Khoti management of the village. The terms of the later series of Kabuliyats were arrived at after the survey settlement of 1865-66 and, we are told, have not since been materially varied. For practical purposes the Khots cannot exercise the management of the village unless they sign the Kabuliyat, for, on refusal to sign, the Government have the power to attach and usually do attach a Khoti village. On their side, therefore, the Khots obtain the management of the village and so much of the dues paid by the cultivators as are Khoti Fayda; on the other the Government receive from the Khot the assessment and secure to the cultivators certain valuable rights by reason of the conditions stated in the Kabuliyat. The Kabuliyat is the result of consideration of their rights by each side and each side has something to gain and lose in the matter. If he so choose, the Khot can refuse to sign the Kabuliyat and can stand on his own rights as Sadashiv Abaji Bhat did [*Secretary of State* v. *Sadashiv Abaji Bhat* (1)]. But if he signs the Kabuliyat he is bound by its terms so long as it is in force. There was a Kabuliyat in force when the trees were sold and cut. That Kabuliyat by clause 11 provided that as to teak trees *in lands such as those in suit* one-third share of the proceeds was to go to the Khots. They had thus bargained their dubious right to the whole proceeds for a certain one-third. It was argued that the Khots' right to the trees remained unaffected by the Kabuliyat. But it is not, as it seems to me, open to a party to an agreement to repudiate the arrangement because he thinks it is turning out unfavourably to him. I do not myself doubt that the agreement as to trees was intended to and did cover the case of trees on the lands described as Varkas; indeed to me it seems that the Kabuliyat was intended to prevent

(3) 12 B. 534 at p. 548; 5 Ind Dec. (N. S.) 840.
(4) 4 B. 264; 7 I A. 55; 4 Sar. P. C. J. 93; 3 Suth. P. C. J. 700; 2 Ind. Dec. (N. S.) 683 (P. C.).

*Since reported as 36 B. 290 — *Ed.*

such a dispute as that which has arisen in this case. Therefore, as between the Khot and the Government the matter in dispute is, in my opinion, concluded by the Kabuliyat and the Khot cannot in this case obtain more than one-third of the proceeds of the sale of the trees.

This, however, is a very small part of the case as argued and I now turn to the first matter, the application and effect of Dunlop's Proclamation. There is a great mass of evidence and there have been days of argument directed on the one side to show that the Khots were under this Proclamation the owners of the trees; on the other that the Government was the owner. There is a third possibility: that the Khatedars are the owners. The evidence and circumstances were all carefully considered by the District Judge but as I have said, in my opinion, the matter is concluded by the Kabuliyats and, therefore, it is unnecessary for me to embark on a consideration of this lengthy and difficult aspect of the case.

It is contended that the claim of the Khots to the one-third must also be dismissed because the notice of suit was defective. No doubt it was in a way defective; but all the same there was substantial notice of the claim and on the circumstances appearing, we cannot, in my opinion, dismiss the claim to one-third on so technical a ground. That claim is good and must be awarded. I would, therefore, award the claim to the extent of one-third and order that the parties bear their own costs throughout.

SHAH, J.—The plaintiffs in this case, who are the Khots of the villages of Girne and Naravali in the Mangaon Taluka of the Kolaba District, seek to recover the price of certain teak trees realised by the Government by the sale thereof to the occupants of the lands, on which the trees stood in 1909, or in the alternative one-third of the amount. In the lower Court they based their claim, *firstly*, on the ground of the proprietorship of the soil, *secondly*, on the allegation that the trees in question were really the subsequent growths of the original teak trees which were cut in 1862 or thereabout and that they belonged to the Khots according to certain Government Resolutions, *thirdly*, on Mr. Dunlop's Proclamation and, *lastly* as regards the alternative prayer on the Kabuliyats. The defendant, the Secretary of State for India in Council, resisted the claim principally on the ground that the lands were Varkas lands, that the plaintiffs were not the proprietors of the soil, that the trees were not cut before as alleged by the plaintiffs, that Mr. Dunlop's Proclamation had no application to the lands in question, and that, if at all, the occupants and not the Khots should have the benefit of that Proclamation, that the rights of the Khots to the trees were regulated by the terms of the Kabuliyats, and that the claim to one third of the price of the trees could not be allowed for want of a specific notice.

The District Court of Thana, which tried the suit, has disallowed the plaintiff's claim.

One of the Khots has preferred the present appeal.

It has been argued at length before us, and though all the four grounds in support of the Khots' claim have been urged, the first two grounds have not been seriously pressed.

These are Varkas lands and whatever the extent of the Khots' interest either as Khots or occupants in the particular lands may be, it is clear that they are not the proprietors of the soil. The question has been fully dealt with in the case of *Vasudev Bhaskar Pendse* v. *Collector of Thana* (5). Mr. Nijsure did not press the point in view of this decision.

The second ground of the plaintiffs' claim is equally untenable. Not only is it not shown that the teak trees in question are the subsequent growths but it is shown that most of the teak trees could not be the subsequent growths as alleged by the plaintiffs. The trial Court has dealt with the evidence on the point; and no good reason has been shown by the appellant why the trial Court's conclusion on this point should not be accepted.

The third ground of the plaintiff's claim relates to Mr. Dunlop's Proclamation. The main controversy between the parties has ranged round this part of the plaintiff's case in the appeal. It will be convenient to note here a few facts bearing on this point, which are either proved or admitted. The villages of Girne and Nanavali

(5) (1879) P. J. 274.

are within the area to which Mr. Dunlop's Proclamation applies. These villages were originally surveyed in about 1855 and the survey settlement was first introduced in 1865-66. The revision survey settlement was introduced in 1902, and at the date of the sale of the trees, the revision settlement was in force. The lands in question are described as Varkas and particular survey and Falni Numbers are given to the lands in question in the settlement register of 1865 65. They are described as Khoti Nisbat land. The occupants or tenants in whose names these lands are entered have to pay a certain fixed assessment and Fayda to the Khots. Sections 37 and 38 of the Bombay Survey and Settlement Act (I of 1865) are applicable to them. The present Khots and their predecessors-in-title have been Khots of these villages since the times of the Peshwas. Their position as Khots was recognised when the British Government acquired this territory. Prior to the first settlement they used to pass Kabuliyats and after 1870 they have passed annual Kabuliyats, to the Government, of which Exhibits 47 and 72 are types. Though their position as hereditary Khots is not admitted by the Government Pleader, it is clear to my mind that for the purposes of this case they must be treated as Khots, whose rights from long standing have become hereditary, and who represent the same class of Khots as the Khots in the case of *Tajubai* v. *Sub-Collector of Kulaba* (2).

Mr. Dunlop's Proclamation was published in 1824, and it is common ground now that in spite of the attempt to cancel the grant in 1851, it is still in force.

The Khots sought to establish their claim against the occupants in the first instance but failed. The occupants are not parties to the present suit, and in this appeal we are not directly concerned with their rights, if any, to the trees. The Khots had to pay a certain fixed amount in the respect of the Varkas lands of these villages every year to the Government, and they used to recover the customary dues from those who used or were in occupation of the Varkas lands prior to the settlement of 1865 66. After the settlement the dues payable to the Khots by the occupants in respect of the Varkas land were the fixed assessment and the Fayda.

These are the important facts which relate to the contentions of the parties as to Mr. Dunlop's Proclamation.

The appellant contends that the Khots have sufficient interest in the lands to invite the application of the Proclamation in their favour, that the persons, in whose names the lands are entered, are really their tenants, and that their claim under the Proclamation is independent of and not affected by the terms of the Kabuliyats. The learned Government Pleader contends that the Proclamation can have no application to the Varkas lands, that the Khots have no such interest in the lands in question as would enable them to take the benefit of the Proclamation, that the occupants in whose names the lands are entered are not shown to have been the tenants of the Khots prior to the settlement of 1865-66, that even if the occupants in whose names the lands were entered in 1865 66 were to be treated as having been in occupation of the lands in 1824 in their own right they, and not the Khots, would be entitled to the benefit of the Proclamation and that the rights, if any, of the Khots under the Proclamation, are modified and regulated by Kabuliyats which the Khots passed from year to year.

I shall first deal with the argument that the Proclamation cannot apply to the Varkas lands. I am unable to accept this argument. It is proved in this case that the Khots had to pay a certain amount every year to the Government in respect of the Varkas lands. Undoubtedly the Khot is a farmer of the village. But as pointed out in *Tajubai's case* (2) the right to cultivate such waste or other lands as may be at the Khot's disposal or to give them out in cultivation under such terms as may be most to his advantage must be viewed as a recognised mode of his remuneration for the services rendered, and that whenever he ceases to be the Khot, he becomes liable for the full amount of the assessment as an ordinary cultivator in respect of lands which he may have brought under cultivation or disposed of for his own benefit. It follows that it would be open to the Khot to dispose of plots of Varkas lands in a

manner as may be most to his advantage, of course subject to the rights of other tenants already in occupation of the Varkas lands, and to acquire such interest in the lands as would enable him to retain the lands subject to his paying the full assessment or customary dues when he ceases to be the Khot of the village. It is open to him to acquire the interest practically of an occupant in any plot of Varkas land. Such an interest, if proved, would entitle him to the benefit of the Proclamation on the principle recognised in *In re Antaji Keshav Tambe* (6) and in *Secretary of State* v. *Sitaram Shivram* (7). No doubt both these cases related to the Khoti Khasgi lands. But it seems to me that the principle of the decisions is not necessarily confined to the Khasgi lands. Fulton, J., while referring to the Proclamation, observed in *In re Antaji Keshav Tambe* (6) as follows: "The correspondence preceding the issue of this document shows that it was intended to be of wide application, and it is difficult to imagine to what class of lands it was intended to apply, if it did not include those of which the Khot was entitled to the permanent occupation so long as he paid the assessment due on the village." If a person—not necessarily a Khot—can prove that he was in permanent occupation of a plot of Varkas land in his own right, I do not see any reason why he is not the person whose land it is, within the meaning of the last sentence of the Proclamation. I have not set forth the whole Proclamation here; but it has been fully set forth in both these cases, and the material part is quoted in Marathi by Parsons, J., in his judgment in *Secretary of State* v. *Sitaram Shivram* (7). Of course any preson who claims the benefit of the Proclamation must prove that the land, on which the trees stand, is his in a popular sense, *i.e.*, it is sufficiently marked out as being in his permanent occupation in his own right so as to make it properly describable as his land.

The learned Government Pleader has relied upon *Vasudev Bhaskar Pendse's case* (5) in support of his argument. But that was a case in which the basis of the claim was the proprietorship of the soil. It was not a case to which Mr. Dunlop's Proclamation could apply. The point was not considered and could not have been decided. The general conclusions of the learned Judges at page 286 have reference to the proprietorship of the soil and have no application whatever to Mr. Dunlop's Proclamation. The only other case relied upon in support of this view by the Government Pleader is the unreported case of *Secretary of State for India in Council* v. *Balkrishna Antaji Bhagwat*, First Appeal No. 73 of 1910 decided on 24th March 1914. I have read the interlocutory judgment of this Court in the case. I do not think that the point could be treated as decided in favour of the Government. At the most it may be treated as an instance in which, if the land was proved to be Varkas, it was assumed that the trees would not belong to the Khot. But even as to that I am very doubtful. The possibility of the Proclamation being applicable to ordinary Varkas land was recognised by the Court, the plaintiff in that case having been expressly permitted to adduce evidence on the point. I am, therefore, of opinion that the Proclamation may apply even to the Varkas land, provided the necessary facts are established.

The second general argument, which I propose to deal with, relates to the Kabuliyats. Assuming for the sake of argument that the Khot has a right to the trees on a certain plot of Varkas land under the proclamation, I do not think that the right is affected by these Kabuliyats. It seems to me that the purpose of clause 11 of the Kabuliyats, with which we are concerned, is to define the rights of the executants as Khots, and not to include within its scope such rights as may be independent of the Khotship, though they may have been acquired in consequence of the Khotship. For instance the trees on the Khoti Khasgi lands would belong to the Khot in spite of clause 11. In the case of *Secretary of State* v. *Sadashiv Abaji Bhat* (1), clause 10 of the Kabuliyat in which corresponded to clause 11 of the

(6) 18 B. 670 at p. 678; 9 Ind. Dec. (N. S.) 955.
(7) 23 B. 518; 1 Bom. L. R. 19; 12 Ind. Dec. (N. S.) 345.

Kabuliyats in the present case, the decision of the District Judge that Dunlop's Proclamation applied in respect of the trees growing on the Khoti Khasgi lands was accepted by the High Court. Similarly, if Dunlop's Proclamation applies to trees on Varkas lands proved to be in the permanent occupation of a person, I do not see how clause 11 can be used to deprive a Khot of the rights to trees, if he is proved to have such rights. I quite agree that such rights to trees as a Khot enjoys only as a Khot, and which would come to an end if he ceased to be the Khot, would be regulated by the Kabuliyats. I do not think that this view conflicts in any way with the decision of their Lordships of the Privy Council in *Nagardas Sanbhagyadas* v. *Conservator of Forests, Bombay* (4). It seems to me that the learned District Judge's view on this point is right.

The next question is whether the Khots are proved to have such interest in these Varkas lands as would bring them under the terms of the Proclamation. This is entirely a matter of evidence. The oral evidence is not of much use. It is necessarily vague and indecisive, when we have to deal with the state of things as it obtained prior to the settlement of 1865-66. There is no register. There are only the appraisement papers, which show that certain lands were cultivated by the persons who were entered in 1865-66 in the settlement register as occupants, or their predecessors. But the lands are described by the names, and it is not shown whether the lands mentioned in these papers refer to the particular plots with which we are concerned. The plaintiffs have not been able to show that any of the occupants or their predecessors were in occupation of the Varkas land as the tenants of the Khots and not in their own right, liable only to pay the customary dues to the Khots. The appraisement papers merely show that they cultivated the lands. But the nature and extent of their rights in relation to the lands are not shown. The plaintiffs have produced a number of rent notes; but they have not proved that a single one of them was executed by the present occupants or their predecessors. Under these circumstances it seems to me to be quite impossible to hold that the Khots were in permanent occupation of the lands in question or that they had such interest in the lands as would enable them to obtain the benefit of Dunlop's Proclamation. I have not discussed the evidence in detail. It was discussed at length before us. On no essential points it could bear examination; and it is unnecessary to deal with it at any length.

In view of this conclusion it is unnecessary to examine the further argument that the right to the trees is vested, if at all, in the tenants or occupants and not in the Khots. The learned District Judge has expressed a strong opinion that the Khatedars have the same rights over the lands in their Khatas except the right of alienation otherwise than by inheritance as the Khots have in respect of their private lands (Khasgi lands). This is not a claim by the Khatedars against the Government; and it is not necessary to express any opinion as to their rights to the trees.

It remains only to deal with the argument of Mr. Nijsure based on sections 37 and 38 of the Bombay Survey and Settlement Act, I of 1865, and section 40 of the Land Revenue Code of 1879. No doubt after the settlement the rights of the occupants and the Khot are regulated by sections 37 and 38 of the Act of 1865. The Khot has the right of reversion, and the occupants' rights of transfer are restricted. It may be that the occupants are the tenants of the Khots within the meaning of section 38. But I do not think that that consideration affects the question of the ownership of the trees apart from Dunlop's Proclamation. Section 40 of the Land Revenue Code, which relates to the rights of the occupants to trees, cannot help the Khots. In the first place the Khots are not the occupants within the meaning of section 40. Even assuming that they are the occupants it is clear from the Proclamation of 1870 (Exhibit 70), and the Proclamation of 1912, which has been admitted in evidence in appeal with the consent of parties, that the teak trees on the Varkas lands were reserved by the Govern-

ment. The Khots have no claim to the teak trees under section 40 of the Land Revenue Code, and they have failed to prove that they are entitled to the benefit of Dunlop's Proclamation in respect of the Varkas lands in question.

As regards the alternative claim to one-third of the price of the trees, it is resisted mainly on the ground of the want of a proper notice. There is no answer to the claim on the merits; and the terms of clause 11 of the Kabuliyats are clear. The notice, though not explicit, is sufficient, in my opinion, to cover this claim.

I, therefore, concur in the decree proposed by my learned brother.

Decree accordingly.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 2801 OF 1915.

December 15, 1917.

Present:—Mr. Justice Shadi Lal and Mr. Justice Chevis.

MUHAMMAD ABDUL KADIR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat HUSSAIN BIBI AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 92—Suit by alleged gaddinashin of Takia to eject trespasser—Trespasser found to be manager of waqf—Sanction of Collector, whether necessary—Religious institution—Takia of Rasul Shahi Faqirs in Lahore, whether wakf—Alienations by trustee, validity of—Trustee alleging himself to be owner, effect of.

The Takia of Rasul Shahi Faqirs in Lahore is a religious institution and *waqf* property. [p. 880, col. 1.]

In a suit by the plaintiff for possession and management of *waqf* property, on the allegations that he was the *gaddinashin* of the Takia, that the property in dispute was the trust property attached to that institution, that the defendant being a mere trespasser had no sort of right to remain in possession of that property and that the alienations made by her of the *waqf* property were invalid, it appeared that the property was *waqf* property and that the defendant was not a trespasser but the trustee and manager thereof:

Held, (1) that upon that finding it was clear that a prayer for defendant's removal would convert the suit into one described in section 92 of the Civil Procedure Code and that there being no consent in writing of the Collector as required by the said section, the prayer for her removal could not be adjudicated upon; [p. 880, col. 2.]

(2) that no issue having been framed by the lower Court as to the necessity for the alienations of the *waqf* property made by the defendant, they could not be set aside until the alienees had been afforded an opportunity, and had failed, to establish the circumstances which would justify the transactions and render them binding upon the persons interested in the institution. [p. 881, col. 1.]

It was urged that no person other than the duly authorised trustee could alienate the property of a religious trust by sale or mortgage and that as the defendant was never appointed a trustee, the alienations made by her were not binding upon the persons interested in the institution:

Held, that this matter as well as the matter relating to the necessity for the transactions could properly be decided in a suit framed for the purpose of contesting alienations made by a *de jure* or *de facto* trustee and that as the plaint did not assign to the defendant the position of a trustee, but described her as a mere stranger to the institution, the lower Court was not called upon to decide these points and the Chief Court was not willing to pronounce any opinion thereon. [p. 881, col. 1.]

Where the father of the defendant was recorded in the revenue papers as the trustee of a shrine and remained in possession in that capacity up to his death, after which the property was held by or on behalf of the defendant:

Held, that the mere fact that after repeatedly describing herself as trustee, the defendant began to claim a higher status, did not alter her real position. [p. 880, col. 2.]

Where property belongs to a religious institution, the person in charge thereof cannot divest himself of his fiduciary position by merely asserting his title thereto [p. 880, col. 2.]

Where the pleadings of both parties leave the Court in the dark as to the nature of the real contest between them, the proper course to follow is not to allow costs to any of them. [p. 881, col. 2.]

First appeal from the decree of the Senior Subordinate Judge, Lahore, dated 23rd August 1915, decreeing plaintiffs' claim for declaration and dismissing as regards ejectment.

Mr. *Oertel*, Bakshi *Gokal Chand* and Malak *Muhammad Hussain*, for the Appellants.

The Hon'ble Mr. *Fazl-i-Hussain*, for *Musammat* Hussain Bibi, Mr. *Nihal Chand Mehra*, for all other Respondents.

Mr. *Tirath Ram*, for the Vendees (Appellants).

JUDGMENT.—This was an action brought originally by one Hassan Shah on the allegations that he was the Gaddi Nashin of the Takia of the Rasul Shahi Fakirs in Lahore, that the property in dispute was trust property attached to the institution, and that he was entitled to the possession and management thereof. The suit was directed mainly against *Musammat* Hussain

Bibi, who was according to the plaintiff a mere trespasser having no sort of right to remain in possession of the property. It appears that this lady had sold two plots of land to defendants Nos. 2 and 3 respectively, and the plaintiff in the original plaint demanded possession of these plots also; but subsequently amended the plaint stating that he had obtained possession thereof, and confined himself to the prayer for a declaration that the alienations, having been made by a person without any shadow of a title, were null and void.

At a subsequent stage of the suit two persons, Abdul Kadir and Muhammad Khan, who claimed to be the worshippers of the shrine, were added as plaintiffs, but their addition did not bring about any amendment in the substance of the plaint. The suit was resisted on several grounds which need not be detailed here. The learned Subordinate Judge, upon an examination of the oral and documentary evidence, has held that (*a*) the property in suit is *waqf*, (*b*) the plaintiff Hasan Shah is not the Gaddi Nashin of the shrine, (*c*) *Musammat* Hussain Bibi is the manager of the institution and in charge of the property as trustee thereof, and (*d*) the alienations in favour of defendants Nos. 2 to 3 being in respect of *waqf* property are invalid. Upon these findings the learned Judge has dismissed the suit for possession as against *Musammat* Hussain Bibi, but has granted a decree declaring that the sale-deeds of the *waqf* property are null and void. Against this decree two appeals have been preferred to this Court, one (Civil Appeal No. 2801 of 1915) by the plaintiffs and the other (Civil Appeal No. 3516 of 1915), by the vendees; and both these appeals may conveniently be disposed of by one judgment.

The findings (*a*) and (*b*) have not been challenged before us either by the plaintiffs or by *Musammat* Hussain Bibi, and we must, therefore, take it that the conclusions of the learned Judge on both these points are correct. The result is that Hassan Shah stands on no better footing than the other plaintiffs; and the suit must, therefore, be treated as one brought by certain persons who claim to be the worshippers of the shrine and beneficiaries in the property attached thereto.

Mr. Oertel on behalf of the plaintiffs confines his attack to the status of *Musammat* Hussain Bibi and contends that she is merely a trespasser and has no right to remain in possession of the property. The learned Counsel invites our attention to the fact that she herself claimed to be the owner of the property, and did not assert that she was holding it in her capacity as the manager of the institution. Now it is true that she has of late been regarding herself as proprietor, but there can be little doubt that previously she repeatedly described herself as the trustee and claimed no higher status than that. Indeed, there are several documents upon the record filed by the plaintiffs as their exhibits, which show that she called herself the Gaddi Nashin of the shrine and stated that the property was *waqf* and belonged to the institution; *vide*, *inter alia*, Exhibits P. 3, P. 14 and P. 26. The learned Subordinate Judge finds, and there is ample evidence to support that finding, that her father Nazir Hassain was recorded in the revenue papers as the trustee of the shrine and remained in possession in that capacity up to his death in 1899, and that since then the property has been held by or on behalf of *Musammat* Hussain Bibi. The mere fact that after repeatedly describing herself as trustee she began to claim a higher status does not alter the real position. It is now common ground that the property belongs to a religious institution, and there can be no manner of doubt that the person in charge thereof cannot divest himself of his fiduciary position by merely asserting his title thereto.

We must, therefore, hold that *Musammat* Hussain Bibi is the trustee of the property; and upon that finding it is clear that the prayer for her removal would convert the suit into one described in section 92 of the Civil Procedure Code. There being no consent in writing of the Collector as required by the said section, the relief for the removal of *Musammat* Hussain Bibi cannot be adjudicated upon. The plaintiffs' appeal must, therefore, fail, and is hereby dismissed with costs.

As regards the appeal preferred by the vendees, the contention urged by their learned Pleader is that no issue on the

question of necessity for the alienations was framed by the lower Court and no enquiry into the matter has consequently been made. It appears that upon the allegations in the plaint that the alienor had no sort of connection with the two plots of land and was merely a trespasser, the issue as to necessity did not arise; but considering that she has been found to be the manager of the institution, the alienations cannot be set aside, until the alienees are afforded an opportunity, and fail to establish the circumstances which would justify the transactions and render them binding upon the persons interested in the institution. That such an issue was not raised is due mainly to the incorrect allegations made by the plaintiffs in their plaint.

Mr. Tirath Ram further contends that the plots of land sold to his clients did not form part of the trust property, and that *Musammat* Hussain Bibi was, consequently, fully entitled to dispose of them in any manner she liked. There is no evidence upon the record that these two plots of land are in any way different from the rest of the property, or that the alienor acquired them with her own money. We are not, therefore, prepared to accede to this contention; and we hold that the entire property, which is the subject matter of this litigation, is trust property, and is attached to the shrine.

Mr. Oertel on behalf of the plaintiffs argues that no person other than the duly authorized trustee can alienate by sale or mortgage the property of a religious trust; and that as *Musammat* Hussain Bibi was never appointed a trustee, the alienations made by her are not binding upon the persons interested in the institution. It seems to us that this matter as well as the question relating to the necessity for the transactions can properly be decided in a suit framed for the purpose of contesting alienations made by a *de jure* or *de facto* trustee; and as the plaint in the present case does not, as stated above, assign to *Musammat* Hussain Bibi the position of a trustee, and describes her as a mere stranger to the institution, we are not called upon to remand the case for inquiry into, and decision upon these points, and we accordingly refrain from pronouncing any opinion thereupon. In view of our findings that *Musammat* Hussain Bibi is the trustee, and that the entire property in dispute belongs to the religious institution, we hold that the suit as framed does not lie, and we accordingly accept the appeal of the vendees and setting aside the decree of the lower Court dismiss the suit. Considering that the pleadings of both the parties left the Court in the dark as to the real position of *Musammat* Hussain Bibi and as to the nature of the property involved in the case, we direct the parties to bear their own costs in both the Courts.

Appeal dismissed.

CALCUTTA HIGH COURT.

RULE *Nisi* No. 602 OF 1917.

February 8, 1918.

Present:—Mr. Justice Teunon and Mr. Justice Newbould.

MADHUSUDAN GOPE—PLAINTIFF —PETITIONER

versus

BEHARI LALL GOPE AND ANOTHER—DEFENDANTS—OPPOSITE PARTY.

Civil Procedure Code (*Act V of* 1908), *s.* 24—*Courts of Small Causes, what are—Small Cause suit transferred from Court of Sub-Judge to Court of Munsif—Munsif's Court, whether Court of Small Causes—Jurisdiction.*

A Court of Small Causes under section 24 (4) of the Code of Civil Procedure includes Courts vested with Small Cause Court jurisdiction as well as the special Courts constituted under the Provincial Small Causes Courts Act. [p. 882, col. 2.]

A suit of the value of Rs. 140 cognizable by a Court of Small Causes was transferred by the District Judge from the Court of a Subordinate Judge vested with Small Cause powers not exceeding Rs. 500 to the Court of a Munsif with Small Cause powers up to Rs. 100 only:

Held, that the Court of the Munsif to which the suit was transferred must be deemed to be a Court of Small Causes under section 24 (4) of the Code of Civil Procedure so as to permit the trial of the suit by that Court. [p. 882, col. 2.]

Rule against the order of the Munsif, 4th Court, Dacca, in Suit No. 616/706 of 1917.

MADHU SUDAN GOPE *v.* BEHARI LALL GOPE.

FACTS appear from the judgment.

Babu *Bepin Behary Biswas*, for the Petitioner.—The learned Munsif, to whom the case was transferred by the order of the District Judge made under section 24 of the Civil Procedure Code, had no jurisdiction to try the suit, because the value of the suit is more than the extent to which the Munsif could exercise his pecuniary jurisdiction as a Small Cause Court Judge. Though the Munsif could try ordinary suits of the value of Rs. 1,000, yet his powers as Small Cause Court Judge extended up to Rs. 100 so this suit, which is evidently a Small Cause Court suit and the value of which exceeds Rs. 100, should not have been tried by the Munsif. See *Dulal Chandra Deb* v. *Ram Narain Deb* (1). Before the transfer of the suit the District Judge should have considered the competency of the Court to which he was transferring the suit.

See section 24 (1), clause (*b*), sub clause (*ii*) of the Civil Procedure Code. See also sections 16 and 33 of the Provincial Small Causes Courts Act.

Babu *Romesh Chundra Sen*, for the Opposite Party.—Under section 24 (4) of the Civil Procedure Code the Munsif, who had jurisdiction to try the suit up to the value of Rs. 1,000, had jurisdiction to try this suit which was transferred to his Court by the order of the District Judge. Section 16 of the Provincial Small Causes Courts Act is limited by the general provisions made in section 24 (4) of the Civil Procedure Code. Therefore, under section 24 (4) the Munsif's Court is, for the purposes of this suit, to be deemed a Court of Small Causes having jurisdiction to try this suit. See *Sankarama Aiyar* v. *Padmanabha Aiyar* (2), *Sukha* v. *Raghunath Das* (3).

JUDGMENT.—In this case it appears that a suit of a Small Cause Court nature valued at Rs. 140 was instituted in the Court of the Subordinate Judge at Dacca vested with powers under section 25 of the Bengal, Agra and Assam Civil Courts Act for trial of suits cognizable by Courts of Small Causes up to a value not exceeding Rs. 500. For certain special reasons into which we need not enter the District Judge of Dacca by an order, made under the provisions of section 24 of the Civil Procedure Code, transferred the suit for trial to the Court of a Munsif at Dacca vested with Small Cause Court powers, but exercising jurisdiction in such cases only up to a value not exceeding Rs. 100. The suit was tried by the Munsif without objection taken by the plaintiff who is the petitioner before us, and it resulted in a decree for a sum of about Rs. 75.

The petitioner now comes to this Court and contends that by virtue of the provisions of section 16 of the Provincial Small Causes Courts Act and by reason of the pecuniary limitation on his Small Cause Court jurisdiction, the Munsif was not competent nor had he any jurisdiction to try the suit in question.

The answer to this contention put forward by the opposite party is that by virtue of the provisions of sub-section (4) of section 24 of the Code of Civil Procedure, the Court of the Munsif must, under the circumstances, be deemed to be a Court of Small Causes within the meaning of section 16 of the Provincial Small Causes Courts Act. In support of this contention he refers us to the cases reported as *Sankarama Aiyar* v. *Padmanabha Aiyar* (2), *Sukha* v. *Raghunath Das* (3). By the petitioner we have been referred to the case reported as *Dulal Chandra Deb* v. *Ram Narain Deb* (1), in which the learned Judges who heard and decided that case intimated that they were inclined to a contrary view. That expression of opinion was not, however, as indeed the learned Judges themselves have pointed out, necessary to the decision of the case before them and must, therefore, be regarded as an expression of opinion and no more. With all deference, we are unable to agree in that opinion and for the reasons given in the case decided by the Madras and Allahabad High Courts to which we have referred we are of opinion that a Court of Small Causes under section 24 (4) of the Code of Civil Procedure does include Courts vested with Small Cause Court jurisdiction as well as the special Courts constituted under Act IX of 1887. It follows, therefore, that the Court of the Munsif to which the suit in question was transferred must be deemed to be a Court of Small Causes, so at least, as to permit the trial of the said suit by such Court. What procedure the

(1) 31 C. 1057 at p. 1062.
(2) 17 Ind. Cas 425; 38 M. 25; 23 M. L. J. 373; (1912) M. W. N. 1086.
(3) 37 Ind Cas. 809; 15 A. L. J. 69; 39 A. 214.

Munsif should have adopted and what finality attaches to his decision it is not necessary for the purpose of this Rule to determine.

In the view we take this Rule must be discharged with costs, the hearing fee being assessed at one gold *mohur*.

Rule discharged.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 1825 OF 1914.

January 15, 1918.

Present:—Mr. Justice Scott-Smith and Mr. Justice Shadi Lal.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—APPELLANT

versus

SOHAN LAL—PLAINTIFF—RESPONDENT.

Land Acquisition Act (I of 1894), ss. 9, 25 (2)—Notice to persons interested—Failure to make claim on date fixed, effect of—Collector, jurisdiction of, to consider claim before award – Cost of construction, whether can be taken into account.

In a suit for compensation for a house acquired by the Government it appeared that the notice issued by the Collector under section 9 of the Land Acquisition Act directed the persons interested to appear and state their objections on the 20th July 1912. The plaintiff failed to appear on that date inspite of the fact that the notice was duly served upon him. Eventually he appeared on the 21st August and filed written objections, which were considered by the Collector who made his award. The plaintiff objected and a reference was made to the Court in accordance with law:

Held, (1) that the plaintiff could not be said to have omitted to make a claim pursuant to the notice given under section 9 merely because he did not make it by the date originally fixed in the notice; [p. 884, col. 1.]

(2) that at any time before giving his award the Collector had jurisdiction to deal with any claim made to him under section 9 (2) of the Act; [p. 884, col. 1.]

Secretary of State for India in Council v. *Gobind Lal Bysak*, 12 C. W. N. 263, *Secretary of State* v. *Bishun Dutt*, 9 Ind. Cas. 423; 33 A. 376; 8 A. L. J. 115, distinguished.

(3) that the cost of construction of the house could be taken into account in fixing its market value. [p. 884, col. 2.]

Land Acquisition Act, 1894, *In re*, 9 Bom. L. R. 1232, *Government of Bombay* v *Karim Tar Mahomed*, 3 Ind. Cas. 273; 33 B. 325; 10 Bom. L. R. 660, *Collector of Hooghly* v. *Raj Kristo Mookerjee*, 22 W. R. 234, *Secretary of State for India in Council* v. *Kartic Chandra Ghose*, 9 C. W. N. 655, distinguished. *Government* v. *Dayal Mulji*, 9 Bom. L. R. 99, *Sukhanand Gurumukhrai, In re*, 4 Ind. Cas. 278; 34 B. 486; 11 Bom. L. R. 1176, followed.

First appeal from the order of the Divisional Judge, Delhi, dated the 26th May 1914, awarding Sohan Lal respondent Rs. 4,830 as compensation on a reference by the Collector under the Land Acquisition Act.

The Government Advocate, for the Appellant.

Lala *Moti Sagar*, R. S., for the Respondent.

JUDGMENT.—This is an appeal on behalf of the Secretary of State for India from an order of the Divisional Judge of Delhi awarding Sohan Lal respondent Rs. 4,830 as compensation on a reference by the Collector under the Land Acquisition Act. The Court has enhanced the Collector's award by Rs. 1,061-7-2 and the appeal is that the order of the Court be set aside and the award of the Collector be confirmed.

The first point urged by the learned Government Advocate on behalf of the appellant is that as the objector-respondent made no claim in pursuance of and in accordance with the notice issued under section 9 of the Land Acquisition Act, therefore, the Court had no jurisdiction in view of the provisions of section 25 to increase the award. The notice issued by the Collector under section 9 of the Act was for the appearance of persons interested and the stating of their objections, etc., on the 20th July 1912. The notice was duly served upon the objector respondent, but he did not appear on the day fixed. The proceedings were adjourned and fresh notices were issued to certain persons who had not already been served. Eventually on the 21st August Sohan Lal appeared and filed written objections in which he claimed Rs. 10,000 on account of compensation. The objections were considered by the Collector who in due course made his award. Sohan Lal objected to the award and a reference was made to the Court in accordance with law.

Mr. Petman's argument is that Sohan Lal should have made his objections, if any, on the 20th July 1912 as the notice under section 9 directed his appearance on that date, and that he had no right to

make any objections to the Collector at any later date. He bases his argument upon section 25, sub-section 2, of the Act which is as follows:—

"When the applicant has refused to make such claim or has omitted without sufficient reason (to be allowed by the Judge) to make such claim the amount awarded by the Court shall in no case exceed the amount awarded by the Collector."

In support of his argument he has cited *Secretary of State for India in Council* v. *Gobind Lal Bysak* (1) and *Secretary of State* v. *Bishun Dutt* (2), but, in our opinion, those cases are distinguishable from the present one, for there the objector never appeared at all before the Collector or made any claim prior to the award. No authority directly in support of his argument has been cited by the learned Government Advocate, and we do not think it can be said that Sohan Lal omitted to make a claim pursuant to the notice given under section 9 merely because he did not make it by the date originally fixed in the notice. Proceedings before the Collector were adjourned from time to time and we consider that the claim made by Sohan Lal on the 21st August was a claim pursuant to the notice given under section 9. In our opinion at any time before giving his award the Collector had jurisdiction to deal with any claim made to him under section 9 (2) of the Act. We consider, therefore, that the first objection raised on behalf of the appellant has no force.

The house for which compensation has been awarded to Sohan Lal was built by him upon land belonging to a Jain Temple and appears to have been of a *quasi*-religious character. It is, therefore, improbable that it could have been sold in the open market to any person who might desire to purchase it. But we see no reason why it should not have been sold to a member of the Jain community to which Sohan Lal himself belongs. As the house had never been rented, and in the absence of evidence of sale of similar houses in the neighbourhood, the Court in order to ascertain the market value enquired into the cost of construction of the building.

The learned Government Advocate's second point is that the cost of construction should not have been taken into account in fixing the market value. In support of his argument he referred to *Land Acquisition Act*, 1894, *In re* (3), *Government of Bombay* v. *Karim Tar Mahomed* (4), *Collector of Hooghly* v. *Raj Kristo Mookerjee* (5) and *Secretary of State for India in Council* v. *Kartic Chandra Ghose* (6).

These rulings do not deal with cases of buildings. They lay down, generally speaking, that the amount of compensation is to be calculated on the actual value to the owner and that the costs of improving the land or of preserving it are not of much use in estimating this. There is nothing in any of these rulings to the effect that in no case can the cost of construction be taken into account in fixing the market value of a building.

On the contrary in the case reported as *Government* v. *Dayal Mulji* (7) the actual cost of constructing buildings was taken into account by the Court and in *Sukhanand Gurumukhrai, In re* (8), it was held that where there is a demand the original cost of building is the most important element for consideration in fixing the market value.

Something was said in argument before us about the re-instatement principle which is referred to in Lord Halsbury's Laws of England, Volume VI, page 37, where we find the following:—

"When the land is used for some particular purpose not of a commercial nature, such as for a public park, or for a church or school, it is very difficult to estimate the loss. One method adopted is that known as re-instatement, by which is meant that the amount of compensation to be awarded shall be assessed according to the cost of acquiring an equally convenient site and erecting equally convenient premises."

(1) 12 C. W. N. 263.
(2) 9 Ind. Cas. 423; 33 A. 376; 8 A. L. J. 115.
(3) 9 Bom. L. R. 1232.
(4) 3 Ind. Cas 273; 33 B. 325; 10 Bom. L. R. 660.
(5) 22 W. R. 234.
(6) 9 C. W. N. 655.
(7) 9 Bom. L. R. 99.
(8) 4 Ind. Cas. 278; 34 B. 436; 11 Bom. L. R. 1176.

AVANASHI CHETTI v. MUTHUKRUPPAN CHETTI.

The learned Government Advocate urges that the re-instatement principle is not in force in India. In support of his argument he has referred to an unreported case of a Division Bench of this Court (Civil Appeal No. 12 of 1898 decided on the 29th July 1898) which supports his contention. Without, however, deciding whether the re-instatement principle is or is not in force in India, we are clearly of opinion that there is no authority for the proposition that the original cost of construction of a building can in no case be taken into consideration in assessing the market value thereof.

In the present case where there have been no sales in the neighbourhood and where the house in question has never been rented, we think that the best method of ascertaining the market value is to enquire into the original cost of construction. The Court below has assumed that there is a demand for such house property in the neighbourhood and we think it was justified in making this assumption. It points out that there are other houses of similar design in the neighbourhood and that this house is a large and well-constructed one, well fitted to hold the family of a Hindu gentleman. We see no reason to suppose that it could not have been sold to some other member of the Jain community.

As to the cost of construction there is a good deal of evidence on the record. No less than three experts have made estimates. These have been discussed by the lower Court. The expert called by the objector estimates the cost at some Rs. 6,000, whereas Mr. Croad, Assistant Engineer of the Public Works Department, made an estimate for Rs. 3,600 only. The experts have criticised each other's estimates, and what the Court has done is to adopt a middle line. It thought Mr. Croad's criticisms would bring Rai Babu Mal's estimate down say to Rs. 4,500, whereas Mr. Croad's own estimate appeared to it to be an optimistic one. Considering all the circumstances of the case and having regard to its own inspection of the spot it thought a fair award would be Rs. 4,200.

After a careful consideration we consider this estimate to be a reasonable one and we see no sufficient ground for differing from it. The appeal, therefore, fails and is dismissed, but considering that Sohan Lal made an exorbitant claim before the Collector and in the lower Court we leave the parties to bear their own costs.

Appeal dismissed.

MADRAS HIGH COURT.

APPEALS AGAINST ORDERS NOS. 107 AND 108 OF 1917.

October 10, 1917.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Bakewell.

A. M. V. AVANASHI CHETTI—PURCHASER—APPELLANT IN BOTH

versus

MUTHUKARUPPAN CHETTI AND OTHERS—PETITIONERS—RESPONDENTS IN A. A. O. No. 107 OF 1917

AND

DORAISAMI *alias* DEVANNA GOUNDAN AND ANOTHER—PETITIONERS—RESPONDENTS IN A. A. O. No. 108 OF 1917.

Provincial Insolvency Act (III of 1907), s. 22—Civil Procedure Code (Act V of 1908), O. XXI, r. 90, applicability of, to contracts of sale by Receiver—Jurisdiction—District Court, powers of superintendence of, over acts of Receiver.

A District Court has no jurisdiction to entertain an application under Order XXI, rule 90, Civil Procedure Code, to annul a contract of sale completed by a Receiver. Its powers are limited to applications preferred within 21 days of the contract under section 22 of the Provincial Insolvency Act. [p. 886, col. 1.]

The District Court has, however, powers of supervision over the Official Receiver and can give him directions not to complete a contract of sale in exercise of such powers. [p. 886, col. 1.]

Appeals against the order of the District Court, Trichinopoly, in Civil Miscellaneous Petitions Nos. 742 and 743 of 1916, in Insolvency Petition No. 14 of 1915.

FACTS.—The Official Receiver of Trichinopoly having concluded the sale of a property of an insolvent to the appellant, the respondents, who were the creditors, applied to the District Court to annul the contract under Order XXI, rule 90, Civil Procedure Code. No application was, however, made within the 21 days allowed by section 22 of the Provincial Insolvency Act. The

District Court purporting to act under the powers vested in it under the Code of Civil Procedure cancelled the sale to the appellant. The respondents appealed against the order to the High Court.

Mr. *S. T. Srinivasagopalachariar*, for the Appellant in both.

Mr. *K. Bhashyan Aiyangar*, for the Respondent in both.

JUDGMENT.—The only power of the District Judge to interfere judicially with the contract of sale entered into by the Receiver is under section 22 of the Provincial Insolvency Act. No application was made under that section to the District Court within 21 days of the contract of sale and hence the District Judge had no power to set aside the contract of sale in a judicial proceeding.

The respondent, in filing a petition under Order XXI, rule 90 of the Code of Civil Procedure, wholly misconceived his remedy.

The District Judge might have the powers of supervision over the Receiver and give directions to the Receiver not to complete a contract of sale in exercise of such powers of supervision, but that is not what he has done in this case. He has held that an application under Order XXI, rule 90 of the Code of Civil Procedure, could be entertained by him in respect of a contract of sale concluded by the Receiver and has passed an order purporting to be passed under that provision of the Civil Procedure Code.

The order was, therefore, passed without jurisdiction and is set aside. As this objection seems not to have been taken before the District Judge, there will be no order as to costs throughout.

Appeal allowed.

M. C. P.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 625 OF 1917.

November 30, 1917.

Present:—Mr. Justice Shadi Lal.

THE FIRM BHAGAT RAM-GANPAT RAI THROUGH KALA RAM AND GIRDHARI LAL —PLAINTIFFS—PETITIONERS

versus

CHHAJJU RAM—DEFENDANT—RESPONDENT.

Mortgage—Mortgagee giving up rights under mortgage in consideration of Hundi—Hundi *insufficiently stamped—Mortgagee, whether can sue on mortgage.*

When a cause of action for money is once complete in itself, whether for goods sold, or for money lent or for any other claim, and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may, always as a rule, sue for the original consideration, provided that he has not endorsed, or lost, or parted with, the bill or note, under such circumstances as to make the debtor liable upon it to some third person. But when the original cause of action is the bill or note itself, and does not exist independently of it, then the bill or note is the only contract between the parties, and if for want of proper stamp or some other reason it is not admissible in evidence, the creditor must lose his money. [p. 887, col. 1.]

Plaintiff gave up his rights under a mortgage in consideration for cash payment and a Hundi executed in his favour by the mortgagor. He made an endorsement on the back of the mortgage-deed that he had received the full amount of the mortgage-debt from the mortgagor. The Hundi executed by the mortgagor in his favour was not properly stamped:

Held, that the plaintiff by acknowledging the receipt of the entire money due on the mortgage-deed had discharged the mortgagor from his liability on the deed, the Hundi being the only contract between the parties, and that for want of proper stamp the Hundi being inadmissible in evidence the creditor must lose his money and could not sue on the original mortgage-deed. [p. 887, col. 2.]

Petition for revision of the decree of the Senior Subordinate Judge, Hissar, dated the 10th April 1917, reversing that of the Munsif, 1st Class, Hissar, dated the 16th March 1917, decreeing the claim.

Lala *Faqir Chand*, for Bakhshi *Tek Chand*, for the Petitioners.

Mr. *Manohar Lal*, for the Respondent.

JUDGMENT.—There can be little doubt that the plaintiff Kalu Ram gave up his rights under the mortgage-deed, dated the 10th November 1908, for Rs. 1,400 in lieu of Rs. 1,000 paid in cash and a Hundi for Rs. 400 executed in his favour by the mortgagor. That the cause of action on the mortgage-deed was extinguished is clear from the fact that the creditor wrote an endorsement on the back of the deed to the effect that Rs. 1,400 had been received in full from the mortgagor. Now, the Hundi is admittedly inadmissible in evidence for want of sufficient stamp; and the only question for consideration is whether the plaintiff can

prove his claim *aliunde*. The rule of law applicable to a case of this kind is enunciated in a Division Bench judgment of the Calcutta High Court in *Sheikh Akbbar* v. *Sheikh Khan* (1) and is to the effect that when a cause of action for money is once complete in itself, whether for goods sold, or for money lent, or for any other claim, and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may, always as a rule, sue for the original consideration, provided that he has not endorsed, or lost, or parted with, the bill or note, under such circumstances as to make the debtor liable upon it to some third person. But when the original cause of action is the bill or note itself, and does not exist independently of it, then the bill or note is the only contract between the parties, and if for want of proper stamp or some other reason it is not admissible in evidence, the creditor must lose his money. This principle of law is beyond doubt, and the difficulty arises in ascertaining to which class any particular case belongs.

I have considered the arguments advanced by the learned Counsel on both sides, and I am of opinion that the case before me belongs to the second class, and that the plaintiff has no cause of action independently of the Hundi. Indeed, the facts of this case are, in the application of the principle, very similar to those dealt with in the aforesaid Calcutta judgment. It appears that the plaintiff in that case had a claim against the defendant for the value of his share in a partnership business, and it was verbally agreed between the parties that in settlement of that claim Rs. 250 should be taken as the value of the share, out of which Rs. 25 were paid to the plaintiff and for the balance the plaintiff gave the defendants a receipt and took in return a promissory note for that amount executed by the defendants. The learned Judges held that the transaction was one of loan of Rs. 225 to the defendants upon the terms contained in the promissory note, and as there was no loan independently of the note, the note itself was the best evidence of the transaction, and as it could not be proved for want of a proper stamp, the plaintiff could not recover upon it. Now, in the present case the plaintiff by acknowledging the receipt of the entire money due on the mortgage-deed discharged the mortgagor from his liability on the deed, and then entered into a loan transaction for Rs. 400 upon the terms contained in the bill of exchange. In this view it is quite clear that the decision in the Calcutta case fully applies and that the lower Appellate Court has rightly dismissed the suit.

The learned Pleader for the petitioner has cited a number of judgments, but as pointed out above the Court has upon the circumstances of each case to determine whether it belongs to one or the other of the two classes referred to in *Sheikh Akbar* v. *Sheikh Khan* (1). The judgment of the Allahabad High Court in *Hira Lal* v. *Datadin* (2), to which my special attention has been drawn by Mr. Faqir Chand, is a very brief one, and apparently proceeded upon the ground that there *was* a contract independently of the promissory note which was inadmissible in evidence. That ruling consequently has no application to the facts before me.

For the aforesaid reasons I am not prepared to interfere on revision, and dismiss the application with costs.

Application dismissed.

(1) 7 C. 256; 8 C. L. R. 528; 3 Ind. Dec. (N. S.) 713.

(2) 4 A. 135; A. W. N. (1881) 144; 2 Ind. Dec. (N. S.) 705.

PATNA HIGH COURT.

SECOND CIVIL APPEALS NOS. 486-501 OF 1917.

February 20, 1918.

Present:—Mr. Justice Roe.

ERNEST MYLNE—APPELLANT

versus

NATHU SUNDI AND OTHERS—RESPONDENTS.

Provincial Small Causes Courts Act (IX of 1887), ss. 15, 16—Suit to recover mutharfa, *whether cognisable by Small Causes Court—Jurisdiction, question of, consideration of—Procedure—Ground rent and house rent, distinction between.*

ERNEST MYLNE *v.* NATHU SUNDI.

A Court in order to satisfy itself as to its jurisdiction is required to examine the plaint and decide on the plaint and not on the written statement what is the nature of the claim. [p. 888, cols. 1 & 2.]

A suit to recover a sum from a tenant levied as *mutharfa*, irrespective of the area of the land upon which the tenant builds and of the dimensions of the house built by him, is cognisable by a Court of Small Causes, whether the sum is regarded as rent or as a tax. [p. 888, col. 2.]

The distinction between a house rent and a ground rent lies in the contract between the lessor and the lessee. If a lessee takes a parcel of land and then builds a house upon it, the rent that he pays to his lessor is a ground rent. If the lessor builds the house and then lets house and land together, the rent is a house rent. [p. 888, col. 1.]

Second appeals from the decisions of the Subordinate Judge, Shahabad.

Messrs. *Kulwant Sahay* and *Mrityunjoy Lal*, for the Appellant.

Mr. *Atul Krishna Ray*, for the Respondents.

JUDGMENT.—These appeals arise from decisions of the Court of the Subordinate Judge of Shahabad confirming a decree of the Munsif of Arrah, rejecting the plaintiff's claim for what he called in his plaint "Mutharfa rents." The learned Munsif had held on the third issue framed that the suits were cognizable by a Small Cause Court, but instead of returning the plaints to be presented in the Small Cause Court he proceeded to dismiss them upon the merits. On appeal the issue was again raised, whether the lower Court had jurisdiction to try the suits. Upon this question the learned Subordinate Judge decided that Mutharfa rents were ground rents and that suits for such rents were not cognizable by a Small Cause Court. The distinction between a house rent and a ground rent lies in the contract between the lessor and the lessee. If a lessee takes a parcel of land and then builds a house upon it, the rent that he pays to his lessor is a ground rent. If the lessor builds the house and then lets house and land together, the rent is a house rent. This I understand to have been the basis of the decision in the case decided as *Uma Churn Mandal* v. *Bijari Bewah* (1). In my view the learned Munsif should have gone into the issue whether he had jurisdiction to try the cases or not, before he proceeded to try them, and to satisfy himself as to his jurisdiction he was required to examine the plaint and decide on the plaint and not on the written statement what was the nature of the claim. The plaint has been read out to me. I do not find in it one word regarding land or any contract to pay rent for land. It is said that the defendants have houses, and that for the privilege of occupying those houses they are liable to pay yearly a certain sum. On the plaints as framed clearly the sums claimed were either house rents or as set out in the judgment of Chamier, C. J., in the case of *Mahboob Momin* v. *Bhagwati Prasad* (2), taxes and not rents at all. The evidence given in the case by the plaintiff's agent (which evidence may be now taken for the purposes of the argument as a statement explaining the nature of the claim) shows that the sum levied as Mutharfa is levied irrespective of the area of the land upon which the tenant builds and irrespective of the dimensions of the house which the tenant has built upon the land. Whether we regard such a levy as a rent or a tax a suit to recover it is cognizable by the Small Cause Court. The learned Munsif had, therefore, no jurisdiction to try it, and the learned Subordinate Judge, had he decided this point in this way, would have set aside his order and directed him to return the plaint for presentation in the proper Court, as was done in the case of *Musammat Edoo* v. *Shaikh Hefazut Hossein* (3).

If I am wrong on this point and if the suits can be regarded as suits for ground rent, I may say that in my view the appeal is concluded by findings of fact. The expressions used by the learned Subordinate Judge are not peculiarly happy, but he does find as a fact that there has been no satisfactory evidence to show that these defendants voluntarily agreed to pay Mutharfa rents after 1310 *F. S.*, nor is there any satisfactory evidence to prove usage or custom. If the sums be regarded as ground rents it was necessary for the plaintiffs to show an attornment to them by the defendants as tenants. Both the Courts below are agreed that there was no such attornment and if indeed any rents were

(1) 15 C. 174; 7 Ind. Dec. (N. S.) 700.

(2) 39 Ind. Cas. 949; 1 P. L. W. 541; (1917) Pat. 250.

(3) 13 W. R. 358; 5 B. L. R. App. 15.

realized they were realised by force and not under any contract. They were in a sense bribes to the landlords to be left in peace and not acknowledgments of any liability to pay yearly rent. The payment of such bribes would not create the relationship of landlord and tenant and, therefore, the suits as suits for ground rent were not maintainable. The order of the Court is that the Munsif be directed to return the plaints to the plaintiffs in these sixteen cases. The costs of this appeal and of the appeal to the lower Appellate Court will be paid by the appellants to the respondents.

There will be no order as to the costs of the Munsif's Court.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 467 OF 1917.

July 12, 1917.

Present:—Mr. Shah Din, Chief Judge.

SURJAN DAS—PLAINTIFF—APPELLANT

versus

GANDA MAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), s. 49—Unregistered deed of gift, admissibility of, to explain origin of possession.

In a suit for possession the lower Court held that although an unregistered deed of gift relied upon by the defendant was inadmissible in evidence for want of registration and could not, therefore, affect the subject of the gift, yet it was admissible for a collateral purpose, *viz.*, for the purpose of proving that defendant took possession of the subject of the gift from the date of the gift and remained in adverse possession of it for more than twelve years before the date of suit. There was no reference to delivery of possession in the deed of gift:

Held, that the deed was inadmissible in evidence even for the purpose of showing that the defendant had been in adverse possession of the property from the date of the deed.

Second appeal from the decree of the Senior Subordinate Judge, Gurdaspur, dated the 18th January 1917, affirming that of the Munsif, 2nd Class, Batala, dated the 31st October 1916, dismissing the plaintiff's claim.

Lala *Hargopal*, for the Appellant.

Pandit *Ram Bhaj Datta*, for the Respondents.

JUDGMENT.—Both the lower Courts have held that although the unregistered deed of gift, dated the 8th November 1896, which was executed by the plaintiff in favour of his brother, defendant No. 1, is inadmissible in evidence for want of registration and cannot, therefore, affect the half share of the house which was the subject of the gift, yet it is admissible for a collateral purposes, *viz.*, for the purpose of proving that defendant No. 1 took possession of the half share of the house in question from the date of the gift and remained in adverse possession of it for more than 12 years before the date of suit. This view is clearly incorrect, as has been held in *Ali Bakhsh* v. *Raushan* (1), *Jaman* v. *Chandiya Ram* (2), *Jut Mal* v. *Beli Ram* (3) and *Muthukaruppan Samban* v. *Muthu Samban* (4).

I may note here that in the unregistered deed of gift there is no reference to delivery of possession of the portion gifted by the donor to the donee; and there is no evidence on the record that, apart from the alleged exclusive possession of defendant No. 1 by reason of the gift, his possession was that of a sole owner for a period of 12 years prior to the institution of the present suit.

I accept this appeal, set aside the judgment and decree of the Subordinate Judge and give the plaintiff a decree with costs throughout, which will be paid by defendant No. 1.

Appeal accepted.

(1) 102 P. R. 1900. P. L. R. (1900) p. 481.

(2) 18 Ind. Cas. 978; 196 P. L. R. 1913; 83 P. R. 1913; 69 P. W. R. 1913.

(3) 33 Ind. Cas. 948; 35 P. R. 1916; 52 P. W. R. 1916.

(4) 25 Ind. Cas. 772; 1 L. W. 754; 16 M. L. T. 344; (1914) M. W. N. 768; 27 M. L. J. 497; 38 M. 1158 at p. 1161.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 76 OF 1917.

November 14, 1917.

Present:—Sir John Wallis, Kt., Chief Justice,
Mr. Justice Sadasiva Aiyar and
Mr. Justice Kumaraswami Sastri.

KEELANGOTI NARAYANA TANTRI—PLAINTIFF—APPELLANT

versus

NAGAPPA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXIII,

HUKAM SINGH *v.* SHAHAB DIN.

r. 1—*Withdrawal of suit with liberty to file fresh suit, petition for—Order, construction of—Leave granted by implication.*

Where, on a petition praying for withdrawal of a suit with liberty to bring a fresh suit, the Court simply endorsed the word 'permitted':

Held, that the order should be construed as having impliedly granted leave to file a fresh suit.

Golam Mahomed v. *Shibendra Pada Banerjee*, 35 C. 990; 12 C. W. N. 893, followed.

Appeal, under clause 15 of the Letters Patent, against the judgment of Mr. Justice Bakewell, in Second Appeal No. 669 of 1915, preferred against the decree of the Court of the District Judge of South Kanara, in Appeal Suit No. 260 of 1914, preferred against the decree of the Court of the District Munsif of Kasargod, in Original Suit No. 437 of 1912.

FACTS.—In the course of proceedings in a suit the plaintiff applied for leave to withdraw a suit with liberty to file a fresh suit. On the petition the Court simply endorsed the word 'permitted'. Plaintiff then instituted a fresh suit, when it was objected by the defendant that it was not maintainable as no leave had been granted under Order XXIII, rule 1, Civil Procedure Code. In appeal, Seshagiri Aiyar and Bakewell, JJ., differed in the construction of the order, the former holding that the Court impliedly granted leave, and the latter being of opinion that no leave was granted.

The plaintiff preferred an appeal under section 15 of the Letters Patent.

Mr. *A. Srirangachariar*, for the Hon'ble Mr. *T. Rangachariar*, for the Appellant.

Mr. *B. Sitarama Rao*, for the Respondent.

JUDGMENT.—In the original vernacular petition it is quite clear that what the petitioner asked for was the liberty to withdraw with permission to bring a fresh suit.

In these circumstances, following *Golam Mahomed* v. *Shibendra Pada Banerjee* (1), we think that the order 'plaintiff is permitted to withdraw from the suit' must be read with the petition and construed as granting it. On the other construction the order was most misleading to the petitioner and not an order contemplated by the Code.

We allow the Letters Patent Appeal with costs, set aside the decree of the District Judge and remand the appeal to the District Judge for disposal according to law. Other costs will abide the result.

Appeal allowed; Case remanded.

M.C.P.

(1) 35 C. 990; 12 C. W. N. 893.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 232 OF 1917.

July 20, 1917.

Present:—Mr. Justice Leslie Jones.

HUKAM SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

SHAHAB DIN—PLAINTIFF AND RAMZAN BEG AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), ss. 3, 6—Minor, assignee of, whether can take advantage of s. 6—Limitation, plea of, not taken in lower Court—Appellate Court, duty of—Appeal on particular point—Suit, whether can be dismissed in toto*—Court-fee, payable.*

An assignee of a minor cannot avail himself of the benefit conferred upon the minor by section 6 of the Limitation Act. [p. 891, col. 1.]

The abandonment of a point of limitation in a lower Court does not relieve an Appellate Court of the duty of taking notice of the Statute. But the plea of limitation in order to be effective must be properly before the Court. [p. 891, col. 1.]

Where a defendant appeals only on a particular point and not on the whole case, the Appellate Court is precluded from taking up a point which would involve the dismissal of the suit *in toto*. [p. 891, cols. 1 & 2.]

Where the plea of limitation involves the dismissal of a suit *in toto*, the defendant must appeal on the whole case and not merely on a particular point, and must pay Court-fee on the whole claim. If he fails to pay full Court-fee within the time limited by the law, the appeal must be dismissed. [p. 891, col. 2.]

Second appeal from the decree of the District Judge, Amritsar, dated the 4th December 1916, modifying that of the 1st Class, Munsif, Amritsar, dated the 24th May 1916, decreeing the plaintiff's claim on payment of Rs. 234.

Mr. *Lal Chand Mehra*, for the Appellants.

Mr. *Jai Gopal Sethi*, for the Respondents.

JUDGMENT.—The plaintiff in this case is the assignee of a Muhammadan minor and as such claimed to recover certain

property which had been sold by the minor's mother. A plea of limitation was overruled, and the plaintiff obtained a decree for possession on payment of Rs. 243, *viz.*, Rs. 119 for benefit received in the shape of the redemption of a mortgage; and Rs. 115 for improvements. The plaintiff only appealed to the District Judge, who thought that the sum of Rs. 115 should not have been allowed to the defendants, and granted the plaintiff a decree for possession on payment of Rs. 119 only.

The defendants then filed a second appeal in this Court, the original memoranda containing two grounds only. The appeal, however, was not admitted on those grounds, which have not been argued before me, but because the admitting Judge was of the opinion that the suit was clearly barred by time, in that a suit by the minor himself would only have been in time by virtue of section 6 of the Limitation Act and the assignee could not avail himself of the benefit conferred by that section.

The defendants afterwards, and apparently as the result of the order of the admitting Judge, put in, within time, a third ground of appeal in which the point of limitation was expressly taken.

It would appear that the mere fact that the question of limitation does not appear to have been raised in the lower Appellate Court, would not of itself relieve this Court of the duty of taking it up, see *Muhammad Kamil* v. *Musammat Imtiaz Fatima* (1), where Lord MacNaghten held that abandonment of a point of limitation in the Indian Courts would not relieve their Lordships of the duty of taking notice of the Statute; and again, *Hari Bhusan Mukerji* v. *Upendra Lal Mukerji* (2), where a point of limitation tacitly abandoned in the High Court was argued before the Judicial Committee.

But the plea must be properly before the Court, and in this case it is not so, in spite of the additional ground of appeal, in that the Court-fee has been paid on the sum of Rs. 115 only and for that reason it appears to me that I am precluded from taking up a point which would involve the dismissal of the suit *in toto*. The appeal has been stamped with reference only to a part of the claim. No offer has been made to make up the deficiency, and seeing that the defendants did not raise the point of limitation in this Court of their own motion, I do not think that I am in any way bound to grant an extension of time for which I have not even been asked, to enable them to pay the requisite Court-fee, the payment of which is long since barred by time. Compare *Kandasamy Chetty* v. *Annamalai Chetty* (3).

Akkaraju Narayana Rao v. *Akkaraju Seshamma* (4) is authority for the position that when this suit ought to have been dismissed *in toto* as time-barred, the defendants must appeal on the *whole* case and not merely on a particular point, and as owing to the failure of the defendants to stamp their appeal properly I am not in a position to dismiss the whole claim, I dismiss the appeal. But in the circumstances of the case parties will bear their own costs in this Court.

Appeal dismissed.

(1) 4 Ind. Cas. 457; 10 C. L. J. 297; 11 Bom. L. R. 1210; 14 C. W. N. 59; 31 A. 557; 12 M. L. J. 697; 19 O. C. 183; 36 I. A. 211 (P. C.).

(2) 24 C. 1; 23 I. A 97; 6 Sar. P. C. J. 680; 12 Ind. Dec. (N. S.) 665 (P. C.).

(3) 28 M. 67; 15 M. L. J. 402.

(4) 26 Ind. Cas. 33; 27 M. L. J. 677.

PATNA HIGH COURT.

CIVIL REVISION No. 263 OF 1917.

February 5, 1918.

Present:—Mr. Justice Chapman and Mr. Justice Atkinson.

BANKEY BEHARI AND ANOTHER—PETITIONERS

versus

RAM BAHADUR AND OTHERS—OPPOSITE PARTY.

Court-fee—Suit to set aside decree—Plaintiff entitled only to portion of property affected by decree—Court-fee payable—Revision—High Court, power of, to interfere at interlocutory stage.

Plaintiff brought a suit to set aside a compromise decree obtained on the basis of a mortgage. He was entitled to a portion only of the property affected by the compromise decree:

Held, that Court-fee was payable on the value of

the share of the plaintiff, and not on the value of the whole of the property affected by the decree. [p. 893, cols. 1 & 2.]

Where the record of a case has been sent for by the High Court and there appears on the record an obvious error, it is right and proper that the High Court should dispose of the matter even at an interlocutory stage and thus save the parties to the litigation unnecessary expenses and undue delay. [p. 892, col. 2.]

Civil revision from an order of the Subordinate Judge, Shahabad.

Messrs. *Sushil Madhab Mullick* and *Abani Bhusan Mukherji*, for the Petitioners.

Messrs. *Kulwant Sahai* and *Tirbhuban Nath Sahay*, for the Opposite Party.

JUDGMENT.

ATKINSON, J.—The plaintiff instituted the present suit against the defendants seeking to set aside a mortgage decree which had been obtained on the 2nd of August 1915. The original mortgage was made by the father and grandfather of the plaintiffs in favour of the father of the defendants. The original mortgage was for a sum of Rs. 11,261 and the mortgage decree by way of compromise was for Rs. 12,200. The plaintiffs had not been born on the date of the execution of the mortgage-bond in 1905; but they were born when the decree by way of compromise was obtained. The plaintiffs bring this suit seeking to set aside the decree of the 2nd of August 1915; and the question which arises for our determination is: what is the proper sum for Court-fees payable on the plaint in this suit. The action is not one for a mere declaration; but for a declaration coupled with certain consequential reliefs which are specifically mentioned in the plaint.

The plaintiffs contend that they are only liable to be charged Court-fees upon the value of their share of the property; and not upon the entire value of the whole property affected by the compromise decree. They contend that the value of the entire property is Rs. 2,000 and that their share is two-thirds of Rs. 2,000. The learned Subordinate Judge has held that the plaintiffs are liable to pay a Court-fee on the total amount of the compromise decree sought to be set aside, on the ground that if the decree is set aside the plaintiffs will be benefited to the extent of the total value of the decree, and that, therefore, the proper Court-fee payable by them should be assessed upon the total amount of the decree.

Mr. Kulwant Sahay who appears on behalf of the defendants has raised two points for our consideration. The first is a mere technical point by which the learned Vakil submits that this Court ought not to interfere with the order of the Judge at this stage of the proceedings in revision; that the suit has not been disposed of; and that the proper procedure under the law would have been that the plaint should in the first instance be rejected by reason of the default of payment of the Court-fees ordered by the Court; and that when the plaint was so rejected, it would be open to the plaintiffs to come to this Court in appeal from the order rejecting the plaint.

There may be a good deal to be said in favour of Mr. Kulwant Sahay's contention with regard to the regularity of procedure; but this Court has, as a matter of fact, interfered in interlocutory matters like the present on former occasions; and it appears to us that where the record of the case has been sent for by this Court and there appears on the record an obvious error, it is right and proper that this Court should dispose of the matter even at this stage of the proceedings having regard to the erroneous finding touching a question of jurisdiction by the lower Court, and thus save the parties to the litigation unnecessary expenses and undue delay.

The second point raised by Mr. Kulwant Sahay is that what is really the subject-matter in the present suit is the validity of the compromise decree and that therefore Court-fee must be paid on the full value of that decree. Mr. Mullick on the other hand urges that it is not the value of the decree which is in dispute so far as his clients are concerned, but their two-thirds share in the property in suit which is valued at or about Rs. 1,300.

We have been referred to many cases by both sides. Mr. Kulwant Sahay in support of his argument refers us to a case reported as *Hurihar Prasad Singh* v. *Shyam Lal Singh* (1). In that case the plaintiff brought a suit to set aside a decree on the ground of fraud. The property in suit was valued at Rs. 7,000 and the decree which was sought to be set aside was

(1) 21 Ind. Cas. 404; 40 C. 615.

valued at Rs. 2,794. Harrington, J., in delivering the judgment of the Court held that inasmuch as the real value of the relief claimed was Rs. 2,794, the plaintiff was liable to pay a Court-fee upon that amount. I think that this decision must be read in conjunction with the decision of their Lordships of the Privy Council reported as *Phul Kumari* v. *Ghansbyam Misra* (2), in which their Lordships say at page 43 as follows :—"The value of the action must mean the value to the plaintiff. But the value of the property might quite well be Rs. 1,000, while the execution debt was Rs. 10,000. It is only if the execution debt is less than the value of the property that its amount affects the value of the suit." In the case decided by Harrington, J., it is clear that the value of the decree was less than the value of the property and, therefore, it was rightly held in that case that the Court-fee should be assessed upon the value of the decree. In the case before us, however, the value of the property, so far as the plaintiffs' share is concerned, is only Rs. 1,300 odd, whereas the value of the decree sought to be set aside is Rs. 12,200, and applying the principle laid down in the judgment of their Lordships of the Privy Council it seems to us that the plaintiffs are only liable to pay Court-fees assessed upon their share of the property affected by the compromise decree. Mr. Kulwant Sahay refers us to another case *viz.*, *Umatul Batul* v. *Nauji Kuar* (3). That was a decision of Mookerjee and Holmwood, JJ., but it is apparent that in that case, as also in the case reported as *Harihar Prasad Singh* v. *Shyam Lal Singh* (1), the person seeking to have the decree set aside was substantially entitled to the entire property which would be affected if the decree was set aside. In the case before us, however, the plaintiffs are not entitled to the entire property but only to a two thirds share in it. We are of opinion, therefore, that the learned Subordinate Judge was wrong in directing that the plaintiffs were liable to pay Court-fees assessed on the total value of the decree. This view is supported by the decision reported as *Ganesh Bhagat* v. *Sarada Prasad* (4). The facts of that case are not distinguishable from the facts of the case now before us. The decree sought to be set aside was for over Rs. 22,000, but the plaintiffs' share in the property in suit was valued at Rs. 9,000 only; and their Lordships who decided that case held that the Court-fee payable must be assessed not upon Rs. 22,000 but upon Rs. 9,000. In our opinion the same principle must apply to the case before us and accordingly we direct that the order of the learned Subordinate Judge, dated the 7th of September 1917, be set aside and that the Subordinate Judge do proceed with the hearing of the case upon the plaintiffs' paying a Court-fee assessed upon the value of their two thirds share in the property in suit.

This application succeeds and is allowed with costs measured at two gold *mohurs*.

CHAPMAN, J.—I agree.

Application allowed.

(2) 7 C. L. J. 36; 35 C. 202; 35 I. A. 22; 12 C. W. N. 169; 10 Bom. L. R. 1; 17 M. L. J. 618; 2 M. L. T. 506; 14 Bur. L. R. 41; 5 A. L. J. 10.

(3) 6 C. L. J. 427; 11 C. W. N. 705.

(4) 30 Ind. Cas. 111; 42 C. 370; 19 C. W. N. 895.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 810 OF 1916.

January 26, 1917.

Present:—Mr. Justice LeRossignol.

PARTAP SINGH—PLAINTIFF—APPELLANT

versus

Musammat PARTAPI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Custom—Marriage—Evidence—Long cohabitation—Man and wife, treatment as—Presumption.

When a man and a woman have long cohabited and have been treated by their acquaintances, and have treated each other, as man and wife, such long cohabitation plus such treatment is sufficient among Jats to establish a marriage and the legitimacy of the offspring. [p. 894, col. 1.]

Where, however, the parties have not treated each other as man and wife but as master and concubine, the same legal results do not flow from cohabitation even of long date. [p. 894, col. 1.]

Second appeal from the decree of the District Judge, Hoshiarpur, dated the 24th December 1915, reversing that of the Sub-

ordinate Judge, 2nd Class, Hoshiarpur, dated the 6th July 1915, decreeing the claim.

Mr. *Mukand Lal Puri*, for the Appellant.

Mr. *Taj Din* and Pandit *Bindra Ban*, for the Respondents.

JUDGMENT.—The lower Appellate Court finds that *Musammat* Partapi is the wife of Hakim Singh. This conclusion is based on:

1. Evidence of cohabitation for several years.

2. The supposed custom that such cohabitation is sufficient to establish marriage even in the absence of any ceremony.

The custom, however, is not correctly stated; when a man and a woman have long cohabited and have been treated by their acquaintances and have treated each other as man and wife, such long cohabitation *plus* such treatment is sufficient, among Jats, to establish a marriage and the legitimacy of the offspring.

When, however, the parties have not treated each other as man and wife but as master and concubine, the same legal results do not flow from cohabitation even of long date. The union remains a temporary illicit union. In this case the widow Partapi now states she is the wife of Hakim Singh, but there is not a single document on the record wherein she describes herself as his wife; on the other hand, there are many documents, including one subsequent in date to the First Court's decree, in which she describes herself invariably as the widow of Mahan Singh.

Even in the criminal proceedings in 1905 Hakim Singh did not allege that Partapi was his wife, he said she had lived in his house as a wife.

If she had married Hakim Singh, the land left by her husband would have been mutated not in favour of Hakim Singh alone, but in his and his brother's name.

There is no reasonable proof that Partapi and Hakim Singh are man and wife. The District Judge then finds that the whole transaction is fictitious, but he has not discussed all the details and he has failed to consider that Hakim Singh after 1907 abandoned Partapi and went to America, where he stayed for some four years.

How was Partapi to maintain herself and her children during that period, especially, as I understand, the whole of her late husband's estate was in the hands of mortgagees? The production by Partapi of stamps purchased in her name and thumb marked by her is quite inconclusive. As *Musammat* Partapi is held not to have remarried, the question of necessity falls to the ground, and the only question for decision is that of consideration. If any portion of the consideration has passed, the mortgage is security for that consideration. [*Cf. Allah Ditta* v. *Nazar Din* (1).] I remand the case to the lower Appellate Court for further enquiry whether the mortgage transaction is wholly fictitious.

Return in a month.

Case remanded.

(1) 33 Ind. Cas. 474; 51 P. W. R. 1916; 53 P. R. 1916.

MADRAS HIGH COURT.

CIVIL APPEALS NOS. 146, 228 AND 230 OF 1916.

November 29, 1917.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Sadasiva Aiyar.

IN APPEAL NO. 146 OF 1916

MUNA MUHAMMAD ROWTHER AND OTHERS—DEFENDANTS—APPELLANTS

IN APPEAL NO. 228 OF 1916

KATHIJA BIVI AMMAL AND OTHERS—DEFENDANTS—APPELLANTS

IN APPEAL NO. 230 OF 1916

THADAYPALLI PERIA SUBBA ROW AND OTHERS—DEFENDANTS—APPELLANTS

versus

K. R. MUTHU ALAGAPPA CHETTIAR, PANCHAYAT OF SRI NAVANEETHEESWARA SWAMI TEMPLE AT SIKKIL AND OTHERS—PLAINTIFF AND OTHERS DEFENDANTS—RESPONDENTS.

Landlord and tenant—Tharam Faisal Muchilikas, execution of, before passing of Madras Estates Land Act (Mad. I of 1908), effect of—Tenants described Ulavadai Kudikani Mirasidars, effect of—Occupancy rights, claim of—Lease by trustees of temple lands—Alienation by tenants without protest by trustees, effect of—Estoppel and prescription, acquisition of permanent occupancy rights by—Burden of proof—Temple lands in Tanjore District, incidents of.

MUNA MUHAMMAD *v.* MUTHU ALAGAPPA CHETTIAR.

In certain Tharam Faisal Muchilikas executed by the lessees in favour of their landlords, the trustees of a temple in a village in the Tanjore District, long before the passing of Madras Act I of 1908, it was recited that the tenants agreed (1) to accept the lands from the temple for *purposes of cultivation* from the current Fasli, (2) that they would pay the Melvaram Tirva due to Government in cash instead of in grain, though the said Tirva was directly due by the lessor (temple) to Government, (3) that they would pay the equivalent price of the paddy grain besides the Punja cash rent due to the temple as Swamibigam (soil proprietor's dues) and that such rent would be paid *as long as the occupants were in possession*, (4) that they would pay additional revenue to Government for raising garden crops, (5) that when waste lands were newly cultivated, they would pay additional *tirva* or Swamibogam to Government and (6) that they would supply Kudimaramath labour for repairs and men for carrying the temple paraphernalia in times of fairs and festivals. The tenants described themselves as Ulavadai Kudikani tenants:

Held, (1) that the executants of such Tharam Faisal Muchilikas could not be said to possess permanent rights of occupancy; [p. 904, col. 2.]

(2) that the mere assertion by the tenants that they were Ulavadai Kudikani Mirasidars in the village could not invest them with such rights; [p. 905, col. 1.]

(3) that the onus of proving the existence of occupancy rights lay on the lessees. [p. 899, col. 1; p. 904, col. 2.]

Nature and incidents of lands held by temples in Tanjore District discussed. [p. 897, col. 1 to p. 899, col. 1.]

(Authorities reviewed.)

The mere fact of the tenants alienating the lands without protest or demur by the temple trustees will not confer on the tenants a right of permanent occupancy by estoppel or prescription. [p. 900, col. 1; p. 906, col. 1.]

Appeals against the decree of the Court of the Temporary Subordinate Judge, Tanjore, in Original Suit No. 4 of 1913.

Messrs. *M. D. Devadoss* and *T. R. Venkatrama Sastri*, for the Appellants.

The Hon'ble Mr. *T. Rangachariar* and Mr. *G. S. Ramachandra Aiyar*, for the Respondents.

These appeals and the memoranda of cross-objections filed by the respondent in Appeal No. 146 of 1916 and by the 1st respondent in Appeals Nos. 223 and 230 of 1916 coming on for hearing on the 5th, 6th, 7th, 8th and 9th November 1917 and the cases having been posted to be spoken to on the 26th November 1917, and having stood over for consideration till this day, the Court delivered the following

JUDGMENT.

WALLIS, C. J.—These are appeals from the decree of the Subordinate Judge of Tanjore in a suit brought by the plaintiff as trustee of a temple to eject the defendants from the lands in their possession in the village of Sellur, on the ground that the lands are the properties of the temple. The Subordinate Judge, after a very careful examination of the evidence, decreed the plaintiff's suit and the defendants have appealed. The case, which is one of great importance to the parties, was again very ably and elaborately argued before us for several days, and we reserved judgment. The first question for consideration is, is the village of Sellur an estate within the meaning of the Estates Land Act of 1908, as, if so, the defendants are entitled to occupancy rights under the Act and the jurisdiction of the Civil Courts in ejectment is taken away. This question is closely connected with the question whether the defendants are entitled to occupancy rights apart from the Act, because in conferring or recognizing occupancy right the Legislature, speaking generally, has so far confined itself to cases where a presumption of occupancy right had been recognized by the Courts before the passing of the Act. Curiously enough the majority of cases which came before the Courts related to lands owned by temples like this or Mutts in Tanjore. In all these cases the decision was against the existence of occupancy right except in *Krishnasami Pillai* v. *Varadaraja Ayyangar* (1) and *Chockalingam Pillai* v. *Mayandi Chettiar* (2) and the latter decision was reversed by the Privy Council in *Mayandi Chettiyar* v. *Chokkalingam Pillay* (3). In the well-known Chockalingam case [*Chockalinga Pillai* v. *Vythealinga Pundara Sunnady* (4)] certain observations of the learned Judges questioning the decision in *Venkataramanier* v. *Ananda Chetty* (5) were thought to

(1) 5 M. 345 (F. B.); 2 Ind. Dec. (N. S.) 240.
(2) 19 M. 485; 6 M. L. J. 247; 6 Ind. Dec. (N. S.) 1043.
(3) 27 M. 291; 8 C. W. N. 545; 31 I. A. 83; 14 M. L. J. 200; 8 Sar. P. C. J. 587 (P. C.).
(4) 6 M. H. C. R. 164.
(5) 5 M. H. C. R. 120.

have gone far to negative the existence of occupancy rights in permanently settled estates, but the subsequent decisions in *Appa Rau* v. *Subbanna* (6) and *Venkatanarasimha Naidu* v. *Dandamudi Kotayya* (7) and *Cheekati Zamindar* v. *Ranasooru Dhora* (8) showed that this was not so, and recognized a presumption of occupancy right in Zemindari *ryots* on the ground that the Zemindars were largely in the position of assignees of land revenue, that the grants in their favour did not affect the ownership of the *ryots* in the soil and that, even as regards *ryots* admitted after the *sunnads* granted to the Zemindari proprietors under Regulation XXV of 1802, the presumption was that they had been admitted on the same terms as other *ryots* in the Zemindari, that is, with occupancy rights. On the other hand in *Cheekati Zamindar* v. *Ranasooru Dhora* (8), the latest and leading case on this subject, the learned Judges, Shephard and Subramania Aiyar, JJ., recognized that the presumption is the other way in cases where the landlord claiming to eject is not a mere assignee of land revenue, but is himself the owner of the soil—following the decision of Sir Arthur Collins, C. J., and Muthusami Aiyar, J., in *Chidambara Pillai* v. *Thiruvengadathiengar* (9). The learned Judges held that "the claim for an occupancy right as overriding the proprietor's right to cultivate his own land is of a special character and as such it is one which the party seeking to derogate from the ordinary incidents of property is bound to establish. Of course the appellants are entitled to the benefit of any presumption which may reasonably arise from the length of enjoyment and other special circumstances of the case. The contention that mere length of enjoyment in the capacity of tenants or Purakudies irrespective of other circumstances is *prima facie* proof of occupancy right cannot be supported." Applying the principles laid down by the Courts the Legislature in the Act of 1908 has conferred occupancy rights on *ryots* in Zemindaris, except as to Zemindari Pannai lands which the Zemindar cultivates as his own and except as regards lands which have never been in the hands of cultivators or have been relinquished and come within the definition of "old waste." The only villages outside such large estates that come under the operation of the Act and come within the definition of estate are villages "of which the land revenue alone has been granted as Inam to a person not owning the Kudivaram thereof.....or any separated part of such village." If the Inamdar or assignee in whole or in part of the Government revenue on the village, owns the Kudivaram, that is to say, is also a land-owner in the village, the presumption against him does not arise, the Act is not made applicable to his case, and the question whether those holding under him have occupancy rights is left to be decided by the Court, the presumption being that they have not.

Now in this case it is absolutely clear, as found by the Subordinate Judge, that, as regards this village, the temple is not a mere assignee of land revenue but the owner of lands in the village. We cannot indeed tell the date at which it was founded or became so, but we know that temples in this part of India are not at all infrequently the Mirasidars or hereditary owners of the cultivable lands in the village, and there is abundant evidence that this is so in the present case. It is sufficient to refer to the Paimash register of 1829 in which the temple is described as having the Ekabogam Miras of the village, a term which is well understood as meaning the whole ownership of the Mirasi right in the village as opposed to cases of Palabogam where the ownership is divided among many. Further the parties to Exhibit E, through whom the plaintiff claims, undertake in that instrument to pay Swamibogam and Odavarams to the temple. These payments, which are in the nature of rent and fees, are payable to a Mirasidar by those holding under him and the fact that they were payable by those under whom the plaintiff claims shows that they held under the temple.

(6) 13 M. 60; 4 Ind. Dec. (N. S.) 752.
(7) 20 M. 299; 7 M. L. J. 251; 7 Ind. Dec. (N. S.) 213.
(8) 23 M. 318; 8 Ind. Dec. (N. S.) 624.
(9) 7 M. L. J. 1.

The temple is then in the position of an ordinary *ryot* owning his holding subject to the payment of land revenue either to Government itself or, if the holding be situated in a Zemindari, to the Zemindar as assignee of the Government demand. Now as regards such *ryots*, whether they pay the revenue direct to Government or its assignees, the presumption in this Presidency, as laid down in *Chidambara Pillai* v. *Thiruvengadathiengar* (9) and recognized in *Cheekati Zamindar* v. *Ranasooru Dhora* (8), is against the existence of any occupancy rights in those holding under them and it is for those who set up such a right to prove it. This is the general law of the Presidency and the proper starting point from which to approach the question, but there are also, as I have already said, a long series of decisions as to these temple villages in Tanjore which have to be considered. They all recognize and enforce the presumption just referred to, but the result of course depended in each case on the materials put before the Court.

All these temple villages in Tanjore have certain features in common. They were all managed from 1802 by the Collector on behalf of the temple until the East India Company in deference to certain religious bodies in England began to withdraw from management in the forties of last century. They were all included in the Paimash or survey of Tanjore which, in this case, took place in 1829. They were also affected by the action taken by Mr. Kindersley, Collector of Tanjore, in 1830 and the following years in substituting money payments for the system till then prevailing of paying revenue in grain. As Collector he had to collect the revenue payable by the temples, and as manager he had to collect the rents payable to them. In these circumstances he took the engagements or Muchilikas, which are a feature of all these cases except *Krishnasami Pillai* v. *Varadaraja Ayyangar* (1), by which the executants undertook to pay directly to the Collector in money not only the Government revenue payable by the temple but also the Swamibogam or rent and other dues payable to the temple as land-owner. Much depends on the proper inference to be drawn from the execution of these documents. In the first case which came before the High Court in 1863, *Alagaiya Tiruchittambala* v. *Saminada Pillai* (10), Scotland, C. J., and Holloway, J., stated that the question was whether *ryots* under the Mirasidar have a title to the permanent occupancy of lands subject to the payment of the Mirasdar's share, and observed that such a tenure for the most part depended on long established usage and custom which had to be proved. They were of opinion, however, that the mere existence of a Muchilika, such as had been executed by the six *ryots* describing themselves as Ulavadi Kanikudi defining the terms of the *ryots'* holding, was opposed to the existence of an occupancy right, and they held that the terms of the particular Muchilika by which the executants agreed to surrender the lands if any one offered more were absolutely inconsistent with it. In the case of *Subupalayi Ammal* v. *Appakutti Aiyangar* (11) the Muchilika seems to have been taken from a single *ryot*, the 1st defendant's father. The 1st defendant claimed to be a perpetual lessee under it and the Court rejected his contention on the construction of the Muchilika which is not set out. In *Chockalinga's case* [*Chockalinga Pillai* v. *Vythealinga Pundara Sunnady* (4)] the defendant claimed to be a permanent lessee under an Izara Muchilika granted to him by Mr. Kindersley in 1837, and on the construction of the document the Court held that it evidenced a letting from year to year unless the defendant alleged and proved an established custom of permanent occupancy. The defendant was not precluded, they held, by the terms of the Muchilika from alleging and proving such a custom but he had not done so and it could not be presumed. No Muchilika was forthcoming in *Krishnasami Pillai* v. *Varadaraja Ayyangar* (1). We have next two judgments of the Court in the same appeal, one reported as *Thiagaraja* v. *Gnanasambantha* (12) and the other as *Thiagaraja* v. *Giyana Sambandha Pandara Sannadhi* (13), where the case was re-heard. Kernan, J.'s judgment is in the same terms in both cases, but there is a concurring judgment by

(10) 1 M. H. C. R. 264.
(11) 3 M. H. C. R. 106.
(12) 7 M. 374; 2 Ind. Dec. (N. S.) 844.
(13) 11 M. 77; 4 Ind. Dec. (N. S.) 54.

Kindersley, J., in the first case and by Brandt, J., in the second. As in *Chockalinga's case* (4) an inference against the existence of occupancy right was raised from the existence of the Muchilika. Both these decisions were approved of by the Privy Council in *Mayandi Chettiyar* v. *Chokkalingam Pillay* (3). In *Chidambara Pillai* v. *Thiruvengadathiengar* (9) there were a series of Muchilikas beginning in 1841 in which the executants bound themselves to cultivate for fixed periods and then restore the lands. The Muchilikas also contained other indications opposed to the existence of occupancy right. The learned Judges came to the conclusion that the five persons styling themselves Purakudis who executed the first Muchilika were not improbably cultivating Purakudis, "that they were expected to cultivate together with other Purakudis in the village, that they were selected as executants of the lease probably because they were the leading men or chief Purakudis in the village for the time being, and that the distribution of the cultivable area among themselves for purposes of cultivation was left to be adjusted by them at each lease or other interval of time". I think that this is probably true of most of the other Muchilikas produced in these cases. We have next the case of *Chockalingam Pillai* v. *Mayandi Chettiar* (2), which was overruled by the Privy Council in *Mayandi Chettiyar* v. *Chockkalingam Pillay* (3). In that case the High Court reversed the judgments of the two lower Courts in second appeal. The defendants in support of their claim produced two leases granted in 1813 which entitled the grantees to hold the lands permanently for all time to come by right of "Ulavadi Kani", and in the Muchilikas subsequently executed by the defendants who claimed under these leases they were described as Ulavadai Mirasidars. The Judicial Committee in their reversing judgment appear to have been of opinion that the leases of 1813 were of questionable validity and could not be relied on. On the other hand they laid great stress on the fact that the Darkast or application pursuant to which the Muchilika was taken by the Collector described the two applicants as Purakudis of the assessed lands in the village owned by the temple, and on the facts that in it they undertook to pay the revenue for one year and asked that a Dharkast Izara for one year might be granted in their names. The inferences to be drawn from these facts were not counterbalanced in their Lordships' opinion by the fact that in the Muchilika the two executants were styled Ulavadi Miras. On the materials before them and with reference to the observations of the Subordinate Judge, their Lordships treated the words Ulavadi Miras as of doubtful signification. Having regard to the further investigation which these tenures have received especially in the judgment of Spencer, J., in *Chinnan* v. *Kondam Naidu* (14) and in the Chingleput Mirasi case, *Seshachala Chetty* v. *Para Chinnasami* (15), I have no doubt that the word Miras in this part of India implies some sort of hereditary right. All that their Lordships said about it came to this, that on the materials before them it was of doubtful signification, and that therefore the decision could not be rested on it. After referring with approval to the decisions in *Chockalinga Pillai* v. *Vythealinga Pundara Sunnady* (4) and *Thiagaraja* v. *Giyana Sambandha Pandara Sannadhi* (13) and distinguishing *Krishnasami Pillai* v. *Varadaraja Ayyangar* (1), their Lordships finally observed that the question must be decided on the contract sanctioned by the Collector, that is to say, the Muchilika. In the next case, *Mahomed Meera* v. *Ramalingam* (16), which came before Munro and Sankaran Nair, JJ., the learned Judges held it sufficient to say that appellants had not proved that they had permanent occupancy rights in the village, and that it was not necessary to say that none of the tenants had it. As regards that particular village the question was again most elaborately considered by my learned brother sitting with Napier, J., in *Naina Pillai* v. *Ramanathan Chettiar* (17) and the same conclusion was come to.

The result is that in all these Tanjore temple villages which have come before the Court except one, occupancy right

(14) 23 Ind. Cas. 113; 26 M. L. J. 169 at p. 177; 1 L. W. 41.

(15) 40 Ind. Cas. 909; 40 M. 410; 32 M. L. J. Sup. 1.

(16) 8 Ind. Cas. 158; (1911) 1 M. W. N. 84; 8 M. L. T. 430.

(17) 41 Ind. Cas. 788; 33 M. L. J. 84.

has been held not to exist, and in that case no Muchilika taken by the Collector after 1830 was put in evidence. The onus is, therefore, very strongly on the defendants to make out their case. The evidence has been so very fully analysed by the Subordinate Judge and now by my learned brother that it is unnecessary for me to say more than that I agree generally with their conclusions. I think it would be altogether unsafe to act on the cadjan documents prior to 1830 produced on either side. Those produced by the plaintiff were put in at a very late stage of the case, and there is very little evidence as to how those produced for the defendants came to be preserved in the family of one of the former tenants who had long since parted with the bulk of his holding. Even assuming that they came from proper custody, the facilities for procuring such documents even bearing what purport to be Government stamps are unfortunately great. On the other hand, the undoubtedly authentic documents before 1829, which my learned brother has summarised, strongly support the plaintiff's case that there was no occupancy right. The strongest evidence in favour of the defendants is to be found in the Paimash register of 1829, Exhibit XI (*b*), in which the Nelkuthagai Miras is said to be Ekabogam or vested in one person, and the Ulavadai Kani Miras, or hereditary right to plough is said to be Palabogam or vested in several, and a number of persons are given as cultivating under this right. The temple itself is shown as cultivating 7 Velis and also 5 Velis which it is said to hold on mortgage from Appasami Appa, who is also shown as the mortgagor of Nayana Naick who is described as in the possession of 2 Velis. So far this is in favour of the defendants, but as my learned brother has pointed out, this is followed by a statement that no Melvaram as such is shown in the accounts and that the custom is to give Purakudivaram and enter it in the temple accounts. Thus the temple is treated as itself cultivating all these lands, and the occupants are shown as receiving as Purakudivaram, or cultivator's share, certain percentages, 40 or 30 per cent. of the outturn. On the whole it would seem as if some of the cultivators had induced the inferior officers who drew up the Paimash to insert entries indicated to serve at some future date as evidence of their claims to occupancy right. This would not be the only time such a thing has happened, and I agree that too much weight must not be given to these entries, inconsistent as they are with other entries in the Paimash itself and with the evidence as to periods immediately preceding and following. Much reliance is placed for the defendants on Exhibits XLVI and XLVI (*a*), which purport to be a mortgage in 1811 in favour of the temple and a receipt for the mortgage money by Ramasamia Pillai whose brother-in-law Sivaji was, it is suggested by the documents referred to by the Subordinate Judge, the father of Appasami Appa. I am willing to assume that these documents were produced in a Small Cause Suit in 1881 and that they bear the initials of the Subordinate Judge. What the suit was about is not in evidence, but Mr. T. R. Venkatrama Sastri suggests, and has asked leave to show, that it was a rent suit in which the amount of rent payable to the temple was in issue. They were not exhibited in that case and there was no finding as to their genuineness. At that time not only was there this dispute, but the question of occupancy right in these Tanjore temple villages was much before the Courts from 1863 onwards, and it is quite possible that these documents may have been prepared to meet a suit by the temple. There is a suspicious circumstance about them both, that the stamp-vendor's endorsement has been covered up in both cases in exactly the same manner so as to prevent us from ascertaining the year of issue which the plaintiff suggests is 1813, the date given in the copies put in evidence by the plaintiff Exhibits PPP and QQQ. It is remarkable, as the Subordinate Judge has pointed out, that Appasami Appa did not insist when the Muchilika Exhibit E was executed in 1831 on the ownership of these two extensive blocks of land in the village. The contents are not convincing to my mind. It is not stated by whom the money was advanced on behalf of the temple, and as the temple was then in the management of the Collector a transaction of this kind does not seem very probable, and I doubt if the documents represent any real transaction. On the whole, I do not think it

would be safe to act on these two documents as affecting the plaintiff's title. In the Muchilika Exhibit E given to the Collector in 1831 the first of the executants is called a Purakudi and the next is styled Ulavadi Kani Miras. They undertake to pay as long as the lands are in their possession, and agree that their properties may be attached and sold for arrears. Nothing is said of realising the arrears by sale of their interest in the land itself. Exhibits F (19) and F (12) and Exhibits XIII series show that the Collector's system was to take security bonds from them for the lands actually in their cultivation. These lands do not correspond with the lands which were described as being in their possession in the Paimash register Exhibit XI (*b*). In another of these cases there was put in evidence a Karar or preliminary agreement by which the executants agreed among themselves as to the areas they should cultivate individually if they succeeded in getting the Collector to take the Muchilika from them. Possibly there was some arrangement of the kind in the present case.

On the whole I do not think there is sufficient evidence in the present case to rebut the inference against occupancy right which, according to so many decisions, arises from the execution of the Muchilika, Exhibit E, by the persons through whom the present defendants admittedly claim. If the defendants' predecessors had not occupancy rights in 1831, I do not think they can have acquired them since by reason of the fact that the trustees have raised no objection of late years to the transfer of the holdings by sale and mortgage. In *Mayandi Chettiyar* v. *Chokkalingam Pillay* (3) the Judicial Committee question the right of temple trustees to confer permanent rights of occupancy by express grant, and I think they can still less be held to have done so by implication. It is of course very unfortunate that the temple authorities should have thought it necessary to enforce the claims of the temple by seeking to eject all the tenants in the village but this is not a matter which can affect our decision.

I agree with the orders proposed by my learned brother as regards all these cases.

SADASIVA AIYAR, J.—These three appeals have arisen out of the same suit, Original Suit No. 4 of 1913 on the file of the Temporary Subordinate Judge's Court of Tanjore. The appellants are the important defendants in the suit. In Appeal No. 228 of 1916, which is the principal of the three appeals, the 43rd defendant is the 1st appellant. There are four other appellants in that appeal, namely, defendants Nos. 44, 137, 138 and 139 in the suit, but their only ground of appeal is that they should have been exonerated from all liability to the plaintiff as from the beginning they repudiated all interest in or possession of any of the properties in dispute. The plaintiff who brought the suit in April 1910 in the Nagapatam Sub-Court (from which Court it was transferred to the Temporary Subordinate Judge's Court of Tanjore) is the trustee of the famous and ancient Sri Navaneetha Ishwaraswami temple situated in the village of Sikkil near Negapatam. The temple owns lands in several villages. This suit was brought for recovery of lands, house sites and houses situated in the village of Sellur, the defendants being alleged to be tenants from year to year who refused to vacate their holdings after proper notices to quit had been given.

One hundred and fifty-seven defendants were impleaded at first and with the legal representatives of defendants who died during the pendency of the suit, the last number of the defendants became 176.

The most important question in this suit is whether the tenants have got occupancy rights in the cultivable lands in the village in their respective holdings. The other minor questions need not be referred to at present, as a detailing of them will unnecessarily distract the attention from the main issue and the conclusions in respect of several of them depend upon the decision on the main issue.

The principal question is covered by the first three issues framed in the suit which are as follows:

"1. Is the plaint temple the absolute proprietor of the entire village of Sellur?"

"2. Are the defendants tenants from year to year and is the plaintiff entitled to eject them?"

"3. Are all or any of the defendants entitled to a right of permanent occupancy by prescription or otherwise?"

The temple's right to and in the whole

village of Sellur had its origin in such remote times that no grant or title-deed is forthcoming. The earliest document Exhibit, ZZ, in March of the year 1805 contains accounts showing that the temple harvested the produce of the lands in the village, allowed the temporary cultivators (called Purakudis) the Waram due for their labour at varying rates for the lands in the southern half and in the northern half of the village and retained the balance. (The word 'Kudivaram' means strictly the share given to or retained by the actual cultivator or 'Kudi'. The right of permanent occupancy, if it belongs to the 'Kudi' is sometimes known in the Zemindari and Inam tracts as 'Kudivaram *right*', but the mere receipt of Kudivaram by a tenant does not of course show he has the "Kudivaram right" in the larger sense, that is, that he has permanent occupancy right in the lands in his holding. Sometimes the Kudivaram *right* is shortly spoken of as "Kudivaram" and this occasionally leads to confusion). The next documents to be considered in order of date are Exhibits XLVI, XLVI (*a*), PP, and QQ. The plaintiff disputes the genuineness of Exhibits XLVI and XLVI (*a*) purporting to be dated in 1811. In the copy (Exhibit QQQ) of Exhibit XLVI (*a*) supplied by the 40th defendant himself (who is the defendants' 9th witness) the stamp-vendor's endorsement states that the stamp-paper was purchased in 1813, that is, two years *after* the date of the document. The defendants, when producing Exhibits XLVI and XLVI (*a*) into Court, have produced them in such a condition that the last figure relating to the year of the purchase of stamp-paper in both the documents is obliterated and both the papers have been torn at the top in such a manner that the tear proceeds just up to the obliterated figure. The learned Subordinate Judge has considered the question of the genuineness of the documents in paragraph 91 of his judgment. It may be that one of the several reasons he gives for deciding against their genuineness, namely, that relating to custody is rather weak, but the other reasons given by him for his conclusion appear to be sound and I do not see my way to differ from his said conclusion Even if Exhibits XLVI and XLVI (*a*) are genuine, they merely show that the temple trustee in 1811 accepted a usufructuary mortgage of a tenancy right vesting in one of the tenants of the temple, namely, Ramaswamia Pillai son of Muthia Pillai.

I might here at once state that several cadjan documents have been filed on both sides which I consider very unsafe to rely upon whether they are stamped or unstamped. Even stamped cadjans are easily manufactured, with endorsements of imaginary stamp-vendors showing the purpose why the stamp was required. The Subordinate Judge relies on cadjans Exhibits L series, M to M4, N and O (all except O dated before 1831 which is an important date in this case) ranging from 1785, as supporting the plaintiff's case. But I am not inclined to attach any weight to these documents. So also, the defendants rely on Exhibit LV (*e*), a cadjan document of 1826 which is probably spurious and even if genuine is not of much value. There are a few documents like Exhibits XII, F (4) to F (11), F (15) to F (18) which do not relate to the plaint village and which are, therefore, irrelevant.

We now come to the undisputed important Paimash account of 1816 which has not been marked as one single exhibit, but portions of which have been marked in a confusing manner as Exhibits H, HI, XI and XI (*a*). This Paimash account almost conclusively shows that the plaint temple was in 1816 (and had been before that) the sole proprietor of the actual soil of all the lands in the village of Sellur. The temple was paying Nelkuthagai (paddy revenue) to the Government and the village in question was known as the Nelkuthagai village belonging to the Sikkil Navaneetha Iswarasawmi temple. The lands, house-sites and every bit of soil in the village are mentioned as belonging to the big temple with its two sub-temples of Kailasanathaswami and Ananthanarayana Perumal, to which two sub-temples small areas had been given by the bigger temple as Sarvamaniyam. The whole area of the village is stated to be in the enjoyment of these "three individuals", that is, the three temples.

The only "Mirasi" right recognised in any others is in 7 dwellings of tenants,

other tenants' houses being 38 in number and occupied by Purakudis (7), Kasavargam holders (service tenure) (10) and Adimais (slaves or serfs) (21). Then we come to another set of undisputedly genuine documents marked Exhibits F, F1, F4, F5, F13 and F14. The earliest of them is dated 30th October 1820 and the latest is dated in January 1825. It is well-known that these and other famous temples in Tanjore were managed by the Collector on behalf of Government for about half a century from about the beginning of the 19th century. The Collectors found that it was very difficult to make the cultivators (mostly fugitive) to properly cultivate the lands. So in 1820, the then Collector of Tanjore thought it best in the interest of the temples to obtain proposals from intending lessees for short periods of one to five years and to let the whole cultivable area in each temple village to that intending lessee who offers the highest rent (paddy for Nanja lands and cash for Punja lands), it being the successful offerer's look-out to bring cultivators upon the lands and to bring as much extent as he could under cultivation. Such leases are known as "proposal" leases. Exhibits F (1) and F (13) relate to the Izara Muchilika executed by one Chockalingam Pillai taking up the lands in this plaint (Sellur) village and another temple village (Abhishekakattalai) under the Collector from 1st July 1820 to 30th June 1823, that is for three years. Exhibit F (1) clearly shows that the actual cultivators were only Purakudis, that is, cultivators who had no definite term of incumbency and were entitled only to Purakudiwaram to be paid by the lessee out of the gross produce, that the lands themselves were let and that the Mirasi or *occupation right* in the lands belonged to the temple, the paddy revenue due to Government being the real Melvaram. The Mirasidar, when he cultivated through either his Pannai or Adimai (slave or serf) cultivators, takes the whole produce minus the Government paddy revenue, paying wages to his Pannaiyals and serfs. If he leases them to several Purakudies or to the proposal-lessee, what he gets from the lessee may be loosely called "Melvaram", the proposal-lessee taking the Kudivaram. In the case of the proposal-lessee again *as between himself and the* Purakudies, what he retains will be again "Melvaram" and what the Purakudis are given will be the "Kudivaram." But as I said, such loose language leads to confusion and in the old documents, "Melvaram" is used usually for the Government paddy revenue and Purakudivaram is used for the Purakudi cultivators' share given to them out of harvested produce, what the temple Mirasidar obtains being known as Swamibhogam (a very important term) to which Thunduvaram is attached in some cases.

The next document is Exhibit F (4). This is one of the proposals or offers made for the plaint Sellur village and the other Abhishekakattalai village in September 1823 by one of the intending proposal-lessees. This is for only one year. This proposer's proposal seems to have been accepted also for the three succeeding Faslis 1234 to 1236, that is, July 1824 to June 1827 (see Exhibit F), because he agreed to pay 3,850 Kalams of paddy rent per year instead of 3,750 Kalams which prevailed in the preceding 4 years. These documents, which had effect between 1820 and 1827 for 7 years, clearly establish the temple's proprietary Kudivaram right in the village lands and the fact that its lessees were changed even during this short period. See also Exhibit YY (1) account of the receipts and disbursements of the temple in the last year of the proposal-lease period. Then the lands were again taken up by the temple under Amani system and Exhibit N is the account of the year 1827-28. This account shows that the entire gross produce was harvested by the temple, Purakudivaram being paid out of it to the actual cultivators under the temple. (There are several mistakes in the translation of documents in this case, for instance, in this Exhibit N, instead of describing the Sellur and other villages as villages paying paddy revenue to Government, they are described as villages for "paddies leased out" which is unmeaning).

We now come to an important document of 1828-29, which is the Paimash Chitta of the Sellur village prepared in that year. This document again, like the Paimash of 1816, has been exhibited not as one document, but as several documents, namely, H(2), WWW series (5 in number), XI (6),

XLVIII series (10 in number), LXXXIV and LXXVII. This Paimash account was laboriously prepared, though not by the higher grade Revenue Officers. Such an account, it is well known, while fairly reliable as regards the numbers, extents and character of the lands as mentioned in it and as regards broad statements as to rights, is also found to contain statements based on the allegations of interested and ignorant residents of the village, and such statements are of very little value especially when there has been no subsequent revision or check by an officer of one of the higher revenue grades. (See observations in the judgment in a similar case of *Naina Pillai* v. *Ramanathan Chettiar* (17) found at page 96*.) There are even statements of a somewhat (what I may call) absurd character found in such preliminary Paimash accounts. In the present case for instance, while Exhibits H2, WWW and in fact every portion of this Paimash Chitta account of 1829 acknowledges the temple to be the sole Ekabhogam Mirasidar entitled to the full occupancy and cultivation right in the whole of the village lands, we find in Exhibit XI(*b*) (see page 438 of the printed documents papers) that 11 persons are described as Ulavadai Kani Mirasi tenants (under the Ekabhogam Mirasidar) of the village Nanjah lands and one of these 11 persons is stated to be the temple itself, that is, the temple is a tenant of land under itself, which is absurd. Again the very next sentence in this Exhibit IX (*b*) is inconsistent with any Kudivaram or occupancy right in all but the temple, because it says that the custom in the village is that only Purakudivaram is entered in the Devasthanam accounts as given to tenants and that, because the Government gets its revenue in paddy, there is no Mirasivaram in the village. This sentence clearly means that the Mirasidar temple takes the whole produce under its Kudivaram or direct cultivation right and gives out of it to the Urakudi tenants the share due to them for the labour of cultivation.

Guarding ourselves then from giving too much weight to the inconsistent and contradictory statements sometimes found here and there in this Paimash account of 1829 (it seems not to have been checked by any higher Revenue Officer), the statements in this Paimash account clearly indicate that the Kudivaram right belonged to the temple alone as Ekabhogam Mirasidar.

Then we come to the last set of the really important documents in this case, namely, Exhibits E, F19, F20, XIII series, F2 and and F3. We have seen that the proposal-leases came to an end in 1828 and that the village lands were again harvested by the temple Manager, the Collector, on the Amani system. The then Collector, Mr. Kindersley, in the year 1830 desired to substitute money payments on what was known as a "permanent commutation" rate, that is, commutation as regards the value of the paddy revenue payable by the temples. (The word 'permanent' in some of these documents denotes only the permanency of the commutation rate at which the paddy grain due to the Government as Melvaram revenue was permanently settled. See at the end of Exhibit E, where the temple lessees consent to the following provisions: "As for the Nanjah Melvaram in respect of the said village, we shall pay Theervai according to the price *permanently settled* at 3 9/16 Pons per Kalam. Whether the price becomes more or less than that price, the profits or loss must go to us and not to the Government.") Mr. Kindersley also dropped the original Pannai, Purakudi and Adimai cultivation systems and the intermediate "proposal" system and let the entire cultivable lands in each temple village on what has become familiar as the "Tharam Faisal Muchilika" system to one or more lessees, such lessees (where there were several) being usually the prominent, influential and representative persons among the numerous cultivators in the village. Many of these Tharam Faisal Muchilikas have come in several cases before this Court. The important and operative clauses in them have always been substantially the same. The applications to the Collector by the intending lessees in respect of these Tharam Faisal Muchilikas have slightly differed in language, some of the applicants describing themselves as Purakudis alone, some as Kudimiras, some as Purakudimiras, some as Ulavadai Purakudimiras and some (as in this case) Ulavadai Kudikani Miras. Some applications mentioned only one Fasli, and others mentioned indefinite periods and so on, but the Muchilikas in which the applications cul-

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minated, and which were finally accepted by the Collector and were executed by the lessees, contained almost the same terms. In this plaint village of Sellur, the Tharam Faisal Muchilika executed to the Collector is Exhibit E. It was executed on 6th February 1831 by seven persons, two of them Brahmins (including a Brahmin lady), three of them Pillais and two of some other caste. In the body of the document, the male Brahmin executant describes himself as Purakudi Samu Iyer. One other executant describes himself as Ulavadai Kanimiras Arunachellam Pillai. Another executant Suppa Pillai signs at the end as Purakudi Suppa Pillai. But all of them jointly execute Exhibit E, agreeing to be jointly liable under it in identical terms. The document begins by describing the Nanjah and Punjah lands which these have jointly *agreed to accept* from the temple *for the purpose of cultivation* from the current Fasli. They agree to pay the Melvaram Theerva due to the Government (the Collector, who obtained Exhibit E, being both the Government agent and the temple Manager) in cash instead of grain, though the said Theerva was directly due by the lessor (the temple) to the Government. They further agree to pay the equivalent price of the paddy grain besides the Punjah cash rent due to the temple as Swamibhogam (soil proprietor's dues, see Wilson's Glossary). Then, they say that they will pay the rents as agreed upon *as long as the lands are in their possession.* There are also provisions for paying additional revenue to Government when garden crops such as betel, tobacco, plantain, onions, garlic, etc., are cultivated, besides an additional Thunduvaram (of the same nature as Swamibhogam or soil proprietor's share) to the temple. Provision is again made when waste lands are cultivated newly for paying additional Theerva and Swamibhogam to the Government and the temple respectively. They are also to supply Kudimaramath labour for repairs, etc., besides men for carrying the temple paraphernalia in times of festivals and so on.

As I pointed out, none of the executants of the Muchilika claims a higher right in any portion of the lands than any of the other executants. I have dealt in my judgment in *Naina Pillai* v. *Ramanathan Chettiar* (17), the Mangal case, with the uniform interpretation which has been placed upon these Tharam Faisal Muchilikas by this High Court from *Chockalinga Pilla*[1] v. *Vythealinga Pundara Sunnady* (4), namely, that the lessees who execute those Muchilikas and agree to cultivate lands under them do so on a terminable tenure and cannot claim a permanent right of occupancy. It is contended that the executants could not be held to have agreed to relinquish their then existing permanent right of occupancy by executing this Muchilika, assuming that they had such a permanent right on the date of its execution. I shall shortly state three considerations which refute this argument:

Firstly, the burden of proving that on the date of this Muchilika of 1831 the executants had a permanent right of occupancy lies very heavily on them and on those claiming under them. (The contesting defendants have clearly admitted in this case that they claimed only under the executants of these Muchilikas.) It is not contended that in *all the lands* of the village taken together, the executants had a joint permanent occupancy right. That the temple was cultivating at least about one-third of the lands through Panai Purakudies then is admitted, the Paimash of 1829, as I said already, making the statement that as regards those lands the temple was its own Ulavadaikudikani tenant. It is also admitted that these Brahmins and Pillais (who executed Exhibit E) and numerous other tenants cultivated distinct plots in the village separately and not jointly. The permanent occupancy right was in fact claimed only for those who are described in the Paimash of 1829 as Ulavadai Kudikani Mirasidars and not for the numerous persons described as Purakudis, etc. Mr. T. R. Venkatrama Sastri for the 43rd defendant even argued strenuously that the occupancy right could *not* be claimed for the lands in the Vadapathi (northern half) portion of the village lands but only for the lands in the Thenpathi (southern half) portion in the holding of his client, the two halves being separated by a common irrigation channel. That the descriptions given of themselves by these tenants are of little value has been held in almost all the cases. Mere assertion by a tenant, especially where his landlord is a temple whose trustee cannot give an occupancy right without breach of trust, would not derogate from the plain rights of the temple

See *Satya Sri Ghoshal* v. *Kartik Chandra Das* (18) and *Maharanee Shibessouree Debia* v. *Mothooranath Acharjo* (19). In *Chidambara Pillai* v. *Thiruvengadathiengar* (9) followed in this respect even in *Cheekati Zamindar* v. *Ranasooru Dhora* (8), the presumption against the existence of occupancy rights in a tenant, holding under a person who himself owns the Kudivaram proprietary right in the soil, is stated to be a strong presumption. In the present case, except the vague description of some cultivating tenants in the Paimash of 1829 as Ulavadai Kudikani Mirasidars and the fact recorded in that Paimash account that some lands in the possession of one of these tenants were mortgaged to the temple and to another person (even assuming such statements to be true and even assuming that the mortgage was in 1811 under Exhibit XLVI), there is no other evidence to support the contention that in 1831, any cultivable lands, much less all the cultivable lands in the village, were held under permanent occupancy right, whereas the overwhelming probabilities are against the validity of that contention.

In the *second* place, I think, considering the influence of the old East India Company's Collectors and even of the Subordinate Revenue Officers, the executants of the Muchilika Exhibit E who represented all the cultivating tenants, must be deemed to have agreed thereafter not to claim any larger interest (assuming that they had any such plausible claims before that) when they accepted the lands for cultivation under the terms, of Exhibit E, than was expressly reserved to them thereunder. It seems difficult to hold that persons intending to claim varying rights (some superior and some inferior, the superior rights again to be attached to some only of the lands and the inferior rights to other lands) would jointly execute the same Muchilika clubbing all the cultivable lands together and agreeing to hold them on the same terms (with further provisions for cultivating additional lands not then held by any of them and so on) unless, as decided in some of the cases on similar facts, they intended that the newly created lease-hold rights under the Tharam Faisal Muchilika should supersede the vague and varying old rights, if any. The permanent right, alleged to have already existed, is again claimed not under any perpetual lease granted with reference to any specific area, but because the tenants were Ulavadai Kudikani Mirasidars of the entire village lands. The arguments at page 9 of the case *Chidambara Pillai* v. *Thiruvengadathiengar* (9) on this point are very instructive. "Further, the provisions which the several leases contain with reference to the cultivation of Poramboke, the protection of trees and the appropriation of trees seem to indicate that this Kudikani right, if any, did not extend to other than land under actual cultivation and this is not ordinarily the case where *ryots* have Kudikani right to the village as contra-distinguished from a perpetual lease granted with reference to a specific area. It is not the appellants' case that they or their ancestors had a perpetual lease from the temple." In *Thiagaraja* v. *Giyana Sambandha Pandara Sannadhi* (13), Kernan, J., says at page 79 "It is contended that long possession is evidence of right of occupancy. But when the right of possession or *right to continue in possession is proved*, as in this case, to have arisen under a written instrument which does not provide for right of permanent occupancy, then the right to possession must *prima facie* follow the terms of the instrument in the absence of any subsequent agreement." In that case, the defendants had been in possession since, at all events, 1827 (see page 78), that is, before the date of the Muchilika of 1830 which gave them *the right to continue in possession* under certain definite terms. The learned Judge, as I said above, held that the right to so *continue* must be governed by the terms of the Tharam Faisal Muchilika and not by any prior circumstance. Even when there was a regular perpetual lease granted to a tenant in 1820, it was held by the first two Courts in the case decided in *Myyandi Chettiyar* v. *Chokkalingam Pillay* (3) that by applying for a fresh grant and executing a Tharam Faisal Muchilika in 1832 "the tenant had either given up or had lost all his right to the perpetual lease granted to him by the temple authorities and that all he and his successors have

(18) 13 Ind. Cas. 596; 15 C. L. J. 227; 16 C. W. N. 418.

(19) 13 M. I. A. 270; 13 W. R. P. C. 18; 2 Suth. P. C. J. 300; 2 Sar. P. C. J. 528; 20 E. R. 552.

to depend upon is the fresh contract made with the Collector in 1832 under which no permanent right of occupancy was conferred." This conclusion was approved of by their Lordships of the Privy Council.

Thirdly, the areas of the holdings after the date of this Tharam Faisal Muchilika, Exhibit E of 1831, do not correspond to the areas mentioned in the Paimash of 1829, Exhibit XI (*b*). In Exhibit XI (*b*) for instance Appasami Appa is alleged to be the tenant of 2 Velis plus 7 Velis 5 Mahs, total $9\frac{1}{4}$ Velis. But he is content to hold after the date of Exhibit E 2 Velis 2 Mahs and 65 Gulis (see Exhibit F20) and is described in Exhibit F20 as a mere Purakudi while in the Paimash account he is one of the eleven Ulavadai Kudikani Mirasidars. The learned Subordinate Judge has also shown how the descriptions as regards both the lands and the tenants mentioned in the Paimash of 1829 are full of inconsistencies and contradictions, adopting the statement prepared by the plaintiff's Vakil in the lower Court from the records (See Paragraph 104 of the Subordinate Judge's judgment and the statement marked A appended to that judgment.)

Another contention was that the conduct of the temple trustees, in standing by when the tenants were alienating by sale and mortgage and subdividing their holdings, conferred a right of permanent occupancy on the tenants by estoppel or by prescription. I have nothing to add to what I said to a similar contention in the case of *Naina Pillai* v. *Ramanathan Chettiar* (17) and I must, therefore, reject the contention. As Muthusawmi Aiyar, J., said in the case of *Chidambara Pillai* v. *Thiruvengadathiengar* (9): "seeing that the officers of Government had managed the temple villages for many years prior to 1857, it is not improbable that the consideration shown by them to Purakudies, as an incident of good management and the length of time for which the Purakudies cultivated, inspired them with a belief that they were not liable to be ejected as long as they were punctual in the payment of rent. This may account for sales and mortgages by the appellants and their predecessors accompanied with an assertion of Kudikani right, which may loosely be used to indicate a permanent tenure of some kind or other. It may be that the trustees took no notice of what the Purakudis did, as they undertook (with the Collector) not to interfere with their occupation so long as they regularly paid rent." I shall, therefore, not refer in detail to the numerous documents on the defendants' side subsequent to 1831 ranging from 1838 (see Exhibit LXXXVII) to January 1910 (see Exhibit IV, dated about 3 months before suit), indicating voluntary and involuntary alienations of the holdings and the recognition of the alienees as tenants by the temple.

In the result, I agree with the conclusions of the Subordinate Judge on the principal three issues. The Appeal No. 228 of 1916 therefore substantially fails except in two particulars, (1) the defendants Nos. 44, 137 138 and 139 will be exonerated from the plaintiff's claim as they disclaimed all interest in the lands, and (2) the mesne profits awarded would be separately assessed against the 43rd defendant as regards the lands in his possession. In other respects, the appeal is dismissed, the 43rd defendant paying proportionate costs to the plaintiff in both Courts on the value of the relief decreed against him.

APPEAL No. 146 OF 1916.—The appellants here are the defendants Nos. 45, 136, 160 to 163 and 166 to 171. Their contentions are the same as those of the 43rd defendant. The decree against them will be confirmed with costs except to this extent, that they will be made separately liable for the mesne profits of the lands in their respective possession. I might add that several pleas as to want of proper notice to quit, undervaluation of the plaint, excessive mesne profits and so on were not argued or pressed before us by the appellants.

APPEAL No. 230 OF 1916.—The appellants here are several other defendants including the 11th defendant. The appeal, so far as it relates to the contentions of the appellants other than the 11th defendant, must be dismissed with costs for reasons similar to those governing the decision in Appeal No. 228 of 1916. As regards the 11th defendant, however, he holds plots Nos. 6 and 8 in the plaint 3rd Schedule as the trustee of a charity called the Ariya Pillai Thiruvasal charity. The evidence clearly shows that the charity (more than a hundred years old) is being conducted by the 11th defendant. (See his evidence as defendants' witness No. 2.) The temple has no

right to resume the charity lands from the Thiruvasal trustee and has not proved any such right, the said charity being mentioned in the earliest documents on the plaintiff's side itself. The appeal is allowed as regards plots Nos. 6 and 8 of the plaint 3rd Schedule with proportionate costs in both Courts. The 11th defendant, however, must pay proportionate costs in the appeal to the plaintiff so far as the appeal relates to other lands claimed by him in his own right. The mesne profits will be decreed separately against the respective defendants in this appeal also.

Lastly, there are the memoranda of cross-objections filed by the plaintiff as regards the house-sites and houses in the possession of the defendants. These properties are clearly not included in the Tharam Faisal Muchilika, Exhibit E, and the plaintiff has not shown any title to eject the defendants from the house-sites and houses. The other contentions except interest on mesne profits in the memoranda of cross-objections are not pressed. The memoranda are, therefore, dismissed with costs except as regards interest on mesne profits which will be allowed at 6 per cent. per annum from date of plaint.

Appeals, allowed in part.

M. C. P.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 810 OF 1916.

November 20, 1917.

Present:—Mr. Justice LeRossignol.

PARTAP SINGH—PLAINTIFF—APPELLANT

versus

Musammat PARTAPI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Remand—Further inquiry by lower Appellate Court, order for—Lower Appellate Court, whether can remand case to first Court for further inquiry—Procedure.

A case was remanded to the lower Appellate Court for further inquiry. On the return of the case a preliminary objection was taken by the respondent that the further inquiry should have been made by the lower Appellate Court itself and that it had no authority to remand the case to the first Court for the recording of further evidence but should have itself recorded any further evidence it deemed necessary:

Held, that it was not the intention of the Chief Court, when issuing the remand order, that the lower Appellate Court should be precluded from directing the first Court to record any additional evidence, if necessary.

Second appeal from the decree of the District Judge, Hoshiarpur, dated the 24th December 1915, reversing that of the Subordinate Judge, Second Class, Hoshiarpur, dated the 6th July 1915, decreeing the claim.

Mr. *Mukand Lal Puri*, for the Appellant.

Mr. *Bindra Ban*, for the Respondents.

JUDGMENT.—By my remand order of 25th January 1917, I held that the re-marriage of *Musammat* Partapi with Hakam Singh was not proved and that consequently so long as *Musammat* Partapi remained in possession of the land, the only question between her and the mortgagee, since no collateral could intervene during her lifetime or widowhood, was whether the mortgage on which plaintiff sues was fictitious, and I remanded the case for further inquiry on this point to the lower Appellate Court.

A preliminary objection is now taken by the respondent that the further inquiry should have been made by the lower Appellate Court itself and that it had no authority to remand the case to the first Court for the recording of further evidence but should have itself recorded any further evidence it deemed necessary, and *Lahore Bank, Ltd.* v. *Lakhi Ram* (1) is cited.

The objection is highly technical and it was certainly not the intention of this Court, when issuing the remand order, that the District Judge should be precluded from directing the first Court to record any additional evidence if necessary. If then I remanded the case afresh, the course now suggested by the respondent, I should direct that to be done which has been done, which would be an absurdity.

[*Note*—The remaining portion of the judgment is not necessary for this report.—*Ed.*]

(1) 19 Ind. Cas. 970; 105 P. R. 1913; 242 P. L. R. 1913; 144 P. W. R. 1913.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 161 OF 1915.

December 4, 1917.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

BAPUJI RAMCHANDRA KULKARNI—PLAINTIFF—APPELLANT

versus

GUJA MHADU DHANGAR—DEFENDANT—RESPONDENT.

*Civil Procedure Code (Act V of 1908), ss. 11, 47—Mortgage—Redemption, suit for, decided on merits—Second suit for redemption, whether maintainable—*Res judicata.

In a suit for redemption of a mortgage a decree was passed under the Dekkhan Agriculturists' Relief Act directing delivery of possession of the mortgaged property to the mortgagor and ordering the latter to pay off the mortgage debt by instalments. Neither party executed the decree and possession of the property remained with the mortgagee. The mortgagor then mortgaged the property to the present plaintiff, who brought a suit to enforce the mortgage against the mortgagor and the prior mortgagee:

Held, (1) that the suit was practically one for redemption of the first mortgage and could be maintained only if it could be shown that the mortgagor could have maintained a second suit for redemption; [p. 909, col. 2.]

(2) that the first suit having been heard and decided on the merits in respect of the same matter, a second suit for redemption was not maintainable having regard to the provisions of section 11 of the Civil Procedure Code; [p. 909, col. 2.]

(3) that if the suit was to be treated as based on the previous decree, it was barred by section 47 of the Civil Procedure Code. [p. 909, col. 2.]

Second appeal against the decision of the First Class Subordinate Judge, Ahmednagar, in Appeal No. 200 of 1913, confirming the decree passed by the Second Class Subordinate Judge, Rahuri, in Civil Suit No. 124 of 1912.

Mr. *N. V. Gokhale*, for the Appellant.

Mr. *P. V. Kane*, for the Respondent.

JUDGMENT.

SHAH, J.—The facts, which have given rise to this second appeal, are briefly these: One Dhondibai on behalf of her minor sons sued in 1897 to redeem a mortgage of the year 1859 in respect of the land in dispute. In that litigation a decree was passed by the Special Judge under the Dekkhan Agriculturists' Relief Act on the 8th April 1899, the material portion of which is as follows:—"I set aside the decree of the lower Court and order that plaint[illegible] the defendant Rs. 99 i[illegible] gage debt in res[illegible] to in the plain[illegible] give possession of the land in dispute to the plaintiff. Plaintiff do pay Rs. 99 to the defendant by annual instalments of Rs. 25 each...Plaintiff should pay the assessment of the land and take the profit. If any three instalments remain unpaid, defendant should recover the amount remaining due by sale (after obtaining the Court's permission for sale) of the mortgaged property or a sufficient portion thereof." This decree was not executed either by Dhondibai or by the defendant in that case. The possession remained with the defendant, who did not take any steps to have the property sold. On the 26th May 1899 Dhondibai mortgaged the property to the present plaintiff Bapuji Ramchandra Kulkarni. Though it purported to be a mortgage with possession, the mortgagee never obtained possession of the mortgaged property. The present suit was filed on the 19th June 1912 by Bapuji Kulkarni against the sons and heirs of Dhondibai to enforce this mortgage. The defendant, Jivraj Motiram, in Dhondibai's suit was joined in the present suit as defend[illegible] No. 3 as a party in possess[illegible] Though the suit in form was to enforce the mortgage, it was in substance a suit to redeem against defendant No. 3 on the footing of his being a mortgagee at the date of the suit, and was so treated by the trial Court. The defendant No. 3 pleaded the decree of 1899 as a bar to the suit. It is not necessary to refer to defendants Nos. 4 and 5 for the purposes of this appeal.

The trial Court dismissed the suit as against defendants Nos. 3 to 5 and the lower Appellate Court confirmed the decree of the trial Court. We are now concerned only with this part of the decree.

It is urged on behalf of the plaintiff, who has appealed to this Court, that his claim to redeem the mortgage is not barred. It is contended that as the decree of 1899 remained unexecuted, the original mortgagee (*i.e.*, the present defendant No. 3) must be deemed to have continued in possession as a mortgagee, that the amount ascertained to be due to him under the decree of 1899 might be accepted as being payable to him and that his position would be for all practical purposes that of a mortgagee [illegible]ith possession after that decree. [illegible] of the

CHAMPAYIL KOPPAN v. KOLASSERI KELAPPAN NAMBIYAR.

The making of the contract is part of the cause of action within the meaning of section 20 (*c*) of the Civil Procedure Code.

Miscellaneous first appeal from the order of the Senior Subordinate Judge, Ambala, dated the 15th January 1915.

Mr. *Manohar Lal*, for the Appellants.

Mr. *Beni Parshad* Khosla, for the Respondents.

JUDGMENT.—On 27th April 1914, the plaintiffs-appellants instituted this suit claiming Rs. 14,000 from the defendants-respondents as due and payable undera contract made and registered in Jagadhri. The contract was to be performed at Tehri or in any case outside the jurisdiction of the Ambala Courts, and the breach or breaches alleged in the plaint occurred also outside the Ambala District.

The Senior Subordinate Judge ordered that "the plaint "and enclosures be returned to the plaintiff to be presented at the proper Court", holding that the Ambala Courts had no jurisdiction to try the suit, the mere execution or making of the contract at Jagadhri not giving him jurisdiction. The plaintiffs-appellants have appeared and for them I have heard Mr. Manohar Lal, while Mr. Khosla has addressed me on behalf of the defendants-respondents. In my opinion the matter is perfectly clear. It is admitted that under Explanation III to section 17 of the Civil Procedure Code of 1882, the Senior Subordinate Judge, Ambala, had jurisdiction because the contract was made at Jagadhri. This explanation has not been re-enacted in the Civil Procedure Code of 1908, but owing to the addition of the words "wholly or in part" in section 20 (*c*) no change has been made in the law.

The making of the contract clearly is a part of the cause of action and *Salig Ram* v. *Chuba Mal* (1) is clearly in point. Mr. Khosla argued that the suit was for a refund of monies advanced at Chakrata, but it is clear that these advances were made in pursuance of the contract entered into at Jagadhri. I accordingly accept this appeal and return the case to the Trial Court for disposal.

Costs in this Court will be costs in the cause.

Appeal accepted.

(1) 11 Ind. Cas. 712; 34 A. 49; 8 A. L. J. 1160.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No.1742 OF 1916.

December 13, 1917.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Sadasiva Aiyar.

CHAMPYIL KOPPAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KOLASSERI KELAPPAN NAMBIYAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 63—Claim allowed—Suit, subsequent, by judgment-debtor against claimant decreed—Sale by judgment-debtor—Re-attachment of property—Claim by judgment-debtor's vendee, dismissal of—Suit to establish claim, maintainability of.

A claim preferred to property attached in execution of the respondent's decree having been allowed, the judgment-debtor sued the claimant to set aside the settlement which was the basis of the claim and obtained a decree for possession. He then sold the property to the appellant. The respondent having re-attached the property, appellant put in a claim and, having failed in it, he filed a separate suit for possession:

Held, (1) that the first attachment was not revived as the result of the judgment-debtor's suit; [p. 865, col. 1.]

(2) that the appellant's suit was not barred by section 47, Civil Procedure Code. [p. 865, col. 1.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Palghat at Calicut, in Appeal Suit No. 126 of 1916, preferred against the decree of the Court of the First Additional District Munsif of Calicut, in Original Suit No. 898 of 1913.

Mr. *C. Madhavan Nair*, for the Appellants.

Mr. *K. P. M. Menon*, for the Respondents.

JUDGMENT.—The respondent attached the suit property as the property of his judgment-debtor. A third party put in a claim that the property was his and succeeded. The judgment-debtor sued to set aside the settlement by virtue of which the claimant had succeeded in his claim and for possession and obtained a decree. This was not a suit under Order XXI, rule 63, of the Civil Procedure Code, which confers a right of suit only on the party against whom an order has been made rejecting his claim or his objection to another's claim. The person who objects to a claim is the attaching decree-holder. He (the judgment-debtor) then sold the suit property to the appellant. The respondent then again attached the property and the appellant put in a claim petition, and

The result is that we grant the plaintiffs a decree for

	Rs.	A.	P.
(a) rent from 1st July 1911 to 31st January 1912 at Rs. 111-11-6 per mensem ...	782	0	6
(b) damages for the use and occupation of the ground floor of the house from 1st February 1912 to 7th March 1912 at Rs. 223-7-0 per mensem ...	274	0	0
(c) damages for the wrongful occupation of the two plots of land ...	3,000	0	0
Total ...	4,056	0	6

We accordingly accept the appeal, and modifying the decree of the lower Court direct that the defendants do pay to the plaintiffs the aforesaid sum. In the circumstances we leave the parties to bear their own costs throughout the litigation.

Appeal accepted

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 171 OF 1917.

December 20, 1917.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Kumaraswami Sastri.

SUBBARAYA CHETTY—PLAINTIFF—APPELLANT

versus

NACHIAR AMMAL—DEFENDANT—RESPONDENT.

Cause of action, accrual of, after suit—Relief, whether can be granted.

Courts have power, in certain circumstances, to grant a decree in a case, where the cause of action arose subsequently to the filing of the plaint.

In a suit for money, where the money becomes payable to the plaintiff only after the filing of the suit the Court should pass a decree in favour of the plaintiff and not compel him to institute another suit, for the purpose.

Second appeal against the decree of the Court of the District Judge of Tanjore, in Appeal Suit No. 574 of 1915, preferred against that of the Court of the District Munsif of Valangiman at Kumbakonam, in Original Suit No. 71 of 1913.

Mr. *M. D. Devadoss*, for the Appellant.

Mr. *M. O. Parthasarathy Aiyangar*, for the Respondent.

JUDGMENT.—On the finding of the District Judge it is clear that the defendant did receive the money. The learned Judge has, however, found that the suit was premature because of the terms of the unregistered mortgage bond. Granting that the terms of the bond are binding on the parties, having regard to the fact that immediately after the suit the money became payable, we think that it is undesirable that the plaintiff should be compelled to institute another suit for the money. The principle of *Chinta Hararan Das* v. *Radha Charan Poddar* (1) and of the decision of this Court in *Sethrucherla Rama Chandra* v. *Maharajah of Jeypore* (2), in which it was held that Courts have power to grant a decree where a cause of action arose subsequent to the suit, is applicable to this case. Following these decisions and having regard to the special circumstances of this case, we reverse the decree of the District Judge and restore that of the District Munsif, except as to costs. Each party will bear his own costs throughout.

Appeal allowed.

M. C. P.

(1) 37 Ind. Cas. 962.
(2) 34 Ind. Cas. 411; (1916) M. W. N. 354; 19 M. L. T. 260.

PUNJAB CHIEF COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 608 OF 1915.

June 20, 1917.

Present:—Mr Justice Broadway.

SITA RAM AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

RAM CHANDRA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 20 (c)—Civil Procedure Code (Act XIV of 1882), s. 17, Expl. III—Jurisdiction—Cause of action—Contract, execution of, within jurisdiction, effect of.

Explanation III to section 17 of the Civil Procedure Code of 1882 has not been re-enacted in the Code of 1908, but owing to the addition of the words "wholly or in part" in section 20 (c) of the latter Code no change has been made in the law. [p. 864, col. 1.]

Where a contract on the basis of which a suit is brought was entered into within the jurisdiction of a certain Court, that Court has jurisdiction to try the suit notwithstanding that the place where the contract was to be performed and the place where the breach alleged in the plaint occurred are both outside such jurisdiction. [p. 864, col. 1.]

present suit Mr. Gokhale has relied upon *Rama Tulsa Mahar* v. *Bhagchand Motiram* (1) and *Sita Ram* v. *Madho Lal* (2). On behalf of defendant No. 3 it is argued in reply that the present suit is barred by section 47, Civil Procedure Code, so far as it is based upon the decree of 1899, that the present plaintiff is not in any better position than his mortgagor, and that as Dhondibai could not have maintained a second suit to redeem her mortgagee after the decree the plaintiff cannot maintain it. It is contended that the present case is governed by the ruling in *Hari Ravji Chiplunkar* v. *Shapurji Hormasji Shet* (3). Mr. Kane has also relied upon *Vedapuratti* v. *Vallabha Valiya Raja* (4), *Ranga Aiyangar* v. *Narayana Chariar* (5), *Gansavant Balsavant* v. *Narayan Dhond Savant* (6) and *Maloji* v. *Sagaji* (7). His argument is that the case of *Rama Tulsa Mahar* v. *Bhagchand Motiram* (1) is distinguishable on its facts, and that in any case having regard to the decisions referred to by him it should not be accepted as a binding authority.

It is true that the decree of 1899 was passed under the Dekkhan Agriculturists' Relief Act, and the provisions of section 93 of the Transfer of Property Act or the corresponding provisions of Order XXXIV of the Code of Civil Procedure would not apply to such a decree [see *Kashinath Vinayak Bhave* v. *Rama Daji Kale* (8)]. It may be that until an application is made under section 15B of the Dekkhan Agriculturists' Relief Act for the sale of the property the mortgagee's position may continue to be the same with reference to the mortgagor. But this circumstance would not make any difference in the result in this case. Here we have to deal with the effect of a decree the execution of which was admittedly time-barred at the date of the suit.

On the facts of this case it seems to me clear that the plaintiff can maintain the present suit only if it could be shown that his mortgagor could have maintained a second suit for redemption. The plaintiff's mortgage was effected after the decree of 1899. Though the mortgagor's right to execute the decree was not barred at the date of the mortgage, I do not think that he can be in any better position than his mortgagor.

The question is whether the mortgagor could have maintained a second suit for redemption. It seems to me clear that she could not have done so. Whether the second suit be treated as one for the redemption of the mortgage of the year 1859 or whether it be treated as based on the decree taken along with the subsequent conduct of the parties in not executing the decree and in allowing the possession to remain with the mortgagee as before, it would be barred by the decree of 1899. In so far as the suit is based on the decree and the subsequent conduct of the parties, the judgment of their Lordships of the Privy Council in *Hari Ravji Chiplunkar's case* (3) affords a complete answer. The decision is not the less applicable to the present case simply because the plaintiff here acquired an interest in the equity of redemption before the execution of the decree was barred, and not after it was barred as in the case before the Privy Council. Thus section 47 of the Code of Civil Procedure bars the present suit.

Even if the present suit be treated as a suit for redemption of the mortgage of 1859, it seems to me that the suit would be barred under section 11 of the Code of Civil Procedure. The first suit was tried and decided on the merits, and the second suit by the mortgagor would be clearly barred by the terms of section 11 of the Code. In the case of *Rama Tulsa Mahar* v. *Bhagchand Motiram* (1) relied upon by the appellant, the mortgagor had not sued to redeem and had not obtained a decree in the first instance. I am not prepared to extend the *ratio decidendi* of that case to a case where the mortgagor has filed a suit for redemption and obtained a decree in that

(1) 27 Ind. Cas. 249; 39 B. 41; 16 Bom L. R. 687.
(2) 24 A. 44; A. W. N. (1901) 194 (F. B.).
(3) 10 B. 461; 13 I. A. 66; 10 Ind. Jur. 310; 4 Sar. P. C. J. 719; 5 Ind. Dec. (N. S.) 695 (P. C.).
(4) 25 M. 300; 12 M. L. J. 123 (F. B.).
(5) 32 Ind. Cas. 30; 39 M. 896; 18 M. L. T. 596; 30 M. L. J. 13.
(6) 7 B. 467; 8 Ind. Jur. 90; 4 Ind. Dec. (N. S.) 315.
(7) 13 B. 567; 7 Ind. Dec. (N. S.) 375.
(8) 37 Ind. Cas. 255; 40 B. 492; 18 Bom. L. R. 475.

suit and has subsequently filed another suit to redeem the same mortgage. I do not see how the second suit for the redemption of the same mortgage could be entertained, when the first suit was heard and decided on the merits in respect of the same matter, in view of the provisions of section 11 of the Code of Civil Procedure.

It is not necessary to consider the further arguments addressed to us with reference to the case of *Rama Tulsa Mahar* v. *Bhagchand Motiram* (1).

It is also not necessary to consider the question whether a mortgage effected by Dhondibai could give the plaintiff any interest in the equity of redemption which belonged to her sons, the present defendants Nos. 1 and 2.

The result is that the decree of the lower Appellate Court is affirmed and the appeal dismissed with costs.

HEATON, J.--I agree.

In my opinion the mortgage of 1859 was put an end to by the decree of 1899 and thereafter the relations between those who had formerly been mortgagor and mortgagee were determined by that decree. The plaintiff in this case became possessed by assignment in the form of a mortgage of whatever rights under that decree the mortgagors of 1859 or their successors possessed. He obtained no other rights as against the present defendant No. 3. He could not, in my opinion, bring a suit to redeem a mortgage, for there was no mortgage to redeem, there was only a decree to execute. He had rights under that decree and those rights he could have exercised in the way permitted by the law, that is, by an application to execute the decree. This he failed to do, and he has failed so continuously that it has now become impossible for him to make any effective application to execute that decree. He has, therefore, it seems to me, lost whatever rights he once possessed in regard to that decree. This conclusion, although I have stated it in the form which appeals to my particular view of the case, is, I think, the decision that would necessarily be reached by applying the principles which are enunciated in the Privy Council case of *Hari Ravji Chiplunkar* v. *Shapurji Hormasji Shet* (3) referred to by my learned brother.

Decree affirmed.

PUNJAB CHIEF COURT.

CIVIL REVISION No. 839 OF 1916.

February 12, 1918.

Present:—Mr. Justice Scott-Smith.

THE COMMITTEE OF NOTIFIED AREA, UNA, DISTRICT HOSHIARPUR, THROUGH ITS PRESIDENT—DEFENDANT—PETITIONER

versus

CHATAR BEHARI NARAIN—PLAINTIFF—RESPONDENT.

Punjab Municipal Act (III of 1911), ss. 86, 242—Profession tax, levy of—Munsif, whether follows profession—Jurisdiction of Civil Courts to determine legality of tax—Suit for recovery of amount paid as tax, whether cognisable by Small Cause Court—Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 1.

The power conferred by a special Act on a local authority to impose a particular tax for particular purposes in a specified manner does not oust the jurisdiction of the Civil Courts to give relief against an illegality committed by that body under cover of statutory powers. [p. 911, col. 1.]

A Civil Court has jurisdiction to determine the question whether the imposition of a tax is illegal and *ultra vires* and to give relief if a tax has been levied from a person who is not liable to pay the same. [p. 911, col. 1.]

The Punjab Government imposed a profession tax in the Una Notified Area and the plaintiff, a Munsif, was assessed to pay the tax. He paid it under protest and then brought a suit for the recovery of the amount:

Held, (1) that the suit was not one concerning an act purporting to be done by any person by order of the Local Government and was not, therefore, excluded from the jurisdiction of a Court of Small Causes; [p. 911, col. 1.]

(2) that the Munsif could not be said to follow a profession in the popular sense of the term and the Government could not have intended that he should be liable to pay a profession tax. [p. 911, col. 2.]

Petition for revision of the decree of the Munsif, 2nd Class, with powers of a Judge, Small Cause Court, Hoshiarpur, dated the 17th April 1916, decreeing the claim.

Bhagat *Govind Das*, for the Petitioner.

Lala *Mul Chand*, R. S., for Lala *Moti Sagar*, R. S., for the Respondent.

JUDGMENT.—The Punjab Government in exercise of its powers under section 242 of the Punjab Municipal Act has imposed a profession tax in the Una Notified Area. Amongst those assessed to pay this tax by the Committee of the Notified Area was the plaintiff Lala Chatar Behari Narain, Munsif, at that time occupying a house within the notified area. He paid the tax Rs. 40 under protest and then brought the present suit against the Committee of the Notified Area for recovery of the amount. The case

was heard by a Small Cause Court Judge who decreed the claim in full. The Committee of the Notified Area has filed an application for revision in this Court.

Three points were argued before me on behalf of the petitioner committee, *viz.*,

(1) that the case was not triable by a Court of Small Causes;

(2) that the Civil Court had no jurisdiction to hear the suit; and

(3) that the Munsif was exercising a profession and was, therefore, liable to pay the tax.

As regards the first point, it was urged that the suit was excluded from the jurisdiction of the Court of Small Causes by Article 1 of the Second Schedule of the Small Causes Courts Act. In my opinion the Article in question is not applicable. The suit cannot be said to be one concerning an act purporting to be done by any person by order of the Local Government. The Local Government in the present case no doubt imposed the tax but the Committee of the Notified Area had to prepare and did prepare a list of the persons liable to pay the tax. The suit, therefore, concerns the levy by the Committee of the tax from the plaintiff.

As regards the second point the appellants rely upon section 86 of the Municipal Act, which lays down that "No objection shall be taken to any valuation or assessment, nor shall the liability of any person to be assessed or taxed be questioned, in any other manner or by any other authority than is provided in the Act and also that no refund of any tax shall be claimable by any person otherwise than in accordance with the provisions of this Act and the rules thereunder." It has, however, been held frequently that the power conferred by a special Act on a local authority to impose a particular tax for particular purposes in a specified manner does not oust the jurisdiction of the Civil Court to give relief against an illegality committed by that body under cover of statutory powers. I think it is clear that a Civil Court has jurisdiction to determine the question whether the imposition of a tax is illegal and *ultra vires* and to give relief if a tax has been levied from a person who is not liable thereto.

The third point is whether it can be said that the Munsif followed a profession. The lower Court has gone into this matter very thoroughly and has come to a reasonable conclusion. In my opinion it cannot be said that the Munsif follows a profession in the popular sense of the term and I do not think that Government can have intended that he should be liable to pay a profession tax.

Whether this be so or not, I do not think that this Court should go into the matter in revision.

The petition for revision is accordingly rejected with costs.

Revision rejected.

CALCUTTA HIGH COURT.

RULE *Nisi* No. 754 OF 1917.

February 8, 1918.

Present:—Mr. Justice Richardson and Mr. Justice Beachcroft.

PULIN BEHARY ROY AND OTHERS—PLAINTIFFS—PETITIONERS

versus

ABDUL MAJID AND OTHERS—DEFENDANTS—OPPOSITE PARTIES.

Succession Certificate Act (VII of 1889), s. 4—Succession certificate, whether necessary where one member of a plaintiff firm dies—Civil Procedure Code (Act V of 1908), O. XXX, r. 4.

In a suit on a hand note executed in favour of a firm, the full amount of the claim should be decreed even where one of the members of the firm dies during the pendency of the suit and his legal representative who is added as a plaintiff does not produce any succession certificate to the deceased partner. [p. 912, col. 2.]

Ram Narain Nursing Doss v. *Ram Chunder Jankee Loll*, 18 C. 86; 9 Ind. Dec. (N. S.) 58; *Bal Kissen Das Daga* v. *Kanhya Lal*, 21 Ind. Cas. 509; 17 C. L. J. 648, followed.

Rule against the order of the Sub-Judge, 2nd Court, Chittagong.

FACTS appear from the judgment.

Dr. *Dwarka Nath Mitter* and Babu *Debendra Nath Mandal*, on behalf of the Plaintiffs-

Petitioners.—This Rule was issued by this Court under section 25 of the Provincial Small Causes Courts Act. A suit was instituted in the Small Cause Court against the defendants on a hand-note executed by them in favour of a firm. After the death of one Amar Chand, one of the members of the firm, an objection was taken by the defendants that a full decree could not be made in favour of the plaintiffs unless Pulin Behary Roy, who was added as a plaintiff as the legal representative of Amar Chand, took out a succession certificate. The Court of Small Causes gave effect to this objection. I submit that the Court of Small Causes was wrong. As the suit was in the name of the firm it was not at all necessary to join the legal representative of the deceased partner Amar Chand as a party to the suit, so the fact that no succession certificate was taken by Pulin Behary Roy could not prevent the suit being decreed in full, as the suit could be maintained without Pulin Behary Roy being added as a plaintiff. There is a decision of this Hon'ble High Court in the case reported as *Ram Narain Nursing Doss* v. *Ram Chunder Jankee Loll* (1) which supports the decision of the lower Court. But I submit that decision is not correct. All other High Courts in India are of opinion that a succession certificate is not necessary in a case like this. Moreover, Order XXX, rule 4, Civil Procedure Code, places the matter beyond doubt and in view of that provision in the new Procedure Code it must be held that the decision of this Court in *Ram Narain Nursing Doss* v. *Ram Chunder Jankee Loll* (1) is wrong.

[RICHARDSON, J.—There is a judgment of Mr. Justice Fletcher in *Bal Kissen Das Daga* v. *Kanhya Lal* (2), which supports your contention.]

I was not aware of that decision, I thank your Lordships for calling my attention to it. I pray that Pulin Behary Roy, who was added as the legal representative of the deceased partner Amar Chand, might be struck off from the category of plaintiffs and the entire amount of the claim be decreed in favour of the firm.

(1) 18 C. 86; 9 Ind. Dec. (N. s.) 58.
(2) 21 Ind. Cas. 509; 17 C. L. J. 648.

JUDGMENT.—The question for consideration in this Rule is whether the rule laid down by this Court in the case of *Ram Narain Nursing Doss* v. *Ram Chunder Jankee Loll* (1) has been superseded by rule 4 of Order XXX. The point came before Mr. Justice Fletcher in the case of *Bal Kissen Das Daga* v. *Kanhaya Lal* (2). We agree with the view taken by Mr. Justice Fletcher that the rule laid down in the case cited no longer applies in view of the provisions embodied in rule 4 of Order XXX. Rule is, therefore, made absolute in this way. The name of the added plaintiff Pulin Behary Roy will be struck out of the category of the plaintiffs and he will be dismissed from the suit. The claim will be decreed in full and the decree of the Court below will be modified accordingly.

Rule made absolute.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 3342 OF 1916.
February 5, 1918.
Present:—Mr. Justice Shadi Lal.

GOKAL CHAND PLAINTIFF—APPELLANT
versus
HUKAM CHAND AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (*IX of* 1908), *Sch. I, Art.* 120—*Suit for declaration of proprietary title—Adverse entry in revenue records, effect of—Cause of action—Limitation, commencement of.*

A declaratory suit brought by a plaintiff who has all along been in enjoyment of the property is not barred simply because an entry adverse to his rights was made or because he came to know of that entry more than six years prior to the institution of the suit. [p. 913, cols. 1 & 2.]

Even if the right to demand correction of the revenue entries is lost by limitation, the plaintiff is entitled to a declaration of his proprietary title, the period of limitation running from the date when the defendant attempted to oust the plaintiff from the property. [p. 913, col. 2.]

Where, therefore, in a suit for a declaration to the effect that plaintiff was owner of 1/12th share in certain lands and not of a 1/18th share only as recorded in the revenue papers, it appeared that the income derived from the land was spent on the upkeep of certain joint family property in which the plaintiff had a 1/12th share which share had been awarded to him:

Held, that the cause of action arose when the plaintiff asked the Revenue Officer to make an entry in his favour and the defendants denied his title. [p. 913, col. 2.]

Second appeal from the decree of the District Judge, Jullundur, dated the 29th of August 1916, reversing that of the Honorary Subordinate Judge, 1st Class, Jullundur, dated the 27th July 1915, decreeing the claim with costs.

Mr. *Manohar Lal* and Lala *Badri Das*, R. S., for the Appellant.

Mr. *Gokal Chand Narang*, for the Respondents.

JUDGMENT.—This second appeal arises out of an action brought by the plaintiff-appellant for a declaration that he is owner of 1/12th of a plot of land known as Thaprana and not of 1/18th only as recorded in the revenue papers. The learned District Judge, dissenting from the Court of first instance, has dismissed the suit upon the ground that it is barred by time under Article 120 of the Limitation Act and after hearing arguments on both sides and considering the authorities cited by the learned Counsel I am of opinion that the decision of the lower Appellate Court cannot be sustained.

An abstract of the revenue entries relating to the land in dispute is given in the judgment of the lower Appellate Court, and there can be no manner of doubt that the entries have for more than 30 years been against the plaintiff and that he had knowledge of those entries more than six years prior to the institution of the suit. It is common ground that the rule of limitation applicable to the suit is that prescribed by Article 120, and the only question for determination is whether the *terminus a quo* is the date of the adverse entry, or the knowledge thereof, or lastly the date when the defendants attempted to oust the plaintiff from the property. Now, there is no reliable evidence that the defendants denied the plaintiff's right more than six years before the date of the institution of the suit, indeed, all the evidence goes to show that the income derived from the land is spent on the upkeep of certain joint family property in which the plaintiff had 1/12th share and that share has, it appears, been awarded to him. I am not prepared to assent to the proposition that an action brought by the plaintiff, who has been all along in the enjoyment of the property, would be barred by time simply because an entry adverse to his rights was made or that he came to know of that entry more than six years prior to the institution of the suit. Indeed, there is ample authority for the proposition that even if the right to demand correction of the revenue entries is lost by limitation the plaintiff is entitled to a declaration of his proprietary title, the period of limitation running from the date when the defendants attempted to oust the plaintiff from the property, *vide*, *inter alia*, *Hakim Singh* v. *Waryaman* (1) and *Nathu* v. *Buta* (2).

The cause of action in the present case arose when the plaintiff asked the Revenue Officer to make an entry in his favour and the defendants denied his title. This event admittedly took place within the prescribed period of limitation, and the suit is consequently not barred by time. For these reasons I accept the appeal and reversing the decree of the lower Appellate Court remit the case for decision on the remaining points. The Court fee on the memorandum of appeal shall be refunded, and other costs shall abide the event.

Appeal accepted.

(1) 140 P. R. 1907.
(2) 27 P. R. 1881.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 1236 OF 1916.

November 18, 1917.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

RAMCHANDRA GANGADHAR KARVE —PLAINTIFF—APPELLANT

versus

MAHADEV MORESHVAR PHADNIS—DEFENDANT—RESPONDENT.

Letters Patent (Bom.), cl. 15—Judgment—Order of Single Judge refusing to excuse delay in presentation of appeal, whether judgment.

An order of a Single Judge refusing to excuse the delay in presenting an appeal has the effect of dismissing or rejecting the appeal, and being thus an order of a final character, is a judgment within the meaning of clause 15 of the Letters Patent and an appeal lies against it under that clause. [p. 914, col. 1.]

RAMCHANDRA GANGADHAR *v.* MAHADEV MORESHVAR.

Second appeal from the decision of the Assistant Judge, Poona, in Appeal No. 161 of 1914, confirming the order of the Joint Subordinate Judge, Poona, in Darkhast No. 66 of 1913.

Mr. *D. C. Virkar*, for the Respondent.

JUDGMENT.

HEATON, J.—Two points arise in this appeal, one of which is peculiar to the facts of this particular case, and the other is a more general question. I will deal with the latter first.

It happened that this appeal was presented beyond the time allowed by law and that an application was made by the appellant to a Single Judge of this Court to excuse the delay. That Judge refused to excuse the delay. And here I pause to remark that this order had the effect of dismissing or rejecting the appeal and that it was an order of a final character, not of an interlocutory character. The appellant appealed to a Bench of this Court against that order and the Bench excused the delay, the result of which was that the appeal was admitted and has now come on for hearing.

It is argued that the order of a Single Judge refusing to excuse the delay is not a judgment within the meaning of clause 15 of the Charter of this High Court and that, therefore, no further appeal lay. But seeing, as I have said, that the order had the very drastic effect of dismissing or rejecting the appeal, it seems to me it must be taken to fall within the meaning of the word judgment as used in clause 15, and I think, therefore, that there is no objection to our disposing of this appeal on its merits.

Turning to the merits we find that the present appellant, who was the plaintiff in the suit out of which ultimately these proceedings have arisen, obtained a decree, a part of which runs as follows:—"The *bol* (passage) between the houses of the parties is of their joint ownership. The plaintiff is entitled to discharge the water of the *moris* on the ground floor of the plaintiff's house and of those on the second storey and rain-water of the eaves of the plaintiff's house, into the said *bol* and to carry it through the *mori* (drain) passing beneath the *bol* so as to join the public gutter on the north. An injunction is issued to the defendant restraining him from causing obstruction to the plaintiff in his enjoyment of his above right or to his going into the said *bol* and making repairs to the *mori* therein." Some years after obtaining this decree the plaintiff applied for execution of the decree on the ground, it appears, that an obstruction had been caused to his right of going into the said *bol* and making repairs to the *mori*. That application was rejected by the First Court and by the Court of First Appeal on the ground that it was out of time.

If we consider the nature of the litigation in which the decree was obtained, and the terms of the decree, it seems to me that the application was not out of time. For the purpose of discussing this point we must assume, as was assumed in the lower Court, that there was an obstruction, and that the obstruction was caused more than three years before the application for execution was made. The obstruction takes the form of a pump which, we assume, blocks up the *bol* and prevents the decree-holder from reaching the *mori* so that he may make repairs to it. The question is whether the obstruction for the purpose of limitation dates from the time when the pump was erected, that is, more than three years before the application was made, or whether it dates for the purposes of limitation from the time when the decree-holder had occasion to enter the *bol* and proceed along it for the purpose of making repairs to the *mori*. Both the lower Courts have held that for the purposes of limitation the date of the obstruction was the date of the putting up of the pump. To me it seems otherwise. I speak here not in any general terms, but with reference to the facts of this particular case and the terms of this particular decree. The right which the plaintiff-decree-holder is now seeking to exercise is the right to proceed along the *bol* for the purpose of making repairs to the *mori*, and that right arises when he finds occasion to enter the *bol* and to proceed, or attempt to proceed, along it, either to make repairs or to ascertain whether repairs are necessary. It is not shown that so considered this right was obstructed more than three years before the application for execution was made. Seeing that the lower Courts have proceeded on the assumption that the right has been considered as dat-

ing back to the time when the pump was erected, I think that their orders are wrong, that they decided the matter wrongly on a preliminary point, and that it must be remanded to the lower Court to be determined according to law.

I am not all sure that the same result might not be reached by applying the analogy of section 23 of the Indian Limitation Act and by regarding the existence of the pump as a continuing wrong or a continuing obstruction. But I do not say anything definite on that point, because having regard to the particular facts of this case I feel clear in my mind that the decision can properly be based on the other ground.

The costs up to date in all the Courts must be paid by the respondent in this appeal.

SHAH, J.—I am of the same opinion.

Case remanded.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 166 OF 1917.

January 9, 1918.

Present:—Mr. Justice Richardson and Mr. Justice Beachcroft.

BASIRUDDIN THANADAR—DECREE-HOLDER No. 4—APPELLANT

versus

MOKIMA BIBI AND OTHERS—OBJECTORS AND CREDITOR No. 1—RESPONDENTS.

Provincial Insolvency Act (III of 1907), s. 36—Transfer impugned—Burden of proof—Benami *transaction, tests of—Antecedent debts—Dower claims.*

In a case arising under section 36 of the Provincial Insolvency Act, the burden of proving that the transaction impugned was carried out in good faith and for valuable consideration is on the transferee. [p. 916, col. 1.]

Antecedent debts might constitute a good consideration for a conveyance impugned under section 36 of the Provincial Insolvency Act. [p. 917, col. 1.]

With regard to the question whether a sale is a *benami* or a real transaction, the fact that the transactions relating to the property sold were carried out in the name of the transferee is not conclusive. Though the question of actual possession is in some cases a test and an important test, yet where the property transferred is a house and the transferor is the husband of the transferee, much importance cannot be attached to the fact of actual possession, inasmuch as the husband might after the sale not unnaturally live in the house which he has transferred to his wife. [p. 917, col. 2.]

The question of the burden of proof retains little, if any, importance, where there is evidence on both sides. [p. 918, col. 2.]

The question whether a transfer challenged under the provisions of section 36, Provincial Insolvency Act, was in good faith, involves as an important element the value for which the properties were sold. [p. 918, col. 2.]

An insolvent had transferred certain property to his wife in lieu of dower within two years before his adjudication. He continued in possession of the property along with his wife, but it was found that the dower debt was genuine and that the value of the property transferred was not incommensurate with the amount of the debt:

Held, that the transaction could not be impugned under section 36 of the Provincial Insolvency Act. [p. 918, col. 2.]

Appeal against the order of the District Judge, Rungpur, dated the 16th April 1917.

Mr. *B. C. Mitra*, Babus *Satendra Nath Mukerjee* and *Atindranath Mukerjee*, for the Appellant.

Babus *Mohendranath Roy* and *Atul Chandra Gupta*, for the Respondents.

JUDGMENT.

RICHARDSON, J.—This appeal is preferred from an order of the District Judge of Rungpur, dated the 16th April 1917. For the present purpose the order must be treated as an order made under section 36 of the Provincial Insolvency Act, refusing an application made by certain creditors of the insolvent that two conveyances executed by him within two years of the date on which he was so adjudged should be annulled. The conveyances in question were in favour of his two wives Nabnat Bibi and Mokima Bibi and are both dated the 11th January 1915. They are each in the nature of a *hiba-bil-ewaz*. In other words, they purport to have been executed in consideration of the dower debts which the insolvent owed to his wives respectively. In January 1915, the insolvent had been married to Nabnat for about 11 years and to Mokima for about 5 years. The dower promised in the case of Nabnat is said to have been Rs. 1,500 and in the case of Mokima, whose father was in better circumstances than the father of Nabnat, Rs. 5,000. The insolvency proceedings were commenced by an application made by the insolvent on the 17th August 1916 and the order of adjudication is dated the 25th November 1916. In the schedule of debts attached to the application the

insolvent estimates his liabilities at Rs. 17,975 and his assets at Rs. 19,872.

The case made for the creditors, one of whom Basiruddin Thanadar is the appellant before us, is that at the time the *hibas* were executed the affairs of the insolvent were in an involved state and the two *hibas* represent merely *benami* and colourable transactions. The insolvent has himself admitted that in January 1915 he was indebted to the extent of ten or twelve thousand rupees. He has not admitted, however, that he was at the time insolvent nor does it appear that there were then any decrees outstanding against him. He owed a considerable amount to the appellant creditor for which the appellant in the course of the year 1915 after the execution of the *hibas* brought a suit against him. The suit was for the balance due on business transactions which took place in 1912-13. It is further in evidence that on the 15th May 1914 the insolvent had borrowed on a note of hand the sum of Rs. 6,000 from the Rungpur Bank. In August of the same year he also borrowed Rs. 1,000 on a note of hand from the North Bengal Bank. The appellant creditor obtained a decree against the insolvent on the 12th January 1916 for the sum of Rs. 5,785. The Rungpur Bank and the North Bengal Bank also sued the insolvent in the course of the year 1915 and obtained decrees on the 13th December 1915 and the 4th January 1916 respectively. It appears that there was another decree against the insolvent obtained in the Small Cause Court for Rs. 684 with costs dated the 15th June 1916. Regard being had, therefore, to the prevalency of *benami* transactions in this country and to the surrounding circumstances it may well be conceded that there is some initial suspicion about these two *hibas*. It may also be conceded, as it is not disputed, that in a case arising under section 36 of the Provincial Insolvency Act the burden of proving that the transaction impugned was carried out in good faith and for valuable consideration is on the transferee. This has been so held in the case of *Nilmoni Chowdhuri* v. *Basanta Kumar Banerjee* (1) decided by this Court and in the case of *Muhammad Habibullah* v. *Mushtaq Husain* (2) decided by the Allahabad High Court.

Now in the Court below it has been found on the evidence that these two ladies, the wives of the insolvent, have succeeded in showing that their husband owed them as dower the sums I have stated. We have been taken through the evidence and I see no reason to differ from the opinion formed by the learned District Judge on this part of the case. It is practically common ground, regard being had to the admission made by the witness on behalf of the appellant creditor, that the insolvent was the son of a prosperous man and that he was at one time himself a prosperous shopkeeper. He and his wives came from the District of Ballia in the United Provinces, though the insolvent had a shop at Rungpur and lived there for a number of years. On the evidence as it stands on the record it cannot be said that the sums claimed as dower are in any way excessive. The main point which was made by the appellant in this connection is that the dower debts are not supported by any *kabilnama* or written document. But witnesses on both sides who are acquainted with the District of Ballia and with the practice of people there in similar circumstances with the insolvent state that in that district it is not usual to execute such documents. There is no doubt evidence for the appellant creditor that the dower stipulated for in most cases is much smaller than the sums mentioned in the present case. But one of the witnesses states in cross-examination that at his own marriage dower was fixed at 202 gold *ashrafis*, that is to say, a sum of about Rs. 3,232, and that no document was executed. It is said that what the witness really said was that the dower which he promised was Rs. 200 and 2 gold *ashrafis*. But the learned District Judge has taken the statement as it stands in the deposition. No step appears to have been taken to clear up the point in the Court below and we must also like the District Judge take the statement as it stands. On this part of the case, therefore, as to the probability of these sums having been promised as dower and being

(1) 29 Ind. Cas. 814; 19 C. W. N. 865;

(2) 37 Ind. Cas. 684; 39 A. 95; 14 A. L. J. 1183.

in fact due by the insolvent to his wives, I accept the conclusion arrived at by the District Judge. It follows that there were in fact in respect of these conveyances, which are challenged, antecedent debts which might constitute good consideration for them and the argument in this Court has turned mainly on the value of the properties transferred.

Before dealing with that point, however, it is well to refer to an admission said to have been made by the insolvent himself in conversation with an officer of the Rungpur Bank. The principal witness on this point is the Pleader Babu Rajani Kanta Bhattacharjee who is the managing director of the Rungpur Bank. The conversation occurred, he says, a few months before the Rungpur Bank instituted its suit against the insolvent and it related to these *hibas*. Apparently the insolvent was trying to obtain time for paying off his debts and it is said that he admitted that the transfers were merely *benami* transactions. It appears, however, that what the insolvent said at the time was not quite understood by the learned Pleader. The answer which the witness gave in cross-examination leaves the matter somewhat vague. He says: "I did not ask Abdur Rahman distinctly if the *hiba* was an out and out transaction. I did not enquire then in whose possession the properties at that time were." Even if the insolvent made some statement of the kind which might be construed as an admission that the transactions were *benami*, it does not necessarily follow, regard being had to his position and to the fact that he was trying to gain time, that the admission was true. What appears to have happened afterwards is that a draft was made of a power of-attorney by which his wife Mokima Bibi was to empower him to pledge the property transferred to her as security to the Rungpur Bank. This draft was sent to the lady but she having consulted her own advisers refused to sign it or to give her husband the authority that he wanted. Her conduct in the matter seems to indicate that she was in real, and not merely in nominal, possession of the property, and the incident, therefore, is rather in her favour than otherwise.

In this connection, I should also mention that the title created by the *hiba* has been respected ever since, at any rate on paper. Transactions relating to the property such as payments of rent to the superior landlord and receipt of rent from the tenants in occupation and so forth are carried out in the name of the transferee. No doubt that is not conclusive. It has been pointed out that when a *benami* transaction is entered into, no benefit can be derived or expected from it unless the fictitious title is afterwards on paper treated as the true title. The question of actual possession is in some cases a test and an important test, but in the present case not much can be said about this either way because the husband afterwards not unnaturally lived in the house which he had transferred to one of his wives. The co-wife also lived there. Similarly in the circumstances little turns on the fact that the servants employed by the husband for managing the property were also employed by the wives or one of them after the properties were transferred. The mode in which the properties were enjoyed and managed is of little assistance in the present case and no doubt the learned Counsel was right in putting the case as dependent mainly on the question as to the value of the properties.

Now it appears that the question of the value of the property transferred to Mokima Bibi was raised in the lower Court, but so far as the record shows it does not appear that in that Court any question was raised as to the value of the property transferred to Nabnat Bibi.

The facts as to the property transferred to Mokima Bibi were as follows. The property is a *maurasi mukarari* property with *pucca* buildings standing upon it. At the date of the *hiba* one building seems to have been nearly completed and since then another building has been commenced. We have a lease executed by certain tenants in favour of the lady on the 19th September 1916. That document shows that on that date she let out to those tenants nearly the whole house at a monthly rent of Rs. 110. The house is described as consisting of 12 doors, a door being, as I understand, a synonym for a room. The tenants took 11 doors for the monthly

rent of Rs. 110 and there remained one room which was let out to Faizulla at a small rent. There was also a rent of Rs. 5 a month payable by a Panwallah for the verandah. The total annual rent comes to something more than Rs. 1,400. It is said that deducting Rs. 20 per cent. as costs for repairs and the annual rent payable to the superior landlord (Rs. 620), the annual profit works out at Rs. 500 or Rs. 530. The creditor claims that the value of the property should be taken at 20 years' purchase or say Rs. 10,000. Now this calculation may very well be on paper, but the evidence on which it rests, consists of passages carefully selected from the depositions of the witnesses for Mokima Bibi. There is no independent evidence of any value on behalf of the appellant creditor. One of his witnesses, who sets himself up to be an engineer and an expert, states that on looking at the house he could say that the building apart from the land was worth Rs. 11,000, but he could not say how much of this value was to be attributed to the old building and how much to the new, nor did he make any sort of examination of the buildings themselves. His estimate can only be regarded as a very rough and ready one and little more than a guess. As I have said, it is probable that the house was not complete at the date of the *hiba*. The insolvent himself in his evidence states that there were 12 doors at the time. But he was not asked to say definitely whether the building was actually finished and completed. On the other hand one of the witnesses for the appellant creditor Kailas Chandra Gupta makes the following statement. "He (the insolvent) did not agree to that even and left the place somewhat annoyed. He had said that the value of the complete portion of his house was Rs. 8,000." And further on the same witness says this: "I cannot deny that the building was not complete in December 1914. He (the insolvent) told me that there were 9 complete rooms which were let out on hire. I cannot say how many rooms there are in the building altogether." Then it appears that in the application for execution of the decree obtained by the North Bengal Bank the market value of this property was stated on the 9th December 1914 to be approximately Rs. 5,000. Similarly in an application for execution filed on the 4th February 1916, the market price of the property is stated to be approximately Rs. 7,000. No doubt estimates made for the purposes for which those estimates were made are not of much value. At the same time we have to consider the evidence on the record as a whole and to do the best we can with the materials which the parties have placed before the Court. On those materials the learned District Judge in the Court below has come to the conclusion that the value of the property transferred to Mokima Bibi is not by any means as large as the appellant creditor would have us believe.

The question of the burden of proof was brought forward as a factor which would turn the scale but when there is evidence on both sides the question retains little, if any, importance. Granted that it is for the transferees to prove that these transfers were made in good faith and for valuable consideration, it has been found that there was some valuable consideration inasmuch as there was a debt due to each of the wives at the time. The question then is whether the transfers were made in good faith. No doubt, as the learned Counsel for the appellant contends, this involves as an important element to the value of the properties transferred. The evidence on that question perhaps leaves something to be desired, but on the whole I am unable to differ from the conclusion at which the learned District Judge has arrived. I am not persuaded either in the case of Nabnat or in that of Mokima that the value given was so incommensurate with the debt due as to justify us in saying that the transfer was not at the time made in good faith. Before leaving the case I should like to add that I am disposed to believe the insolvent when he says that he would never have applied to be declared an insolvent unless he had been arrested at the instance of the Nerth Bengal Bank in execution of that decree.

The result is that, in my opinion, this appeal should be dismissed with costs. We assess the hearing fee at five gold *mohurs*.

BEACHCROFT, J.—I agree.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 118 OF 1915.

January 10, 1918.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

JAGARDEO SINGH—DEFENDANT—APPELLANT

versus

ALI HAMMAD AND OTHERS—PLAINTIFFS—RESPONDENTS.

Agra Tenancy Act (II of 1901), ss. 34, 199—Landlord and tenant—Mortgage of sir lands, before Act—Mortgagee, possession of—Equity of redemption, purchaser of, possession by, without landlord's consent—Question of title, determination of, by Civil Court—Revenue Court, ejectment by—Appeal, whether lies to District Judge.

Plaintiffs, as usufructuary mortgagees of certain *sir* lands, brought a suit in the Revenue Court for ejectment of the defendant, on the allegation that they were in possession of the lands under a mortgage existing before the passing of Act II of 1901 and that the defendant was a non-occupancy tenant of the same. The defendant, who had acquired a part of the equity of redemption of the mortgaged land, denied the relationship of landlord and tenant between himself and the plaintiffs. The Revenue Court referred the parties for the determination of the question of title to the Civil Court, which held that the plaintiffs were entitled to remain in exclusive possession as mortgagees and that defendant had acquired a share in the equity of redemption. In accordance with this the Revenue Court, holding that defendant was a non-occupancy tenant, ordered his ejectment. On the Commissioner's refusal to entertain the defendant's appeal, the latter appealed to the District Judge who rejected it, holding that the question of title had been finally and completely disposed of by the Civil Court in the civil suit:

Held, (1) that the District Judge was right in holding that no appeal lay to his Court; [p. 920, col. 1.]

(2) that the defendant had been rightly ejected by the Revenue Court. [p. 920, col. 1.]

Per *Walsh, J.*—The words "a person occupying land without the consent of the landlord" in section 34 of the Agra Tenancy Act mean one who enters into occupation without the express consent of the landlord or without any previous arrangement with him. [p. 921, col. 1.]

Second appeal from a decree of the District Judge, Azamgarh.

Mr. *Iqbal Ahmad*, for the Appellant.

Mr. *S. M. Yusuf Hasan*, for the Respondents.

JUDGMENT.

PIGGOTT, J.—These are four connected appeals which have come before us under the following circumstances:—

The plaintiffs instituted, in the Court of the Assistant Collector, Azamgarh, four suits for the ejectment of the defendant from certain specified plots of land, in each case with the allegation that they themselves were mortgagees in possession of the proprietary rights over the said plots, and the defendant was a non-occupancy tenant of the same. The defendant replied that there was no contract of tenancy between himself and the plaintiffs; that his possession was proprietary in its nature and that he was in possession as of right; because he was a co-sharer in the proprietary rights of the particular sub-division of a *mahal* to which the land in suit appertained. On this the learned Assistant Collector took action under section 199 of Act II of 1901, requiring the defendant to file a suit in the Civil Court for the determination of the question of title in issue between himself and the plaintiffs. The Court of first instance determined the question in favour of the present defendant who was, of course, the plaintiff in the Civil Court. On appeal, however, this decision was reversed. The controversy in this case has been very largely as to the meaning and effect of the Appellate Court's decision in this litigation. The decision fairly considered amounts to this, that the plaintiffs-respondents (the defendants in the Civil Court) held a usufructuary mortgage in respect of the plots of land in suit and were entitled to the exclusive possession of the same as such mortgagees; but the present defendant had acquired a share in the proprietary rights, that is to say, in the equity of redemption, in respect of the mortgage held by the opposite party. The case came again before the Assistant Collector, who was bound to dispose of the ejectment suit then pending before him in accordance with the final decision of the Civil Court. He passed a brief order to the effect that in view of the decision of the Civil Court, the defendant could only be regarded as in possession of the land in suit as a sub tenant, that is to say, a non-occupancy tenant (the land in question being *sir* land) from the plaintiffs. He ordered the defendant to be ejected accordingly. The defendant filed an appeal in the Commissioner's Court, who refused to entertain it, holding that a question of proprietary title was still in issue as between the parties. The defend-

ant then went before the District Judge in appeal, who dismissed the appeal holding that the question of proprietary title, originally in issue, had been finally and completely disposed of in the suit already referred to, and that there was no question left for determination in the case which was not exclusively cognisable by the Revenue Courts. Against this decision four second appeals have been filed. When the case originally came up for hearing, the facts were not as clear as they are now, and an order was passed directing the District Judge to entertain the defendant's appeal and to determine certain issues of fact.

We have now before us the findings arrived at by the District Judge on the issues remanded, and as a matter of fact his findings proceed on admissions made by the parties. The mortgage under which the present plaintiffs-respondents now hold, and have been holding since 1902, was a mortgage of the specific plots of *sir* land which are now in suit. The mortgage itself had been contracted prior to the passing of the present Tenancy Act; so no question of ex-proprietary rights arises. On the terms of the mortgage the plaintiffs, as transferees of the mortgagee rights, were entitled from 1902 and onwards to actual possession and enjoyment in respect of the land in suit.

The defendant, having acquired a part of the equity of redemption, asserted a right to take possession of some of the *sir* lands, without tendering the mortgage money. In prosecution of this claim he somehow succeeded in obtaining possession of the plots of land now in suit. The question specifically raised by these appeals is whether the learned District Judge was right or wrong in holding that no appeal lay to his Court. I should be prepared to hold that that decision was correct, but the matter has now gone somewhat further. After the order of remand and the ascertainment of the facts, the real question before us is whether the Assistant Collector was right in ordering ejectment of the appellant. On the principles laid down by a learned Judge of this Court in *Balli* v. *Naubat Singh* (1) the Assistant Collector was clearly right. It has been suggested, on the other side, that this decision was doubted in a Full Bench decision of this Court in the later case of *Nandan Singh* v. *Ganga Parhsad* (2). (See specially the remarks at page 516*.) As a matter of fact the decision reported as *Balli* v. *Naubat Singh* (1) was not specifically considered or in terms overruled, though it is open for the appellant to contend that remarks of the learned Chief Justice, when delivering the judgment of the Full Bench, suggest that he was not prepared to accept the correctness of that ruling. We find, however, that the principle laid down in *Balli* v. *Naubat Singh* (1) has been in substance accepted and followed by the Revenue Court since that decision was pronounced. Reference may be made to the notes by Mr. M. L. Agarwala in his valuable commentary on the N.-W. P. Tenancy Act, fifth edition, at pages 40 *et seq.* of that edition. Moreover, there is a decision of the Board of Revenue, *Champa Kuar* v. *Pati Ram* (3), which deals with the position of a squatter occupying agricultural land for cultivating purposes, and which adopts the principle of the case of *Balli* v. *Naubat Singh* (1) to its fullest extent. In this state of authorities I should be prepared personally to stand by the reported decisions directly bearing on the question before us. Moreover, I think that, there being nothing in favour of the defendant on the merits, it is not incumbent on us to go out of our way to insist upon any legal technicalities for the sake of enabling the defendant to prolong this litigation. The decision in the case of *Champa Kuar* v. *Pati Ram* (3) is by the Senior Member of the present Board of Revenue; and it is quite clear that if the defendant had got what he asked for, namely, a re-consideration of the Assistant Collector's order by the higher Revenue Courts, the result would have been to affirm his ejectment.

So far as the Civil Courts are concerned they have already decided in favour of the plaintiffs-respondents, and, if the

(1) 16 Ind. Cas. 120; 9 A. L. J. 771.

(2) 20 Ind. Cas. 892; 35 A. 512 at p. 516; 11 A. L. J. 786.

(3) 33 Ind. Cas. 70.

*Page of 35 A.—*Ed.*

present matter could rightly be taken cognisance of by the Civil Courts, they could not have come to a different decision from that arrived at by the Assistant Collector.

The defendant's possession is wholly unlawful and the order of ejectment a proper order on the merits. There are thus abundant reasons for dismissing these appeals.

WALSH, J.—I agree; particularly I accept the cases of *Balli* v. *Naubat Singh* (1) and *Champa Kuar* v. *Pati Ram* (3) as the correct expression of the law. I am not satisfied that in *Nandan Singh* v. *Gaya Parshad* (2) the Full Bench intended to dissent from the case of *Balli* v *Naubat Singh* (1), which was relied on by the appellant who succeeded; but I think the *dictum* at the foot of page 515 in XXXV Allahabad requires further consideration. Apparently the Chief Justice thought that section 34 of Act II of 1901 could only be made to work so long as the person was occupying the land "without permission" of the landlord. The words in the section are not "without permission." I am satisfied that the words "a person occupying land without the consent of the landlord" mean one who enters into occupation without express consent or without any previous arrangement with him. Two reasons seemed to me very strong to show this. If section 34 can be worked only against a person who having entered as a trespasser continues in possession "without permisssion" of the landlord, it is difficult to see how the landlord is to get rent from a person who does remain in possession with his permission, Secondly, such a person is said by the section not to be deemed to hold the land within the meaning of section 11 of the Agra Tenancy Act until he begins to pay rent. Section 11 deals only with tenants and I cannot see how such a person could be deemed to be a tenant within section 11 so as to make it necessary for the Legislature to exclude him from the operation of section 11, unless he was occupying with the permission of the landlord. I think this consideration lends additional weight to the view of Sir George Knox and of the Senior Member of the Board and I agree with my learned brother that the defendant is liable to be ejected by the Revenue Courts.

BY THE COURT.—We dismiss this appeal with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL 213-B OF 1916.

February 27, 1918.

Present:—Mr. Prideaux, A. J. C.

KRISHNAJI HATKAR—DEFENDANT No. 4 —APPELLANT

versus

RAOJI AND OTHERS—PLAINTIFFS AND DEFENDANT—RESPONDENTS.

Mortgage—Ejectment, suit for—Redemption, whether can be allowed.

A Court can in its discretion pass a decree for redemption in a suit in which the plaintiff sues for ejectment. [p. 921 col. 2.]

Parshotam Bhaishankar v. *Rumal Zunjar*, 20 B. 196; 10 Ind. Dec. (N. S.) 689, *Kokilasari Dasi* v. *Mohunt Rudranand Goswami*, 5 C. L. J. 527, *Mahomed Ibrahim* v. *Hamja Mahomedally*: 12 Ind. Cas. 387; 13 Bom. L. R. 895; 35 B. 507, followed.

Appeal from the decree of the Court of the District Judge, East Berar, Amraoti, dated the 25th January 1916, in Appeal No. 38 of 1915.

Mr. *M. Bhawani Shankar*, for the Appellant.

JUDGMENT.—This appeal has no force in it. The finding that the sale of 1897 by Sonba to the extent of a $\frac{2}{3}$rd share in Survey No. 21 is not binding on the present plaintiffs is not challenged. It is admitted, therefore, that they are entitled to redeem the $\frac{1}{3}$rd share of the field but in a separate suit and not in the present suit. The main point argued is that an amendment of the plaint of 1914 converting the suit as regards the present appellant from one of ejectment to one of redemption should not be allowed. Now there is authority showing that a Court can in its discretion pass a decree for redemption in a case in which the plaintiff sued for an ejectment: see *Parshotam Bhaishankar* v. *Rumal Zunjar* (1), *Kokilasari Dasi* v. *Mohunt*

(1) 20 B. 196; 10 Ind. Dec. (N. S.) 689.

Rudranand Goswami (2) and *Mahomed Ibrahim* v. *Hamja Mahomedally* (3). If ever a case existed in which this discretion should be exercised it is the present one. The fact that this would be done was foreshadowed in the remand order of the District Judge dated the 1st December 1909 and was clearly dealt with in the remand order of the Additional District Judge dated the 7th November 1913. No appeal was filed by the present appellant against those two remand orders. He lets the case proceed for another 5 years and then attacks the final decision on the ground that amendment should not have been allowed. The case had been pending since 1906. In this appeal no objection is taken to the amount fixed as annual profits of the $\frac{2}{3}$rd share in the field. In my opinion the amendment was rightly allowed. I, therefore, dismiss the appeal with costs. Appellant will pay respondent's costs.

Appeal dismissed.

(2) 5 C. L. J. 527.
(3) 12 Ind. Cas. 387; 13 Bom. L. R. 895; 35 B. 507.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 3236 OF 1915.

February 27, 1918.

Present:—Mr. Justice Richardson and Mr. Justice Walmsley.

BABU RAM DHENG AND OTHERS—PLAINTIFFS—APPELLANTS

versus

UPENDRA NATH KOLEY AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII B.C. of 1885), ss. 22 (2), 85 (1)—Landlord purchasing raiyati *interest in execution of money decree, whether can eject under-*raiyat*—Amending Act I B. C. of 1907, change made by, in s 22, cl. (2), of Bengal Tenancy Act.*

A landlord who purchases a *raiyati* interest at a sale in execution of a decree for money is in no better position than the landlord who purchases such interest under a private alienation consequently he cannot insist upon any right which he as landlord might otherwise have had under section 85 (1) of the Bengal Tenancy Act to treat the under-*raiyat* as a mere trespasser. [p. 923, col. 1.]

As regards clause (2) of section 22 of the Bengal Tenancy Act the change made by the Amending Act of 1907 does not seem to have altered the law as previously understood. A fractional landlord who gets a transfer of an occupancy holding still acquires from the *raiyat* some sort of tenancy or intermediate interest (except the right of occupancy) which prevents him from treating the under-*raiyat* as a trespasser. [p. 923, cols. 1 & 2.]

Appeal against the decree of the Subordinate Judge, Zillah Hooghly, dated the 11th September 1915, affirming that of the Munsif, Sreerampore, dated the 12th July 1914.

Babus *Sib Chandra Palit* and *Jadunath Mondal*, for the Appellants.

Babu *Lalit Mohun Banerjee*, for the Respondents.

JUDGMENT.

RICHARDSON, J.—The appellants before us are the plaintiffs in a suit for possession. They claim the right to possess the land to which the suit relates as under-*raiyats*. The defendants include some of the co-sharer-landlords of the original *raiyati* holding. They have purchased the holding in execution of a decree for money obtained by them against the original *raiyat*. It is alleged that after their purchase they sub-let the land to the original *raiyats*, that is, to the persons under whom or under whose predecessor the plaintiffs originally came in as under-*raiyats*. These persons have also been made defendants. The Court of Appeal below has dismissed the suit on the ground that under section 85 (1) of the Bengal Tenancy Act the plaintiffs have no valid title to possession as against the landlord-defendants.

The conclusion seems to me to be based on a misapplication to the facts found of the law contained in the Bengal Tenancy Act as explained and illustrated by decided cases. The present case is clearly within the principle of such cases as *Amirullah Mahomed* v. *Nazir Mahomed* (1) and *Lal Mahomed Sarkar* v. *Jagir Sheikh Mallik* (2). The distinction between the position of a landlord who purchases a *raiyati* interest under a private alienation and the position of the landlord who purchases that interest in execution of a decree for arrears of rent at a sale under the Bengal Tenancy

(1) 34 C. 104; 3 C. L. J. 155.
(2) 2 Ind. Cas. 654; 13 C. W. N. 913.

Act is also adverted to in the case of *Janaki Nath Hore* v. *Prabhasini Dasi* (3). The landlord who purchases at a sale in execution of a decree for money is in no better position than the landlord who purchases under a private alienation. In both cases the purchaser is the purchaser of the right, title and interest of the *raiyat*.

No doubt the law as it was laid down in the two earlier of the cases to which I have referred, more especially in the case reported as *Lal Mahomed Sarkar* v. *Jagir Sheikh Mallik* (2), depended to some extent upon the provisions of section 22 of the Act as they originally stood, and not upon those provisions as modified by the Amending Act of 1907. Moreover both cases were decided under clause (1) of the section while the present case, the purchase of the holding having been made by some of the co-sharers-landlords, falls to be decided under clause (2). But the result arrived at in the two cases in regard to transfers under clause (1) had already been arrived at by a Full Bench in regard to transfers under clause (2) [*Ram Mohan Pal* v. *Sheikh Kachu* (4)]. I have referred to the two cases because they explain the principle more fully and illustrate its effect upon the position of the under-*raiyat* let in by the transferring *raiyat*. Under both clauses (1) and (2) in their original form the effect was that only the occupancy right and not the entire interest of the transferring *raiyat* came to an end and the transferee landlord (whether a sole landlord or a fractional landlord) could not say that the whole tenancy had been extinguished. Some intermediate interest still remained derived by the landlord from the *raiyat* which prevented the landlord from insisting upon any right which he might otherwise have had under section 85 (1) to treat the under-*raiyat* as a mere trespasser.

It is unnecessary on the present occasion to consider the effect on the case-law of the change made in the language of clause (1) of section 22.

As regards clause (2) the change does not seem for the present purpose to have altered the law as previously understood. The fractional landlord still appears to acquire from the *raiyat* some sort of tenancy or intermediate interest with the same effect as regards the right to treat the under-*raiyat* as a trespasser as before. Other, and possibly more difficult, problems may arise, but for the present purpose the topic need not be further pursued.

In my opinion the judgment and decree of the Subordinate Judge in the lower Appellate Court must be discharged and the case must be remitted to that Court in order that it may determine the issue dealt with by the Munsif but not dealt with by the Subordinate Judge, whether the plaintiffs have proved their title as under-*raiyats* under the original *raiyats*. If that issue is decided against the plaintiffs the suit will be dismissed. If it is decided in favour of the plaintiffs, a decree will be made entitling them to *khas* possession of the land in dispute and, unless the Subordinate Judge is able to dispose of the question either by agreement of parties or on the materials on the record, remitting the case to the Trial Court for further enquiry as regards the claim for mesne profits.

WALMSLEY, J.—I agree.

Case remitted.

(3) 30 Ind. Cas. 898; 19 C. W. N. 1077 at 1081; 22 C. L. J. 99; 43 C. 178.

(4) 32 C. 386; 9 C. W. N. 249; 1 C. L. J. 1 (F. B.).

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 349 OF 1915.

January 29, 1918.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

L. W. ORDE—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—RESPONDENT.

Land Acquisition Act (I of 1894), ss. 23, 49—Compound appurtenant to house under cultivation of occupancy tenants, whether can be treated as 'building site'—Compensation, assessment of, mode of—Annual profits, whether can form basis of award—Market value.

A compound appurtenant to a house but in cultivating possession of occupancy tenants was acquired under the Land Acquisition Act and compensation was assessed on the basis of 16 years' purchase of the annual profits then derived

ORDE *v.* SECRETARY OF STATE FOR INDIA.

by the owner from the land. The owner objected that compensation should have been assessed according to the market value of the land considered as a building site:

Held, that the method of assessment was correct as the land in suit was not at the disposal of the owner for sale as building site, inasmuch as any one desiring to acquire it for that purpose would have to deal not only with the owner but also with the occupancy tenants having vested rights not transferable except under stringent limitations laid down by the Tenancy Act. [p. 925, col. 1.]

First appeal from a decree of the District Judge, Meerut.

Mr. *Sital Prasad Ghose*, for the Appellant.

Mr. *A. E. Ryves* (Government Advocate), for the Respondent.

JUDGMENT.—This is an appeal in a land acquisition case. The plot of land in question is situated at Meerut and is required by Government for the purpose of a boarding-house in connection with an important school. The owner objected to the District Judge against the sum awarded by the Collector, but his objections failed and he has appealed to this Court against the order of the District Judge. The memorandum of appeal before us raises three points: two of which may be briefly disposed of. The plot of land in suit forms part of a compound appurtenant to a house owned by the appellant, and the point as taken in the memorandum of appeal before us is that the District Judge has erred in refusing to enforce in favour of the appellant the provisions of section 49 of the Land Acquisition Act (No. I of 1894), according to which the appellant was entitled to claim that the entire compound should be acquired. As a matter of fact the point has not been argued before us precisely in this form. It has rather been contended that the provisions of section 23, clause (1) (*thirdly*), have been overlooked by the Court below, and that the compensation awarded should have been increased upon an estimate of the damage presumably sustained by the appellant in consequence of the severance of this parcel of land from the rest of the compound. If we thought that injustice had been done to the appellant in the Court below, merely because he had failed to make it sufficiently clear by his pleadings whether he was desiring to claim his remedy under section 49 or under section 23 aforesaid, we should not have felt that there was any technical objection in the way of our doing substantial justice. We find that this point has been considered in all its bearings and has been disposed of by the learned District Judge. The fact is that, although the land in suit may be spoken of in a sense as forming part of the compound of a house, the area in question has not been kept up as a compound. Both the plot of land in suit and the adjoining area have been brought under cultivation and occupancy tenants are in cultivating possession of the same. Under these circumstances it does not appear that any case is made out for a claim for enhanced compensation on the ground of damage from severance. The third plea on appeal is as to the alleged under-valuation of the well situated on the plot of land in suit. It is sufficient to say about this that the learned District Judge was right in remarking that, on the materials available on this record, there was no case made out for increasing the sum awarded by the Collector under this head. There remains the more substantial plea taken in the second paragraph of the memorandum of appeal. It is contended that the land in question, although at present under cultivation and held by occupancy tenants, has a value as a building site which has been entirely disregarded by the Court below. We have been referred to the case of *Bombay Improvement Trust* v. *Jalbhoy Ardesir Sett* (1), where the principles applicable to the acquisition of land in respect of which there exists more than one interest have been discussed and laid down. We do not see that these principles have been overlooked by the Court below. The learned District Judge has taken into consideration what the market value of this land might be, if it were vacant and available for building purposes. He has estimated its value from this point of view at Rs. 500 a *bigha*. The memorandum of appeal before us seems to accept this valuation as more or less adequate from the point of view on which it proceeds. In argument our attention has been drawn to portions of the evidence from which it might be inferred that even this sum of Rs. 500 a *bigha*

(1) 3 Ind. Cas. 757; 33 B 483; 11 Bom. L. R. 674.

was an under-valuation, but on the evidence as a whole there seems no reason why it should not be accepted as far as it goes. As the learned District Judge, however, points out, the difficulty of this case lies in the fact that the land in suit was not at the disposal of the appellant for sale as a building site. Any one desiring to acquire it for that purpose would have to deal, not merely with the appellant, but with the occupancy tenants, who have vested rights not transferable except under stringent limitations as laid down in the Tenancy Act. Taking this matter into consideration, the learned District Judge has come to the conclusion that the value of this land to the appellant himself does not exceed the sum which has been allowed by the Collector, calculated on the basis of so many years' purchase of the annual profits actually derived by him from it at the present time. We have been asked to consider what has been actually paid by Government under the orders of the Collector to the occupancy tenants for the purchase of their rights; but the occupancy tenants accepted the Collector's valuation and their case was not before the Court below. Had the occupancy tenants given evidence in the present case, and established the fact that they would have been prepared at any time to surrender their rights to their proprietor for the time being, in return for the sum which was awarded to them as compensation by the Collector, there might have been some basis for the contention that the award in favour of the present appellant should be increased by the difference between the market value of the land as a building site, calculated at the presumed rate of Rs. 500 a *bigha*, and the sum total of the compensation awarded by the Collector to the appellant and to the occupancy tenants. There is, however, no such evidence on the record and the mere acquiescence by the occupancy tenants in the Collector's award by no means suggests, as a necessary inference, the fact that they would not have stood out for a higher price if they had found themselves bargaining with a proposed purchaser of the proprietary rights. It seems, therefore, that no cause has been shown for interference with the order of the Court below. We dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 3185 OF 1915.

January 31, 1918.

Present:—Mr. Justice Richardson and Mr. Justice Beachcroft.

PROBODH CHANDRA MITRA—PLAINTIFF—APPELLANT

versus

INDRA CHANDRA CHAULE—DEFENDANT—RESPONDENT.

Landlord and tenant—Consent decree limiting remedy of landlord to eject tenant in case of refusal to cultivate—Landlord, right of, to sue for rent when land left uncultivated.

Where according to the terms of a consent decree, in the event of the defendant-tenant refusing to cultivate the land and to render the plaintiff landlord his share of the produce, the only remedy which the plaintiff would have was to eject the defendant:

Held, that the clause relating to ejectment was in the nature of a clause for re-entry and had not the effect of depriving the landlord of his ordinary right to sue for the arrears of rent due by the tenant. [p. 926, col. 2.]

Appeal against the decree of the Subordinate Judge, Hooghly, dated the 11th September 1915, reversing that of the Munsif, Uluberia, dated the 9th June 1914.

FACTS material to the report as found by the Subordinate Judge in appeal were as follows:—

'As to the appeal I think it should succeed. The auction-purchase by the admitted superior landlords took place on 14th August 1911, as Exhibit F the sale-certificate shows. The rent decree in execution whereof that sale took place was obtained in Rent Suit No. 496 of 1907. The rent decrees Exhibits 6 and 7, in which the present plaintiff was impleaded as a defendant, were obtained for the arrears of rents due for the years 1914 to 1917. It is easy to see therefore that the Rent Suit No. 496 of 1907 was for a period prior to that of suits in which the decrees Exhibits 6 and 7 were passed. I, therefore, cannot agree with the learned Munsif that

the decrees Exhibits 6 and 7 go to show that after their aforesaid purchase the superior landlords did not take actual possession, inasmuch as the decree Exhibit 6 was passed on 1st August 1911 and the decree Exhibit 7 was passed on 28th August 1911 while the aforesaid purchase of the landlords was confirmed on 18th September 1911. Now in his objection under rule 100, Order XXI, of the Civil Procedure Code as per Exhibit A the plaintiff admitted his dispossesion on the landlords' taking possession in pursuance of their purchase as per sale-certificate Exhibit F. This clearly took place subsequent to the passing of the rent-decrees Exhibits 6 and 7 aforesaid. The learned Munsif observed that although the plaintiff alleged dispossession still the Court had found that there was no dispossession. I do not think that on the face of the plaintiff's admission as per Exhibit A, *viz.*, his objection under rule 100, Order XXI, Civil Procedure Code, that finding of the Court should be acted upon. In reality the superior landlords took formal possession after their purchase and subsequently exercised their right by letting out the lands to another person; no matter if that person happened to be a brother of the present defendant. This man is separate in mess from the defendant and was proved to have been in possession of the lands during the disputed period by virtue of his lease from the superior landlords. This was tantamount to the plaintiff's ouster, and being out of possession the plaintiff was not at all competent to recover the *bhag* crops for the year in suit. The decree of the Court below should, therefore, be set aside and the plaintiff's suit should be dismissed."

Babu *Shib Chandra Palit*, for the Appellant.

Babu *Rupendra Kumar Mitter*, for the Respondent.

JUDGMENT.

RICHARDSON, J.—On the facts as found by the learned Subordinate Judge in the Court of Appeal below it does not appear that the defendant-respondent was evicted from the land which he held under the plaintiff by title paramount. The Subordinate Judge seems to be in error in holding that the rent claimed by the plaintiff is not due and payable by the defendant. We have been referred to a consent decree. It is argued that according to the terms of that decree in the event of the defendant refusing to cultivate the land and to render the plaintiff his share of the produce, the only remedy which the plaintiff has is to eject the defendant. As I understand the decree, however, the clause relating to ejectment is in the nature of a clause for re-entry and the document has not the effect of depriving the plaintiff as landlord of his ordinary right as such to sue for the arrears of rent due by the tenant. In this view the appeal should be allowed, the judgment and decree of the lower Appellate Court set aside and the decree of the Trial Court restored with costs throughout.

BEACHCROFT, J.—I agree.

Appeal allowed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 510 OF 1916.

September 10, 1917.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Batchelor.

BAI JAYAGAVRI—PLAINTIFF—APPELLANT

versus

PURSHOTAMDAS SUNDERLAL—DEFENDANT—RESPONDENT.

Transfer of Property (Act IV of 1882), s. 41—Transfer by ostensible owner—Consent of Hindu widow, whether consent of person interested—Mortgage—Endorsement of satisfaction without consideration, effect of—Assignee of mortgagee rights—Bona fide *purchaser for value—Adverse possession against remainderman.*

The principle of English Law that a deed imports consideration has no application to India, and an endorsement on a mortgage-deed that the mortgage has been satisfied made without consideration amounts only to a gratuitous promise not binding on the releasor. [p. 927, col. 2.]

An assignee of an equity of redemption who claims also to be an assignee of the mortgagee's rights but who has taken no re-transfer of the property from the mortgagee or his representatives, and whose assignor has taken no re-transfer of those rights, cannot set up the plea of *bona fide* purchaser for value without notice. [p. 927, col. 2.]

Where property is held by a Hindu widow under a life-interest adverse possession begins to run against the reversioner on the termination of the widow's interest. [p. 927, col. 2.]

Quære:—Whether the "consent of the person interested" required by section 41 of the Transfer of Property Act can be said to be furnished

where the only consent given is that of a Hindu widow, as tenant for life, the remainderman being no party to such consent.

Second appeal from the decision of the District Judge, Broach, in Appeal No. 51 of 1915, amending the decree passed by the Additional Subordinate Judge, Broach, in Civil Suit No. 183 of 1914.

Mr. *T. R. Desai*, for the Appellant.

Mr. *G. N. Thakor*, for the Respondent.

JUDGMENT.—In 1885 Pranjivan became the mortgagee of the plaint property. In 1890, the right, title and interest of the mortgagor was purchased by the predecessors of the defendants Nos. 1 and 2. In 1899, Pranjivan died leaving a widow Hariganga and a daughter's daughter, the plaintiff. He also left a Will whereby substantially the widow Hariganga was given a life-interest in the property, and the grand-daughter the remainder absolutely. In 1900, the defendant No. 3 who was a confidential clerk of Hariganga purchased from defendants Nos. 1 and 2 the equity of redemption in the mortgage. He says that, on the 5th of April 1900, he paid off the mortgage. The mortgage-deed bears an endorsement that the mortgage is satisfied. But it is found as a fact in both Courts that the endorsement is a sham, that nothing was really paid in satisfaction of the mortgage, and that the mortgage still subsists. No transfer of the property was taken by the 3rd defendant from the representative of the mortgagee, Hariganga. The 3rd defendant, on the 15th of February 1912, transferred the property to the 4th defendant. In 1914, Hariganga died, and this suit is filed by the plaintiff, the remainderman under the mortgagee's Will, to recover possession as mortgagee from the 4th defendant, or to recover the amount of the mortgage debt. The 4th defendant pleads that he is a *bona fide* purchaser for valuable consideration without notice. The learned District Judge has held that this plea is established. We are unable, however, to agree with this conclusion.

It is stated in Coote on Mortgages, page 1425 of the 8th Edition, that "where...a mortgagee desires to release his debtor without consideration, he can only effectually do so at law by deed; for, otherwise, there would be a mere gratuitous promise by the mortgagee to forbear from exercising his rights of action to enforce payment, which, by an elementary rule of law, would not be binding on the releasor." The method of procedure by deed, on the principle that a deed imports consideration, has no application in India. It follows that the endorsement in question amounts merely to a gratuitous promise not binding on the releasor. And that indeed is the conclusion arrived at by the learned Judge himself when he holds that the endorsement was a sham, that nothing was paid in satisfaction of it, and that the mortgage still subsists.

The appeal to section 41 of the Transfer of Property Act cannot avail the appellant for the defendant No. 3 never became the ostensible owner, inasmuch as there was no transfer to him from Hariganga, in whom consequently the title always remained. Moreover, it appears to us doubtful whether the required "consent of the persons interested" can be said to be furnished where the only consent given is that of a Hindu widow as tenant for life, the remainderman being no party to such consent.

Here, then, we have the assignee of an equity of redemption, who claims also to be an assignee of the mortgagee's rights who has taken no re-transfer of the property from the mortgagee or his representative, and whose assignor has taken no re-transfer of those rights. The mortgage-deed is registered, and the purchaser must be taken to have notice that there has been no re transfer. It is no doubt true that his transferor had possession which was obtained, as it appears, out of affection from the widow of the mortgagee, and that possession would enure for the benefit of the assignee, the 4th defendant, so long as the life-tenant of the mortgagee-testator survived. But it could not prejudice the remainderman on the principle which is frequently applied as between landlord and persons claiming adversely to a lessee, and which is stated in Shelford's Real Property Statutes, p. 169, thus: "Where property is under lease, adverse possession runs against the reversioner from the expiration of the lease, or from the time when the tenant pays rent to one claiming wrongfully to be entitled in immediate reversion."

KRISHNA MALI *v.* DEOLIA.

The present case appears to be one of a type which is very common in India, where the purchaser has not taken the trouble to investigate the title of his transferor. It is not safe, and very often it is not honest, to take an assignment of a property in which investigation would show that an outstanding mortgage has not been extinguished, in the hope that the person entitled to that mortgage may not assert his claim. We, therefore, do not think that the learned District Judge was right in holding that the 4th defendant was protected by the plea of *bona fide* purchase for value without notice, and for the reasons already indicated, we cannot hold that the possession enjoyed by him during the life of Hariganga can be taken to be adverse to the remainderman who was only entitled to assert her right when the life-tenancy of Hariganga expired.

For these reasons we set aside the decree of the District Judge and restore that of the Trial Court, the result being that the plaintiff is in the position of a mortgagee, and the 4th defendant has an opportunity of redeeming upon paying the price found to be due by the lower Court. Costs throughout to be added to the mortgage debt. The cross-objections are dismissed with costs.

Decree set aside.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 303 OF 1917.

February 25, 1918.

Present:—Mr. Prideaux, A. J. C.

KRISHNA MALI—PLAINTIFF—APPELLANT

versus

DEOLIA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Adoption of married Sudra, validity of.

The adoption of a married Sudra is invalid according to the Mitakshara as interpreted according to the Benares School of Hindu Law.

Teja Bai v. *Mohanlal Marwadi*, 11 C. P. L. R. 56, *Jhunka Prasad* v. *Nathu*, 18 Ind. Cas. 960; 35 A. 263 at p. 265; 11 A. L. J. 293, followed.

Appeal from the decree of the Court of the Additional District Judge, Betul, dated the 16th February 1917, in Appeal No. 4 of 1917.

Mr. *A. Bhagwant*, for the Appellant.

Mr. *M. Gupta*, for the Respondents.

JUDGMENT.—The facts of this case are given in sufficient detail in the judgments of the Courts below. I, therefore, do not repeat them here, but proceed at once to deal with the grounds of appeal. I deal with the second ground of the memorandum of appeal first. It is contended that as the parties are *malis*, that is Sudras, the finding that the plaintiff was a married man at the time he was adopted by *Musammat* Sakai cannot invalidate it. It seems to me settled law that in those parts of the country where Mitakshara is interpreted according to the Benares School a married Sudra cannot be adopted. *Teja Bai* v. *Mohanlal Marwadi* (1) and *Jhunka Prasad* v. *Nathu* (2). The finding of the Courts below is, therefore, correct and the plaintiff's adoption is invalid because he was a married man. In this view of the case it is unnecessary to consider the point raised in the first ground of appeal as to *res judicata*. It is contended that the ancestors of the parties migrated from Berar in which the Bombay rule of Hindu Law of adpotion prevails and brought with them their customary law. Now custom of the caste was pleaded as to the adoption of a married man, but it was nowhere pleaded that because the parties came from Berar therefore they were governed by the Bombay law that the adoption of a married man is not opposed to the doctrines of Hindu Law. This plea also was not raised in the lower Appellate Court. It is far too late to raise in second appeal questions of pure fact. As to the custom alleged, both Courts have held that it has not been established and that finding is conclusive.

(1) 11 C. P. L. R. 56 at p. 60.

(2) 18 Ind. Cas. 960; 35 A. 263 at p. 265; 11 A. L. J. 293.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 945 OF 1917.
March 1, 1918.
Present:—Mr. Justice Piggott.
ABDUL LATIF KHAN—APPLICANT
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 437—Discharge of accused—Further inquiry, order for, without notice—Discretion—Practice.

Nothing in section 437 of the Criminal Procedure Code requires previous notice to any accused person who has been discharged before further inquiry into his case is ordered by a competent authority, that is to say, by the High Court, the Sessions Judge or the District Magistrate. Nevertheless as a matter of judicial discretion it is advisable that previous notice should issue when the matter for consideration is the setting aside of an order of discharge passed in favour of an accused person who has actually been before a Court to answer the facts alleged against him. [p. 929, col. 2; p. 930, col. 1.]

The fact of a person's being in the position of an accused with another during an inquiry which resulted in the order of discharge, should not at all prevent his being summoned as a witness in the further inquiry ordered. [p. 930, col. 2.]

Criminal revision from an order of the District Magistrate, Etah.

Mr. *A. H. C. Hamilton*, for the Applicant.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—This application in revision arises on the following state of facts:—On the 17th of July last a woman named Dojia was struck by a bullet while she was with her husband in a field where he was working. The shot had been fired by some sportsman in the immediate neighbourhood, and it is not suggested that the injury to *Musammat* Dojia was anything but accidental. A number of villagers were attracted to the spot and proceeded to arrest two Mohammedans, named Abdul Latif Khan and Badal Khan, as being responsible for the injury caused to *Musammat* Dojia. These two men were taken to the Kasganj Police Station, some five miles distant, along with the injured woman and her husband and at the same time there was produced at the Police station a double barrelled muzzle loading gun. The two Mohammedans arrested on suspicion were admittedly strangers to *Musammat* Dojia and her neighbours. The Police eventually sent up one of these men, Abdul Latif Khan, for trial in respect of offences under section 338 of the Indian Penal Code and section 19 of the Indian Arms Act. The Magistrate who took cognizance of the matter began by issuing process against the other stranger, Badal Khan; but after taking the evidence discharged both the accused persons. The order of discharge is dated September the 21st, 1917. The gun in question, although bearing a serial number and therefore having apparently at some time or other been held lawfully under a license, could not be traced in the Etah district; and it is admitted that Abdul Latif Khan and Badal Khan held no license to possess fire-arms of any description. Representations were made to the District Magistrate as to the impropriety of the order of discharge, and on the 10th of November 1917 the District Magistrate, after examining the record, passed an elaborate order, reviewing the evidence discussing the comments made on the same by the Trying Magistrate and finally directing further inquiry to be made as regards Abdul Latif Khan. This order was, of course, passed under section 437 of the Code of Criminal Procedure. It is quite clear that no previous notice had been issued to Abdul Latif Khan to show cause why the order of discharge passed in his favour should not be set aside. A curious feature of the case is that before that order had been set aside at all, that is to say, on the 7th of November 1917, another First Class Magistrate of the Etah district had taken cognizance of the offence and had issued process to Abdul Latif Khan to appear and answer charges under section 338 of the Indian Penal Code and section 19 of the Indian Arms Act. However, the question whether Abdul Latif Khan could have been re-tried by another Magistrate without the order of discharge passed on the 21st of September 1917 being first set aside, is not now before me and I need not discuss it. The application in revision which I have to consider is against the District Magistrate's order of November the 10th, 1917.

Now it is beyond question that nothing in section 437 of the Code of Criminal Procedure requires previous notice to any accused person who has been discharged before further inquiry into his case is ordered by a competent authority, that is to say, by the High Court, or the Sessions Judge or the District Magistrate. Nevertheless it has been laid down in a number of cases that as

In the matter of WILLIAM TAYLER.

a matter of judicial discretion it is advisable that previous notice should issue, when the matter for consideration is the setting aside of an order of discharge passed in favour of an accused person who has actually been before a Court to answer the facts alleged against him. I am not aware that the decision of this Court in *Queen-Empress* v. *Ajudhia* (1), which itself follows certain older decisions, has ever been disapproved of in any subsequent decision of this Court. I am myself of opinion that in a matter of this sort it would have been better for the District Magistrate to give Abdul Latif Khan previous notice and an opportunity of arguing the case before him. I am not disposed, however, to interfere with the order of the Court below merely on this ground. If the only result of my doing so were to compel the District Magistrate to issue notice now to Abdul Latif Khan, this might only lead to the passing of another order under section 437 of the Code of Criminal Procedure, and the only result would have been inconvenience to the Courts and undesirable delay in the disposal of the matter. If on the other hand, I were to take it upon myself to direct that no further proceedings be taken, I conceive that I should be straining the powers of this Court, and I am not satisfied that I should not be prejudicing the interests of justice. I have preferred to deal with the matter by asking the learned Advocate who represents Abdul Latif Khan to take this opportunity of showing cause why further enquiry should not be ordered. In substance I have dealt with the matter as if the record had been called for directly by this Court with a view to considering the propriety of the order of discharge. I do not think it would be advisable for me to enter into detail with regard to the very different opinions expressed by the Trying Magistrate and by the District Magistrate in respect of the value and reliability of the evidence produced at the original hearing. I do think, however, that the District Magistrate's order shows good and sufficient cause for further inquiry into this matter in the interests of justice. It seems practically beyond question that an offence punishable under the Indian Arms Act, as well as an offence punishable under the Indian Penal Code, were committed by some person or other on the occasion in question. I agree with the District Magistrate that it is in the interests of justice that there be further inquiry into the question whether the commission of one or both of these offences is or is not brought home to the accused Abdul Latif Khan. I think it advisable under the circumstances that this inquiry should take place outside the limits of the territorial jurisdiction of the District Magistrate of Etah. My order, therefore, is that this application for revision do stand dismissed, and that the further inquiry against Abdul Latif Khan directed by the order of 10th November 1917 be held in the district of Aligarh. I transfer the case in question to the Court of the District Magistrate of Aligarh, who may either dispose of it himself or transfer it for disposal to the Court of any First Class Magistrate subordinate to himself.

With regard to one matter of detail which has been pressed upon my notice, I may say that I agree with the District Magistrate that the proceedings taken against Badal Khan were injudicious, and that the fact of his having been in the position of an accused person during the inquiry which resulted in the order of discharge should in no way be considered to prevent his being summoned as a witness in the further inquiry now ordered.

Further inquiry ordered.

(1) 20 A. 339; A. W. N. (1898) 60; 9 Ind. Dec. (N. S.) 577.

CALCUTTA HIGH COURT.

In re APPEAL FROM ORIGINAL DECREE No. 67 OF 1868.

April 24, 1869.

Present :—Sir Barnes Peacock, KT., Chief Justice, and Mr. Justice Mitter.

In the matter of WILLIAM TAYLER.

Contempt of Court—High Court, power of, to punish summarily for contempt—Unjust criticism of Court's act while Court is not sitting, whether contempt—Printer and publisher of newspaper, liability of, for

In the matter of WILLIAM TAYLER.

contempt—Punishment for contempt, mitigation of —Apology.

If the printer of a newspaper publishes a letter with the name of an author attached to it, he must bear the responsibility if he is unable, when required, to prove that it was published with the authority of the person by whom it purports to have been signed. [p. 953, cols. 1 & 2.]

When letters amounting to contempt of Court are published in a newspaper, the Court has its election to punish both the author and publisher of the newspaper or either of them. [p. 953, col. 1.]

If a printer prints anything that is libellous, it is no excuse to say that he had no knowledge of the contents of the paper and was entirely ignorant of its being libellous. [p. 954, col. 1.]

When contempt of a Court of Record is committed, there are two modes of proceeding open to it, one by a Rule calling upon the person charged with contempt to show cause why he should not be adjudged guilty of contempt of Court, the other by attachment under which that person might be arrested and brought into Court for a similar purpose. [p. 956, col. 1.]

The charge of contempt may be made by the Court itself upon its own knowledge of facts which, if sworn to by any one to the best of his belief, would have made a *prima facie* case of contempt of Court. [p. 956, col. 2.]

To charge a Judge with presumptuous tyranny for the mode in which he is proceeding in a matter pending before him or to publish anything respecting that matter, whilst it is under consideration, with a view to induce the Judge to alter his course is a grave contempt of Court. [p. 958, col. 1.]

It is a high and serious offence to cast unjust and defamatory imputations on a Judge. Judges are subject to be criticised but they must be protected from unfounded defamation. [p. 960, col. 2.]

In cases of contempt of Court by means of misrepresentation or wilful concealment of the true state of facts, a proper apology may mitigate but it cannot wholly excuse or justify the contempt or form a ground for a total exemption from punishment. [p. 962, col. 2.]

JUDGMENT.

PEACOCK, C. J.—It is always a most unpleasant duty for a Judge to be compelled to vindicate his own honour, or the dignity of the Court over which he presides, by adopting measures which may cause pain, or wound the feelings of any man. But a Judge who would shrink from the discharge of what he considers to be his public duty, merely because it is to him a painful one, is not fit to be entrusted with the office which he holds. To me the duty which I am now called upon to perform is all the more painful, because the gentleman whose conduct is called into question is one with whom in times gone by I have held social and friendly intercourse. The case is one of public importance, and I am anxious that there shall be no misunderstanding of the views and opinions of the Judges and of the reasons which induced them to adopt the course which they have pursued. Above all, I am desirous that there shall be no further misrepresentations such as those with which unhappily we are called upon to deal. I have, therefore, thought it right to enter fully into the facts and law of the case, and I have reduced into writing the greater portion of my judgment.

Mr. W. Tayler was formerly a member of the Bengal Civil Service. After his retirement he was admitted as a Vakeel of the late Sudder Court; and upon the amalgamation of the late Supreme and Sudder Courts, he, in common with all the Vakeels of the late Sudder Court, was enrolled as a Vakeel of the High Court. He subsequently carried on business as a Mooktear or law agent in the District of Patna, in which, before his retirement from the Civil Service, he had acted as Commissioner. Among other clients, he was retained by Ranee Usmedh Kower, the elder Ranee of Ticaree, for two years, upon a retaining fee of Rs. 500 a month for looking after her suits, in addition to which he was to receive a reward for every case that he might win according to its importance. Matters did not proceed amicably between Mr. Tayler and the Ranee, and the result was that two suits were commenced—one by Mr. Tayler against the Ranee to recover a sum of Rs. 29,773, consisting of Rs. 20,910 alleged to be due for principal and interest on a bond given, as Mr. Tayler alleged, for fees due to him, and Rs. 8,000 and interest alleged by Mr. Tayler to be the balance due on account of his salary or retaining fee; the other by the Ranee against Mr. Tayler to recover money alleged to have been received by him on her account.

In the suit brought by Mr. Tayler, the Court held that the bond had been improperly obtained, and the result was, that Mr. Tayler's suit was dismissed with costs, and Rs. 6,110 were decreed to the Ranee in her cross-suit. The case *Ranee Usmut Koowar* v. *Taylor* (1) is reported in the 2nd Volume, Weekly Reporter, page 307.

On the 29th January 1866, the Ranee applied to the Judge of Behar for execution, and in the month of February in that year, a tenure called Dergaon, belonging to Mr.

(1) 2 W. R. 307.

Tayler, was attached in execution. That attachment, by virtue of the provisions of section 240, Act VIII of 1859, prevented Mr. Tayler from selling the estate so long as the attachment was in force. On the 26th February a consolidated appeal to Her Majesty in Council was filed by Mr. Tayler in the two suits, and on the 8th March he obtained a Rule calling upon the Ranee to show cause why, upon his giving security, the execution should not be stayed pending the result of his appeal to Her Majesty in Council; and the sale under the attachment was stayed pending that Rule. The Rule was sent to the Judge of Behar for service, and he thereupon passed an order in the execution case that the proceedings should be stayed "for the time," that is to say, until the Rule to show cause should be disposed of; and as there was nothing which he could do in the execution case whilst that Rule was pending, he, at the time of transmitting to the High Court his return of having served the Rule upon the Ranee, ordered that the proceedings for execution should be struck off the file of cases pending in his Court.

When the Rule *nisi* came on for hearing in the High Court, it was considered more just that, as the Ranee had obtained a decree, she should be allowed to execute it on giving security, than that she should be restrained from realising the amount upon Mr. Tayler's giving security. Accordingly, upon the 18th May, it was ordered that the decree should be executed upon the Ranee's giving sufficient security, to the satisfaction of the Judge, for the due performance of such decree as Her Majesty in Council should make.

That Rule was received by the Judge on the 29th May, and thereupon the execution case was again numbered and restored to the file of cases pending in his Court. The Ranee, who was a lady of large property, tendered security, which was admitted on the 7th December 1866. The delay which occurred between the transmission of the Rule to the Judge and the acceptance of the security which the Ranee offered is not accounted for on the evidence in the cause. I have frequently found in cases in which execution is stayed until the decree-holder gives security, that great delay is caused by inquiries into the sufficiency of the security, to which the debtor or his agent objects merely for the purpose of delaying the execution. Whether this was the case in the present case or not does not appear, and it is not necessary to enquire. It is not likely that the Ranee, who is a lady of large property, would have had any difficulty in finding security for so small an amount, or that Mr. Tayler would have run any risk if she had been allowed to execute her decree without security. But Mr. Tayler, having appealed to Her Majesty in Council, was entitled by law to have security, and it was granted to him.

It is clear that there was no improper delay on the part of the Ranee in completing her security. Delay is not generally the game of the judgment-creditor, and it is expressly found by the Judge that there was no default by the Ranee in carrying on the case.

On the 11th day of October, Mr. Tayler sold to *Musammat* Zuhoorun, the wife of Ahmedoollah, for Rs. 55,000, the estate which had been attached under the Ranee's decree. Mr. Tayler says that the purchase was made by Ahmedoollah in the name of his wife. That is very probable, and I shall treat the case as if it were so, and give Mr. Tayler the full benefit of that argument. But when Ahmedoollah is described as an old Pleader at Patna, for the purpose of raising an inference that he must have known of the attachment at the time of the purchase, it must be borne in mind that the estate was at Gya and not at Patna, and that the sale was under an attachment from the Court at Gya, and not from the Court at Patna.

After the sale by Mr. Tayler, the estate was again attached by the Ranee under her decree, and the 25th February 1867 was fixed for the sale. On the 13th February *Musammat* Zuhoorun intervened and disputed the right of the Ranee to sell under her decree, and claimed a right to the property upon the ground that her purchase was completed before the second attachment. The case was decided against her, and an order was made that the estate should be sold. *Musammat* Zuhoorun thereupon satisfied the decree to prevent the sale of the estate which she had purchased and for which she had paid Mr. Tayler Rs. 55,000, and commenced a suit against him to recover Rs. 12,406, the amount which she had been

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compelled to pay in satisfaction of the Ranee's decree.

In the written complaint in that suit, it was distinctly charged that Mr. Tayler, the defendant, had concealed the fact of his liability to the Ranee under the decree and of the attachment of the estate in execution. The plaintiff stated that she had paid an adequate price for the estate, and that after the defendant, Mr. Tayler, had secured the entire purchase-money, and had conveyed the estate, and had put her in possession of it, the estate was publicly proclaimed for sale; that she intervened and objected to the sale, but that her claim as a purchaser was overruled on the 23rd February 1867; that the vendor, Mr. Tayler, having failed to satisfy the decree, she was compelled to pay the amount due under it in order to preserve the estate which she had purchased.

The following is a translation of the defence set up in the defendant's written statement put in on behalf of Mr. Tayler, and verified by Mr. Kelly, his agent. He says :—

"First.—On the principle that purchaser is bound to inform himself of all the advantageous and disadvantageous circumstances connected with the property he is going to purchase, plaintiff has no claim upon your petitioner in reference to the judgment-debt payable to Ranee Usmedh Koer, as numerous precedents of the Sudder Dewanny Adawlat and the High Court in support of this argument are extant.

Second.—If the plaintiff, without asking your petitioner and obtaining his concurrence, has, to *serve her own ends*, liquidated the judgment-debt due to Ranee Usmedh Koer, she cannot by any rule or regulation recover from your petitioner the money so paid.

Third.—At the time of sale, Mouzah Dargaon, in accordance with the proceedings of the Civil Court of Gya, dated 1st February 1866, A. D., and 13th February 1867, A. D., was attached and advertised for sale, and the plaintiff in full knowledge of the circumstances purchased the *mouzah*, and nothing was kept secret from her : on the contrary, the condition of the property was above board at the time of sale, and the plaintiff in full knowledge of all particulars, in whatsoever way acquired, purchased the property.

Fourth.—the plaintiff has purchased a most valuable property, namely, a property of the value of upwards of Rs. 88,000, for a small price of Rs. 55,000, and since she procured a property worth Rs. 88,000 for a trifling sum of Rs. 55,000, she raised no objection in reference to the decree money of Ranee Usmedh Koer, of which, in consequence of the attachment of Dergaon, she was undoubtedly cognizant, nor did she enter into any arrangements for the deduction of the amount, nor had she any document executed for her satisfaction: on the contrary, considering the bargain for Rs. 55,000, notwithstanding the payment of the decreed money, to be a cheap one, she forthwith upon securing the sale-deed paid up in a lump the whole of the purchase-money and took possession of the property. Under these circumstances, she has no reason whatever to complain, hence the suit brought by her is quite uncalled for. Your petitioner prays that for the ends of justice her claim may be dismissed."

Here let me remark that in the defence set up on the part of Mr. Tayler, no suggestion was made that the Ranee's attachment had ceased to have effect in consequence of the execution case having been struck off the file, or that the first attachment had been superseded by the second. The point was not alluded to, or even suggested : on the contrary, it was admitted that the estate was liable to be sold under the decree. The plaintiff, when she intervened and set up her purchase as a bar to a sale under the attachment, took the objection, but it was very properly overruled by the Judge in a very clear and decisive judgment, and the plaintiff satisfied the decree to save from sale the estate which she had purchased. That judgment was put in evidence in the suit against Mr. Tayler. It might just as well be contended that all the proceedings in a suit in this Court are nullified, and that the parties must commence *de novo*, if a case is for any reason taken out of the peremptory board. The point is too absurd for argument.

The suit proceeded, and the case was tried by Baboo Girish Chunder Ghose,

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the Principal Sudder Ameen of Patna, who laid down two issues:—

First.—Whether or not the plaintiff has the right to a refund of the amount of Rs. 11,381-13 6 paid by her in order to save the disputed property from sale, with interest claimed by her; or whether the suit is barred by the application of the maxim of *caveat emptor*?

Second.—Did the plaintiff know at the time of the purchase as to the property being attached by Usmedh Kower in satisfaction of a claim against the vendor? Did the vendor inform her about the said attachment when the negotiations were completed?

As to the first issue, the Principal Sudder Ameen found that, according to the legal maxim *caveat emptor*, a purchaser ought to exercise a proper caution in order to ascertain the amount and nature of the interest which he is about to buy; that if, without instituting proper and sufficient enquiries within his reach, he foolishly purchases any property in which the vendor's interest was not what it was represented to be, he will not be entitled to compensation for the loss he sustains for the defectiveness of title and quality of the property bought, for it is his own folly and laches not to use the means of knowledge within his reach. He then entered into the question whether the plaintiff had made due enquiries, and finding that she had not done so, he said she must be presumed to have purchased the estate with all faults, except as to the extent of the right of the vendor. He added:—

"It is contended that the fact of the attachment was fraudulently concealed, but there is no proof whatever to support the allegation. On the other hand, such a thing as the attachment, which was known to the world so far as the village was concerned, could not by any attempt on the part of the vendor be *industriously concealed*, for it was known to hundreds of people residing in the village sold. The attachment would be known in no time if a proper man had been deputed to make necessary enquiries on the spot. Therefore, the concealment, if it was one, was by no means fraudulent, and, unless fraud be proved, the contract could not be annulled; and had there been anything like fraud on the part of the vendor, the plaintiff would undoubtedly have come to the Court for the cancellation of the contract. As there was no legal fraud on the part of the vendor the cause of the complaint falls to the ground, and hence it is to be presumed that, with the liability existing on the property, the plaintiff has purchased the same."

He, therefore, ordered the suit to be dismissed with costs.

In the latter part of his judgment the Principal Sudder Ameen alluded to a contention on the part of the plaintiff that the execution case had been struck off the file and subsequently revived, and added:—

"Admitting her contention to be correct I see no force in it, for the simple reason that, in that case, she was not bound to pay the amount due to the decree holder; and in case the property was sold, she, as a third party, might have sued for the cancellation of the sale on the ground that there existed no attachment before the sale."

It is not very clear why such a contention should have been urged on the part of the plaintiff in the suit. It was her contention when she intervened and disputed the Ranee's right to sell under the attachment and probably there may have been some confusion as to the time at which such contention was put forward on her behalf. But it is not very material.

The result of that decision, if upheld, would have been that Mr. Tayler would have had his judgment debt satisfied by the plaintiff, and that she would have had no redress against him.

Mr. Tayler in his letters has cited from "Shakespeare," but he has not made any quotation from a "*New way to pay old debts.*"

The plaintiff appealed to the High Court from the judgment of the Principal Sudder Ameen; and amongst other grounds she urged to the effect—*first*, that the defendant could not take advantage of his own wrong; *second*, that the doctrine of *caveat emptor* did not apply to a case like this, in *which fraud was alleged as the cause of action*; *seventh*, that the very circumstance of the defendant's concealing the fact of attachment on decree was sufficient to show

a *fraudulent concealment*, as Mr. Tayler was well aware of such attachment, and sufficient to fix him with liability, unless he proves that the plaintiff purchased with knowledge and paid inadequate value, and *eighth*, that the case was not one of voluntary payment, for the recovery of the money was sought, not from the judgment-debtor, but from the vendor.

The appeal was heard in the First Bench before the Chief Justice and Mr. Justice Dwarkanath Mitter. The case was very fully and ably argued by Mr. Paul as Counsel on behalf of Mr. Tayler; the evidence on both sides was fully considered, and every attention and consideration was given to the case which it was in the power of the Court to bestow. It was very properly admitted on behalf of Mr. Tayler, for it could not possibly be denied, that the payment was not voluntary, and the Chief Justice was so fully satisfied of the plaintiff's right to recover upon the ground that she had been compelled to pay Mr. Tayler's debt in order to protect from sale, under the Ranee's decree, the estate which she had purchased from Mr. Tayler, that he did not consider it necessary to express any decided opinion upon the other points of the case, *viz.*, whether there was concealment or no concealment, fraud or no fraud. He says :—

"It appears to me that this is a very clear case. The plaintiff seeks to recover the sum of Rs. 12,406-7-0, which she paid on account of Mr. William Tayler in discharge of a decree which Ranee Usmedh Koer had recovered against him. It is almost unnecessary to consider whether the plaintiff was a volunteer in paying this money, or whether she paid it under compulsion, because it has been admitted by Mr. Paul, the learned Counsel of Mr. Tayler, that the payment was not a voluntary one.

"It appears that the plaintiff purchased an estate from Mr. W. Tayler for the sum of Rs. 55,000; that before the sale to the plaintiff that estate had been attached in execution of the decree; and that the plaintiff paid the amount of the decree and interest in order to prevent the property which she had purchased from being sold in execution. It is said by Mr. Tayler that although the property was sold for Rs. 55,000 it was worth a great deal more; and in proof of that assertion he has called a witness, who, if he is to be believed, has shown that Mr. Tayler's estimate of the value was very much under the mark, inasmuch as the estate was worth two lakhs. I do not believe the evidence of that witness. It is improbable that he, acting as the agent of Mr. Tayler, would have sold for Rs. 55,000 a property which was worth two lakhs; but whether it was worth Rs. 55,000, Rs. 88,000, or two lakhs, is wholly immaterial for the decision of this case.

"By section 235 of the Code of Civil Procedure, when property is to be attached in execution of a decree, the attachment is to be made by a written order prohibiting the defendant from alienating the property by sale, gift, or in any other way, and all persons from receiving the same by purchase, gift, or otherwise; and by section 240 of the same Act, it is enacted that when any attachment shall have been made by actual seizure, any private alienation of the property attached, whether by sale, gift, or otherwise, shall be null and void.

"Mr. Tayler, therefore, must, before he sold the property, have been served with an order from the Court prohibiting him from alienating it. He must have been fully aware at the time of the sale that any sale by him would be liable to be defeated by the decree-holder.

"Several witnesses have been called on the part of the defendant, and have proved that the plaintiff at the time that she purchased the estate was aware of the attachment. Enayut Hossein swore that he informed the husband of the plaintiff of the attachment at the time of the execution of the deed of sale. Shaik Ensoof Hossein swore that Enaynt Hossein told the husband of the plaintiff in his presence in the house of Wilayat Ali Khan, where the consideration money was paid; and yet Enayut Hossein, who was acting for Mr. Tayler in selling the property, upon cross-examination, stated that he did not remember at what place he told Ahmedoollah about the lien. Ahmedoollah, on the other hand, swears that he never knew of the attachment and if it were necessary to decide upon the conflicting testimony of the witnesses in the cause, I should have little hesitation in deciding that the plaintiff, at the time of the payment of the purchase-money, was not aware of the attach-

ment. It is hardly likely that, if she had been aware of the attachment, something would not have been said upon the subject. Enayut Hossein, who, according to his own evidence, took the precaution of telling Ahmedoollah about the attachment, swears that he was acting for both parties; and yet, according to his evidence, nothing appears to have been said at the time of the sale as to whether the plaintiff, in consequence of her being allowed to purchase the estate for what Mr. Tayler calls the trifling sum of Rs. 55,000, was to take upon herself to discharge the debt which Mr. Tayler owed the Ranee. Even supposing the plaintiff made a good bargain in buying this estate for Rs. 55,000, there was no obligation on her part, because she got the estate cheap, to pay Mr. Tayler's debt.

"If it had been intended that she was not only to pay the Rs. 55,000 to Mr. Tayler, but was also to pay off the debt which Mr. Tayler owed to the Ranee, the purchase-money would have been stated, as suggested by Mr. Twidale, to be the Rs. 55,000 and the amount of the debt added; and part of the purchase-money would have been paid to the decree-holder in satisfaction of her decree. It is clearly beyond all doubt that the plaintiff has paid Mr. Tayler's debt; that she was under no legal obligation to pay that debt as between her and Mr. Tayler; that she did not pay the debt voluntarily, but under compulsion, to save the estate which she had purchased, and for which she had paid, from sale in execution of the decree; and under the ordinary rules of law, of justice, and of equity, Mr. Tayler, who has had the benefit of having his debt discharged by the plaintiff, would be bound to repay the amount. Even if the plaintiff knew that Mr. Tayler owed the money, and that the estate had been attached, that fact would make no difference, unless she came under an obligation to Mr. Tayler to pay off that debt in consideration of his allowing her to have the estate for Rs. 55,000; yet Mr. Tayler contends that, because she got the estate cheap, she was bound to satisfy the decree against him. I see no reason to believe that Mr. Tayler would have sold the estate to the plaintiff or to any one else for Rs. 55,000 if he could have got two lakhs, or even Rs. 88,000 from any other person. This lady was no more bound, without a contract, to pay Mr. Tayler's debt, because she got the estate for Rs. 55,000, than she was to repay Mr. Tayler the difference between Rs. 55,000 and Rs. 88,000, the amount at which he now values it, or the two lakhs at which it was valued by his agent.

"In the case of *Exall* v. *Partridge* (2), which was decided on the principles of justice, applicable as much in the Mofussil as they are in England, it was held that where the goods of a stranger were on the premises of another person and were distrained by the landlord for rent in arrear, and the stranger was obliged to pay the rent in order to redeem his goods, he might recover the money paid from those who owed the rent.

"It was said by one of the Judges that 'the plaintiff could not relieve himself from the distress without paying the rent. It was not, therefore, a voluntary, but a compulsory payment. Under these circumstances, the law implies a promise by the three defendants to repay the plaintiff.'

"Another of the Judges said, 'one of the propositions stated by the plaintiff's Counsel certainly cannot be supported, that whoever is benefited by a payment made by another is liable to an action of assumpsit by that other, for one person cannot, by a voluntary payment, cause an assumpsit against another; but here was a distress for rent due from the three defendants, the notice of distress expressed the rent to be due from them all, the money was paid by the plaintiff in satisfaction of a demand on all, and it was paid by compulsion. Therefore, I am of opinion that this action may be maintained against all the three defendants.'

"Here, then, was a debt of Mr. Tayler's paid under compulsion by a person who was under no obligation to pay it, and the plaintiff is entitled to recover the amount. It is unnecessary, therefore, to consider or to decide whether there was any fraudulent concealment on the part of Mr. Tayler of the fact that the estate had been attached, or to enter into the question whether the recital in the deed amounted to a covenant that Mr. Tayler had power to sell.

"The legal maxim *caveat emptor* has been misapplied. It is wholly inapplicable, and

(2) (1799) 8 T. R. 308; 101 E. R. 1405.

has no bearing whatever upon the present case.

"The Principal Sudder Ameen says that 'the concealment, if it was one, was by no means fraudulent,' but I feel at a loss to understand what notions the Principal Sudder Ameen entertains of fraud, when he holds that if a gentleman sells an estate which he knows has been attached under a decree against him, and conceals the fact from the purchaser, and receives the purchase-money, the concealment is one which does not fall within the class of fraudulent.

"Cases have been cited to show that if an execution case is struck off the file, the attachment which has been made under the execution necessarily falls to the ground.

"Section 245 of the Code of Civil Procedure enacts, that 'if the amount decreed with costs, and all charges and expenses which may be incurred by the attachment, be paid into Court, or if satisfaction of the decree be otherwise made, an order shall be issued for the withdrawal of the attachment; and if the defendant shall desire it, and shall deposit in Court a sum sufficient to cover the expense, the order shall be proclaimed or intimated in the same manner as hereinbefore prescribed for the proclamation or intimation of the attachment, and such steps shall be taken as may be necessary for staying further proceedings in execution of the decree.'

"I find no authority in Act VIII of 1859 for saying that an attachment is at an end if the execution case is struck off the file; and, therefore, if it became necessary to decide upon that point, I should refer the case to a Full Bench.

"No one, I presume, will contend that if a Judge finds that he has struck off an execution case improperly, he cannot restore it to the file, but that the case must proceed *de novo*. In this case, according to the statement, which must be taken all together, 'the execution decree case had been for a time struck off the register when the sale took place, and subsequently the case was revived, when a sale-proclamation issued, on which the plaintiff preferred a claim, and on the claim being rejected, she paid the amount for which the property had been attached.'

"There has been no case cited which goes to the extent of holding that if an execution case is struck off the file, and a proclamation issued upon the attachment which had issued before the case was struck off, the sale would be subject to all incumbrances created by the debtor between the time the attachment was made and the time the property was sold, on the ground that the effect of the attachment was destroyed for ever by striking the case off the file. Though not expressly in point, the case of *Rajah Muhesh Narain Sing* v. *Kishanund Misr* (3) has a strong bearing upon the point.

"For the above reasons, it appears to me that Mr. Tayler is bound to refund the money which the plaintiff was compelled to pay, and did pay, in order to save the estate, which she purchased and paid for from being sold under the execution."

Mr. Justice Dwarkanath Mitter said (and this is the principal grievance of which Mr. Tayler complains in his letters to the Editor of the *Englishman*)—

"I entirely concur. I feel no hesitation in holding that the plaintiff is entitled to recover, both upon the ground that she has paid a debt due from Mr. Tayler to Ranee Usmedh Koer when she was under no obligation to pay it, as also upon the ground that a fraud has been perpetrated against her by Mr. Tayler in concealing from her the fact that the estate sold by him to her was under attachment in execution of a decree of Court. I should have been extremely sorry if the state of the law were otherwise."

The finding that there was a fraudulent concealment was upon a point raised in the suit and in the grounds of appeal, and one upon which evidence was gone into on both sides.

For pronouncing this judgment upon a point in issue, the learned Judge, as will be presently seen, is charged with "wanton insult and unfounded aspersion." He is charged with having done that for which a District Judge would probably have been suspended. But the charge was made in letters in which the real facts under which the judgment was pronounced were artfully, and I may say wilfully, concealed by Mr. Tayler; and a new state of facts, which was untrue, and which, if true, had never

(3) (1862) 1 Suth. P. C. J. 488; 9 M. I. A. 324; 1 Sar. P. C. J. 862; 19 E. R. 764.

been set up as a defence in the suit, or ever brought to the notice of the learned Judge, was substituted. Mr. Tayler must have known, and I will prove out of his own mouth that he did know, that upon the facts, as they appeared at the time when Mr. Justice Dwarkanath Mitter pronounced his judgment, there was not the slightest ground for complaint. It was not because the Chief Justice felt so confident of the plaintiff's right to succeed upon another point, and abstained from finding upon the issue of fraud, that Mr. Justice Dwarkanath Mitter was not at liberty to express his opinion upon that point, which was directly in issue, without subjecting himself to such charges as those which Mr. Tayler has preferred against him in his letters. As well might a juryman be charged with wanton insult and unfounded aspersion for pronouncing, upon evidence before him, a verdict of guilty against a man tried upon a charge of theft or embezzlement. The case was one appealable to Her Majesty in Council, and even if it had not been so, it would have made no difference.

Judges, although they may agree as to the judgment which ought to be given in a particular case, do not always agree in the reasons for arriving at that conclusion, or one Judge may have an additional reason, upon which the other has not expressed his opinion. There is no reason why a native gentleman, who by his abilities has raised himself to the Bench of the High Court, is to be maligned and slandered because he has the independence to express an opinion of his own, or even to differ from the Chief Justice. What would become of the independence of Judges if this were to be allowed?

Mr. Tayler says that this dishonoring and unmeasured imputation, judicially cast upon him by Mr. Justice Dwarkanath Mitter, has been recorded by him without one tittle of evidence to support it; that it is wholly untrue and manifestly absurd. But, if he was dissatisfied with the finding, he could have appealed to Her Majesty in Council, for the case was an appealable one, and it is not too late to appeal even now. But Mr. Tayler knew full well that, if he appealed to Her Majesty in Council, he must have appealed upon the case as it stood when the Judge pronounced his judgment. He, therefore, preferred to appeal to the Editor of the *Englishman*, and through him to the public, and to rest that appeal upon a false state of facts and a dishonest concealment of the real one.

No one reading the letter of the 7th of April could have imagined that Mr. Justice Dwarkanath Mitter's judgment was a finding upon an issue in the case founded upon what he honestly believed to be the weight of evidence given on both sides. If Mr. Tayler had honestly intended to criticise the judgment, with reference to the evidence given in the cause, he might have done so without objection: he might have set the evidence and commented upon it, so that those who read the criticism might have been able to form their own judgment as to his conclusions.

I now pass from the charge against Mr. Justice Dwarkanath Mitter in reference to his original judgment to the charge brought against him in respect of his refusing to retract upon review.

Here let me again point out that throughout the whole of Mr. Tayler's so called criticism he treats Mr. Justice Dwarkanath Mitter's finding upon a material issue in the cause as a gratuitous, uncalled-for aspersion, and as a wanton insult which he could retract at pleasure. But this is not so. Mr. Justice Dwarkanath Mitter had expressed his judgment upon a material point in the case, and he could not, without granting a review, retract it. The finding had been come to and the judgment had been recorded. The case was one which might have been appealed by Mr. Tayler to Her Majesty in Council, and the plaintiff would have been entitled to have the finding returned with the record.

The case set up by Mr. Tayler in review was, like the case set up in his letters, entirely different from that which had been set up or even suggested on his behalf in the lower Court.

In the lower Court it was admitted in the 3rd paragraph of the written statement that at the time of sale the estate was attached under proceedings of the Civil Court of the 1st February 1866 (now

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said Mr. Tayler to have been at an end by the striking of the case off the Judge's file) and of the 13th February 1867 (the attachment stated in Mr. Tayler's letter of the 13th April 1869 to have been discovered by him only within the last two days), and the contention then was that plaintiff purchased with full knowledge of the first attachment; that she bought for Rs. 55,000 an estate which was worth Rs. 88,000; that she paid off the decree against Mr. Tayler to serve her own ends, and that the maxim *caveat emptor* applied.

In the petition for review, the case set up was, that in Mr. Tayler's belief the attachment had been *ipso facto* withdrawn before the sale, by reason of the case in execution having been struck off the file in consequence of the Ranee's having neglected to furnish security in pursuance of an order of the High Court, and that Ahmedoollah was aware of the fact when the sale was completed.

Mr. Tayler said:—

"Your petitioner, having just returned to India, has read, he need not say, with pain and mortification the decision of the High Court in the case of *Musammat* Zuhoorun passed on the 19th November 1868.

"Your petitioner cannot reasonably demur to the decision, based as it is on the defence set up by his native Mookhtear, and supported by the evidence which he has volunteered in the case.

"All your petitioner now desires to do is to inform the Court that the statement put in and the evidence given by Enayut Hossein and his creatures are totally false, made and given without the approval, concurrence, or knowledge of your petitioner, and in direct opposition to the instructions given by your petitioner to Enayut Hossein before his departure from India.

"When the High Court is informed that Enayut Hossein is now in the criminal jail, convicted of fraud and embezzlement against your petitioner, and that your petitioner himself has been compelled to come out to India at great loss and inconvenience principally for the purpose of counteracting his nefarious proceedings, it will without difficulty appreciate your petitioner's position."

He then proceeded to state what he called the facts of the case, to the effect that the Ranee attached the estate in February 1866, under the decree; that being about to appeal to Her Majesty in Council, he obtained an order from the High Court that she should be required to give security before execution; that the Ranee not having complied with the order, the decree case was struck off the file; that whatever might have been the strict legal consequence of that order, he confidently believed that it necessarily involved the withdrawal, *ipso facto*, of the attachment; that he truly and conscientiously believed that no obstacle existed to the absolute sale of the property; that he gave instructions to his agent to sell it; that negotiations for sale were carried on for several months, and were finally concluded at nearly the end of the year, when the sale was completed, the deed registered, and possession given, *the Ranee having during the whole of that period failed to comply with the Court's order*, and the attachment being still, as generally believed, removed; that he heard nothing more until a few days before he left India, when Enayut Hossein informed him that the estate had been brought to sale, and that *Ahmedoollah had paid the amount of the decree*; that in the meantime a correspondence had been going on between Enayut Hossein and the Ranee's Dewan, and that the latter had proposed a compromise of the decree on a cash payment of Rs. 6,000 or Rs. 7,000; that when Mr. Tayler heard that Ahmedoollah had, without the slightest intimation or reference to him, paid the full amount, and thus, for his, Ahmedoollah's own, benefit deprived Mr. Tayler of the advantage of the reasonable compromise just about to be concluded, he instructed Enayut Hossein to represent the circumstances to Ahmedoollah and effect an amicable compromise with him, if possible, for the amount which, but for the sale under the decree would have been effected with the Ranee; *that he never disputed nor wished to dispute his liability for the payment made.*

He then went on to say that he left a few days afterwards for England; that when some months afterwards he heard that an action had been brought against him, not then having reason to distrust Enayut Hossein, he concluded that, if he defended the suit at all, it would only be

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to the extent of the equitable plea above mentioned *according to the instructions received*; that it was impossible to divine for what purpose Enayut Hossein put in the false and dishonest statement on which the High Court had commented; but he positively asserted that both himself and, to the best of his belief, Ahmedoollah and the numerous other persons cognizant of the lengthened negotiations *were all under the conviction that the attachment had ceased*, and everything was concluded with the greatest openness and publicity; that Ahmedoollah, the purchaser in his wife's name, to the best of his belief, had the same conviction, being, as he believed, perfectly aware of all that had passed; that Enayut Hossein's statement as to the attachment, the value of the estate, *and the information said to have been given to the purchaser, as well as his plea as to the non-liability of Mr. Tayler, were totally and wickedly untrue.*

He prayed that the Court would accept his statement, which he was prepared, if required, to substantiate on oath, and relieve him from the harsh and dishonoring animadversions which it had recorded—a modest request certainly, when in the petition he accused Enayat Hossein of perjury and with having misrepresented to Mr. Kelly, Mr. Tayler's own agent, the effect of the written statement which Mr. Kelly had verified upon oath; and when the petition stated, in direct contradiction of Ahmedoollah's evidence given in the cause upon oath, that he, Ahmedoollah, was to the best of Mr. Tayler's belief fully cognizant of all that had passed, and was under the same conviction as he that the attachment had ceased.

In his petition and in his affidavit he declared that it was not his intention to dispute his liability for the amount paid. He stated that he directed Enayut Hossein to endeavour to compromise with the plaintiff if he could. He does not state what instructions he left with Enayut Hossein as to the defence to be set up if the plaintiff should refuse to compromise, but merely that, when he heard that the action had been brought, he considered that if Enayut Hossein *defended at all* it would only be to the extent of the equitable plea above mentioned according to the instructions received. This was explained by an additional affidavit, in which he swore that he believed that the only plea which he would ever have allowed to be advanced on his behalf was, that a compromise had been agreed to by the Ranee's Dewan for a sum (as far as he could remember) of Rs. 7,000, and that the plaintiff, by paying the full amount of the decree, without notice, had deprived him of the benefit of the compromise. He also annexed extracts from a correspondence between himself and Mr. Kelly.

In one of the letters to Mr. Kelly he appears to have said :—

"I certainly would not pay Amedoollah more than Rs. 7,000, which is the sum I should in all probability have been able to compromise with the Ranee for. He had no right to pay the money on his own authority and without my concurrence, and thus entail on me a liability to the whole without compromise and without the time which the Court would undoubtedly have given me. So if he does not accept this, let him bring his action. But in this matter also, you had better exercise some discretion in consultation with Enayut Hossein and Wilayut Ali."

That letter is dated 3rd May 1867. The plaintiff's suit was not brought before the 3rd December following. Though Mr. Kelly and Mr. Tayler both made affidavits, not one syllable was stated by either of them as to any offer of compromise having been made to the plaintiff. All Mr. Kelly swore upon that subject was, that if there had been a compromise he had funds in hand sufficient to pay Rs. 7,000 or 8,000 to the purchaser.

That no compromise had ever been effected with the Ranee is clear from her proceeding with the execution without any attempt on the part of Mr. Tayler to prevent it. It is clear that no compromise was made with the plaintiff, from the fact that her suit was afterwards brought, and no such compromise was set up as a defence.

The only defence that Mr. Tayler could have set up under these circumstances was, that the attachment was not in force when the sale took place. If he had made that defence, he might have dictated his own terms, for in that case

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the plaintiff had paid in her own wrong; and no doubt Mr. Tayler would have set up that defence and dictated his own terms, if he had believed that the attachment was not in existence when the sale took place, or that it was superseded by the second attachment; but no such defence was suggested by him either to Enayut Hossein or to Mr. Kelly in any one of his letters. It is also to be remarked that nothing is said either in the petition or in the affidavits as to whether any and what consultation ever took place between Mr. Kelly, Enayut Hossein, and Wilayut Ali, as recommended in Mr. Tayler's letter of the 3rd May 1867,

Mr. Tayler was heard in support of his petition for review, and on the 13th of March 1869 the following judgments were delivered. The Chief Justice said:—

"It appears to me that there is no ground for reviewing the judgment. I have read very carefully the judgment which I delivered in this case, and I see nothing in it which I can retract. I did remark upon the judgment of the Subordinate Judge, but I abstained from expressing any opinion as to whether there was any fraudulent concealment on the part of Mr. Tayler."

Mr. Justice Dwarkanath Mitter said:—

"I am of opinion that this application ought to be refused.

"It is not contended that the remarks made by me in the judgment, which is now sought to be reviewed, were not warranted by the evidence then before me, nor is it contended that the decree which followed upon that judgment is in any respect contrary to law or justice. But it is urged that the written statement put in on behalf of the petitioner, and the evidence adduced in support of it, were all concocted by one Enayut Hossein, the native agent of the petitioner, contrary to the instructions expressly given to him by the petitioner, and I have been accordingly asked to withdraw certain remarks which I had made with reference to the conduct of the petitioner, as disclosed by the evidence on the record which I had before me when I heard the appeal.

"I do not think that an application of this sort, which does not ask for any substantial interference either with the judgment or the decree which followed upon it, can be legitimately treated as an application for review, and on this ground I decline to entertain it.

"I wish to add, however, that I should not be justified in withdrawing the remarks in question upon an *ex parte* proceeding of this kind. Enayut Hossein is not before the Court, and so far as the plaintiff is concerned, she is in no way interested in opposing this application, inasmuch as the petitioner is not seeking for any interference with the decree which has been passed in her favour.

"I express no opinion whatever as to the correctness or otherwise of the statements contained in the affidavit filed by the petitioner. I can only say that if the charges brought against Enayut Hossein are true, the petitioner ought to prosecute him upon those charges; and I have no doubt that such a prosecution, when brought to a successful termination, would be a sufficient vindication of his character. As matters stand at present, I cannot, upon an *ex parte* application like this, hold Enayut Hossein guilty of the serious offence with which he has been charged by the petitioner, and this I must do before I can withdraw the remarks in question.

"I wish further to add that I am by no means satisfied with the explanation given by Mr. Kelly with reference to the verification of the written statement. Mr. Kelly says in his affidavit, 'I received from Mr. Tayler a letter, dated from London the 17th April 1867, and another dated from the said place the 3rd May of the said year, and in these two letters were contained instructions for the settlement of the claims of *Musammat* Zuhuroonnissa, and the purport and substance of these instructions were communicated by me to the said Enayut Hossein. When the suit of *Musammat* Zuhuroonnissa was brought, the written statement on the part of Mr. William Tayler was prepared by the said Enayut Hossein, and was represented to me as being in conformity with the purport and substance of the instructions of Mr.

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William Tayler in the said matter, and upon this assurance I verified the written statement.'

"In the first place I remark that the affidavit does not disclose the precise instructions which Mr. Kelly gave to Enayut Hossein in case he, Enayut Hossein, should fail to bring about an amicable settlement, nor does it appear that the letters referred to are very clear on the point. But be that as it may, it appears to me that Mr. Kelly was in no way justified in verifying the written statement in question merely upon a general assurance from Enayut Hossein that it was prepared 'in conformity with the purport and substance of the instructions of Mr. Tayler.' When a gentleman puts in a verified written statement, it is his bounden duty to satisfy himself, by every possible means in his power, that every allegation which is contained in that written statement is in strict conformity with truth; and it is no excuse whatever for him to say that he is ignorant of the language in which the written statement was drawn up, or that he was generally assured by some one else that everything stated therein was in conformity with his instructions. It may be that Mr. Kelly was misled by Enayut Hossein; but without expressing any opinion upon this point, one way or the other, I do not feel the slightest hesitation in saying that, upon his own showing, the explanation offered by Mr. Kelly is altogether unsatisfactory.

"I reject this application."

Before those judgments were pronounced, the Chief Justice and Mr. Justice Dwarkanath Mitter consulted together upon the subject of Mr. Tayler's application for review. I pointed out to Mr. Justice Dwarkanath Mitter that I did not see how he could revoke his finding upon the issue of fraudulent concealment without virtually expressing his opinion, behind the back of Enayut Hossein, of the charges brought against him by Mr. Tayler in his petition and affidavits. I fully concurred with my honourable colleague in the course which he proposed to adopt, and which he did adopt, in the judgment which I have read.

Without setting out the judgment, or even stating the nature of his reasons, Mr. Justice Dwakanath Mitter is charged with having, on the narrowest grounds of technicality, refused to retract an unfounded and unjustifiable accusation and a slander recorded against an absent suitor without one tittle of evidence to support it; and this though the accusation had been clearly disproved. If this is fair criticism, I confess I do not understand what fair criticism is.

Mr. Tayler, in his affidavit put in on Tuesday last, swears that the several letters written by him were written for the sole and single purpose of removing the stigma which attached to his name in consequence of the remark recorded by Mr. Justice Dwarkanath Mitter, and to prove, by a searching criticism before the public and his friends, that the facts of the case did not warrant such inference. If that is true, Mr. Tayler has far exceeded the means necessary for the end.

To show the animus with which the letters were written, I proceed to read them.

They are all artistically framed; and, like the chapters in some novels, each is headed with a quotation to give some short general idea of what is coming. Some of the insinuations are artfully penned, but there can be no doubt that they are defamatory. It is plain who are the persons alluded to, and what is the meaning, and to quote the words of Lord Hardwicke in a similar case [*The St. James's Evening Post case* (4)] of contempt—

"As a Jury, if this fact was before them, could make no doubt, so, as I am a Judge of facts, as well as law, I can make none."

The first letter, that of the 7th April, begins with a quotation from Shakespeare—

"My reputation, Iago, my reputation."

Othello.

"TO THE EDITOR OF THE ENGLISHMAN.

"SIR—I was in hopes that, long ere this, I might have sent you for publication the proceedings of the High Court in the matter of my application for a review of judgment in the case in which Mr. Justice Dwarkanath Mitter did me the honour to record that I had 'perpetrated a fraud;' but as I have not yet been able to obtain authenticated copies, I do not wish to delay any longer the remarks which I consider myself called

(4) (1742) 2 Atk. 469 at p. 470; 26 E. R. 683.

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upon to make in justice to myself in regard to this *insulting*, and as I shall show, *utterly unjustifiable*, *charge*.

"Condemnation or censure passed by a Court of Justice on a suitor (if without sufficient ground or reason) is the most mischievous, the most intolerable of slanders. The Judge on the Bench, like the Parson in the Pulpit, has it all his own way for a time; but the Preacher attacks man in general, the Judge deals with the individual. General condemnation hurts no one. Individual censure may be ruin to the object of it.

"I now purpose to show, and that by *clear and unanswerable evidence*, that this dishonoring and unmeasured imputation judicially cast upon me by Mr. Justice Dwarkanath Mitter *has been recorded by him without one tittle of evidence to support it; that it is wholly untrue and manifestly absurd; and I beg you to observe that the learned Judge who placed it on record has not condescended to give one single reason, ground, or argument in support of his denunciation.*

"*If a District Judge had so acted, he would in all probability have been suspended*, or, at all events, subjected to some such ordeal as Mr. Beaufort underwent not long ago! Whether elevation to the Bench of the High Court carries total exemption from responsibility with it remains to be seen."

This is a distinct charge, that the learned Judge had been guilty of such conduct that if he had been a District Judge he would in all probability have been suspended; but where is the promised clear and unanswerable evidence to support it? It not only asserts that the Judge's conduct was such as to justify suspension, but Mr. Tayler declared that it remains to be seen whether, in consequence of his high position, he will be exempt from responsibility by Government. There was a charge sufficiently grave to justify the Secretary of State in calling for explanation. Was the learned Judge to wait, or immediately to vindicate his honour and his character?

The letter proceeds:

"The facts of the case, as far at least as they regard this judicial insult, lie in a nutshell."

Mr. Tayler then proceeds to detail the facts, not as they appeared on the record, on which alone the Judge had to decide, but upon Mr. Tayler's statement. He says:—

"In October 1866, I sold an estate then in my possession in the Gya District for Rs. 55,000 to one Ahmedoollah, an old Patna Vakeel, who purchased it in the name of his wife. Nine months after the sale, this estate had been attached by the *delicious old maid of Ticaree* under the decree which, to her utter amazement and bewilderment, she obtained from the Hon'ble Justices Loch and Norman for Rs. 12,000—a decree which robbed me of the hard earnings of a year."

I shall have occasion in another place to refer to this description of the Ranee. I merely ask here, was it necessary for the vindication of Mr. Tayler's character in this matter under consideration? But what was the meaning of the assertion that she obtained that judgment to her utter amazement and bewilderment? What was the meaning of describing the decree as one which had robbed him of the hard earnings of a year? Could any other meaning attach to those words than that the decree was an unjust one? Was it necessary for the vindication of Mr. Tayler's character, with reference to the question whether he had fraudulently concealed the attachment from a purchaser of the estate, to enter into the merits of the decree under which that estate was attached? I should have thought that Mr. Tayler would have been glad to allow all questions as to that decree to be buried in oblivion; for, notwithstanding the Judges did on review, and upon reading a deposition of Mr. Tayler which had been taken irregularly and was not before the Court on the first hearing of the appeal, withdraw certain remarks which reflected seriously upon Mr. Tayler's character, still the ugly fact remained that Mr. Tayler endeavoured in a certain suit against the Ranee, his former client, to enforce payment of a bond which he had obtained improperly from her, and by the doctrine of estoppel to bind her to certain untrue statements which had been introduced into the bond.

Mr. Justice Norman in that case made the following remarks:—

"Mr. Tayler, however, raises the issue that his client is estopped by the admission

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in the bond. There cannot be a greater mistake. Mr. Tayler stood towards the Ranee in a fiduciary position as her confidential legal adviser." And again—"We think Mr. Tayler is not entitled to recover on the bond, and it must be set aside as improperly obtained from his client."

The attempt made by Mr. Tayler in that suit to pervert justice by a misapplication of the doctrine of estoppel was not unlike the attempt which was made by him in the suit brought by *Musammat* Zuhoorun to pervert justice by a misapplication of the maxim *caveat emptor*. And here I may ask why, if Mr. Tayler believed that the decree passed by Justices Loch and Norman was unjust or erroneous, did he not proceed with his appeal which he preferred to the Privy Council, and which he withdrew before the date of this letter?

The letter continues:—

"After this attachment, she was required by the High Court to give security before her decree was executed, and on failing to comply with the order, *the case of execution of decree was struck off without reservation.* Some time after this, I gave directions for the sale of the estate. The negotiations were conducted with the utmost publicity by my agent while I was at Simla. They were carried on for months together, and finally completed nine months after the case had been struck off."

This allegation not only contains a false fact, but suppresses the truth. It is false as regards the statement that the attachment was struck off for default of the Ranee. It is a suppression of the truth, inasmuch as the facts stated were not those upon which the Judge decided, and the validity of the attachment, or of the Ranee's right to sell the estate under it, had never been disputed or set up as a defence by Mr. Tayler.

It is not necessary to decide that Mr. Tayler, when he wrote in this letter that the decree had been struck off for default of the Ranee, stated what he knew to be false, but it is a very remarkable fact that it was made after the Judge in his judgment in the intervention case had declared that the case was not struck off for default of the Ranee, and that the precedent which had been cited by the Pleader to show that the attachment was invalidated by the striking the case off the file was applicable only to a case in which the decree is struck off owing to the negligence of the decree-holder. That judgment having been filed as part of the evidence in the suit against Mr. Tayler, that gentleman in his letter brings his case within the rule by the false statement that the decree was struck off in consequence of the Ranee's having failed to comply with the order that she might give security.

It will make the case clearer if I now read the Judge's judgment in the intervention suit, which was put in as evidence in the suit brought by the purchaser against Mr. Tayler, and compare it with these assertions of Mr. Tayler:

"To-day this case came on for hearing in the presence of the Pleaders for both parties, and the papers of the case have been taken into consideration. The particulars of this case are as follows:—

"On the 27th January, 1866, Ranee Usmedh Koer filed a petition for execution of decree, with a view to realize the costs and interest payable to her under the decree of the High Court, dated 29th April 1865, by Mr. William Tayler. At that time she also submitted a schedule of the properties which she intended to attach, that is to say, a schedule of sixteen annas of *mokuraree* right in Mouzah Dargaon in Pergunnah Sumai. On the 1st February 1866, an order for attachment was passed by this Court, and also the usual processes were issued and the estate was attached on the 9th March 1866. An order was sent by the Court to the effect that the decree-holder should show cause within two weeks, why the execution of decree should not be postponed if the judgment-debtor would find sufficient security until the appeal preferred to the Privy Council shall have been decided. On the receipt of the order afore alluded to, this Court passed an order, to the effect that the execution proceedings should be postponed for the time. Also on the 13th March at the time of the transmission of the return to the superior Court, this Court made this order, that the proceedings for execution of decree should be struck off

from the files of pending cases. On the 29th May 1866, an order was received from the High Court, purporting that in the event of tender of sufficient security, the decree in favour of the decree-holder might be executed In obedience thereto, the case for execution of decree was again numbered on the file. On the 7th December 1866, the security tendered by the decree-holder was admitted, and the property having been again attached, the 2nd February 1867 was fixed for another sale. On the 13th February 1867 *Musammat* Zuhoorun, the objector, filed a petition praying that the property attached might be exempted from sale, because she having purchased the property in dispute under a deed of sale of 11th October 1856 had been in possession, and the purchase in question took place before the second attachment.

"In this case the point for trial is whether the order of this Court in the matter of striking off the case for execution of decree for the time being from the file of pending cases can be prejudicial to the previous attachment, and render the same null and void.

"The opinion of the Court is, that an order, like the one passed by this Court, cannot be prejudicial to the interest of the decree holder under the circumstances of the case, and with reference to the fact that the proceedings in execution of decree were thrown out for a short time and no default was committed by the decree-holder in carrying on the case. Hence, as the decree holder has furnished sufficient security, and the case for execution of decree has been numbered on the file by order of the Court, the parties to this suit have been placed in the same position in which they were at the time of the striking off of the case for a short time. Hence the Court finds that the first attachment has been in existence and in *status quo*. The precedent relied on by the Pleader for the objector, of 3rd May 1855, page 221, can be applicable to a case in which the execution of decree is specially struck off the file, owing to the negligence and default of the decree-holder. Hence, believing that the first attachment did not become null and void, and as the first attachment had taken place prior to the purchase made by the objector, the Court does hereby order that the objection be rejected, and the property attached be sold by auction for the realization of the money decreed."

The letter goes on:—

"Now I ask you, and through you the public, the whole service to which I had the honour to belong, and with which I am still connected by so many ties, and finally I ask the Hon'ble the Chief Justice and the Judges of the High Court to say what was the fraud which I perpetrated in thus disposing of my property?"

I will answer the question. The fraud consisted, not in selling the estate, but in selling it without informing the purchaser of the attachment, receiving the whole purchase-money from her, leaving her subject to have her estate sold under that attachment, and when she had been obliged to satisfy the decree in order to save her estate from sale, refusing to pay her the money which she had so paid, and of which Mr. Tayler got the benefit in satisfaction of the decree, and setting up the doctrine of *caveat emptor* and other similar sham defences. Mr. Tayler was not so innocent as not to know that the fraud charged was not the simple fact of his selling his property.

The letter further says:—

"Is it not, and has it not for years passed been the unvarying custom throughout the District Courts to consider an attachment dead when an execution case has been struck off the file? Will Mr. Justice Dwarkanath Mitter dispute this?"

This question has already been answered by the Judge of Gya, who held that striking off an execution case does not invalidate an attachment unless the case is struck off for default of the decree-holder. The facts in this letter, as stated, bring the Ranee's attachment directly under this category; but they are false, as has been already shown.

Mr Tayler's letter proceeds:—

"On what ground, then, on what evidence, did this Judge in the first instance record this grave accusation? Not on the evidence of Enayut Hossein, my native agent, for *his* evidence was set aside by the Court as unworthy of trust."

Enayut Hossein's evidence was disbelieved as to the fact that the purchaser was in-

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formed of the attachment, and that the amount of it was fixed at Rs. 14,000. The concealment was proved by Ahmedoollah and the other witnesses produced by the plaintiff.

Further the letter goes on:—

"Whatever may have been the dishonesty of his pleading and answer to the suit, where were the materials to justify the charge that I perpetrated a fraud in selling my estate in October 1866?"

Mr. Tayler must know that that was not the charge, and that the fraud alleged consisted of his suppressing the fact of the attachment.

The letter proceeds:—

"And if the original charge is thus shown to be without reason, ground, or evidence, what will be said when it is known that after the solemn affidavits taken by me before the Court, and the full proof I have given of my entire blamelessness in the matter, Mr. Justice Dwarkanath Mitter refuses, on grounds of the narrowest technicality, to expunge his remarks, and tells me that a criminal prosecution against my native agent, if conducted to a successful termination, will be a complete vindication of my character. (I quote from memory of what he said at the time)."

Here again the judgment and the reasons for it are suppressed. I cannot understand what Mr. Tayler's notions of justice are, if he holds that a refusal to act upon a charge of perjury against a man behind his back is a matter of the narrowest technicality.

Mr. Tayler proceeds:—

"I should certainly have thought that a Judge, endowed with those high qualifications which are generally believed to be essential to the due discharge of his duties, would have gladly seized the opportunity, when he found that he had unwittingly and unjustly slandered an absent suitor, to retract his words and expunge them from the record, instead of referring me to a process not only of doubtful issue, but which is actually impracticable in execution, for there is no criminal charge which could be framed against my agent in this case. He cannot be indicted for perjury without the express sanction of the Civil Court. He cannot be charged with false verification because he induced Mr. Kelly, my English agent, to verify the statement put in on his behalf. He certainly disobeyed my instructions, but he fought the case and gained a decree in my favour in the District Court."

If Enayut Hossein was guilty of perjury, as charged by Mr. Tayler, he might clearly have been charged with perjury. Mr. Tayler would in all probability have had no difficulty in obtaining leave to prosecute him. If Mr. Tayler had no evidence to prove perjury, he ought not to have made the charge.

Mr. Tayler continues:—

"On what possible grounds could I frame or conceive a criminal charge against him with the slightest chance of bringing such charge to a successful termination?

"So the happy sequel is, that I am unjustifiably accused. The accusation is clearly disproved. My accuser refuses to retract, and refers me for vindication of my character to an impossible remedy.

"It is a satisfaction at least that the Honorable the Chief Justice has publicly disclaimed all participation in this cruel wrong."

All that I stated was that I had nothing to retract. I left it to Mr. Justice Dwarkanath Mitter to say what he thought right with reference to his own judgment.

The next letter is that of the 12th April; it runs thus:—

"*First Fury.*—Thou thinkest we will rend thee, bone from bone.

And nerve from nerve, working like fire within?

Prometheus.—Pain is my element, as hate is thine!

Ye rend me now, I care not."

Prometheus unbound.

"TO THE EDITOR OF THE "ENGLISHMAN."

"SIR,—Two or three days ago, I addressed you on the subject of Mr. Justice Dawarkanath Mitter's charge against me of 'fraud.' What I am now about to relate is an appropriate and somewhat amusing supplement to the narrative. *At the very time* I was in person protesting against this insulting and unfounded imputation, what was taking place in the same district and before the same Court in which the attachment of my estate had taken place?

"Listen, and be edified. Some weeks ago, I had myself attached a house belonging

to a judgment-debtor against whom I held a decree for Rs. 5,000. The house was worth about that sum. Before the sale, however, my irresistible old maid of Ticaree, who is in dangerous *rapport* with all the Amlah of all the Courts, having a stray claim against me of Rs. 500 for costs, attached my decree for Rs 5,000."

Here is a direct charge against the Ranee that she is *in rapport* with all the Amlah of all the Courts. Was it necessary for the vindication of Mr. Tayler's character that the discharged Mookhtear should turn upon his former client and endeavour to bring her into ridicule and contempt? The lady who is styled "my irresistible old maid of Ticaree" is a lady of rank and position: above all, she is a Hindu widow, a state which Mr. Talyer from his experience must know is one in which she is removed from all worldly pleasure. Is it because she discharged Mr. Tayler from her service, or because she holds some stray decrees against him which she seeks to enforce, that she is to be slandered and ridiculed? Her sex, her misfortune, ought to have protected her from insult and indignities.

I have no doubt that the charge was intended to convey the imputation that all the Amlah of all the Courts in the district are under undue influence exercised over them by her. But even if this was not the meaning of the slander, there was the intention to ridicule; and why was this? Mr. Tayler has positively sworn that the only object of this letter was to vindicate his character. Would he have thus written if he had continued to be the Ranee's Mookhtear on a salary of Rs. 500 a month, with extra reward for winning suits? Is this part of the edification which he promises to those who listen? Let me not be misunderstood. I do not charge this as part of the contempt of the Court. I refer to it merely as evidence of Mr. Tayler's *animus*, and to test the credibility of his affidavits.

Mr. Tayler goes on:—

"And now for judicial wisdom! Instead of allowing the sale to proceed, subject to this lien for Rs. 500, which would, of course, have been paid out of the proceeds, to the satisfaction of justice and all the parties concerned, the Judge strikes the case off the file! The Ranee steps in with another decree against the same party and the house is sold for her benefit! Meanwhile my agent at Patna, directly he hears of the attachment of my decree, sends off Rs. 500 in cash and prays for the sale of the house.

"What is the order? Your case has been struck off. *Ergo*, your attachment has fallen to the ground, and another has reaped the fruits of your diligence!!"

This judgment is not intelligible, but, right or wrong, it did not justify the aspersions on Mr. Justice Dwarkanath Mitter.

The letter proceeds:—

"Now, just observe how I am dealt with. Because, in the one case I acted in the belief that the attachment of my own property had ceased in consequence of the case being struck off the file, Mr. Justice Dwarkanath Mitter declares I perpetrated a 'fraud.'"

Now is this true? Did Mr. Justice Dwarkanath Mitter declare that Mr. Tayler perpetrated fraud because he acted in the belief that the attachment had ceased in consequence of the case being struck off the file? The fact was not before him when he delivered the first judgment. His reasons for not withdrawing the remarks were given in his judgment in review.

The letter continues:—

"Because, in the Court of Gya, my case of execution had been struck off the file (and that inexcusably), I am robbed of Rs. 5,000 on the ground that the attachment had ceased.

"Thus justice, like the sword of Ali, strikes me at one and the same moment with both edges of the redoubtable Zoolfikar, and each time, as was Ali's pleasant custom, with a shout of insult and derision.

"At the voice of Mr. Justice Dwarkanath Mitter down goes my reputation; on the dictum of the District Judge away goes my money; both Judges acting on grounds diametrically opposed to each other."

What was meant by the words "shouts of insult and derision" with reference to Ali's sword, except that Mr. Justice Dwarkanath Mitter, who was compared to one of the edges, insulted and gloried in his insult?

Mr. Tayler proceeds:—

"With all respect to the majesty of the

ermine, I cannot but think that such instances of human frailty should teach our Judges, whether high or low, the melancholy lesson that after all they are but fallible mortals, and at least make them pause before they aggravate the wrong of an erroneous judgment by the far greater wrong of wanton insult and unfounded aspersion."

The last letter is dated 13th April 1869; it commences thus:—

"*Dogberry.*—Come you hither, Sirrah; a word in your ear, Sir; I say to you, it is thought you are false knaves.

Borachio.—Sir, I say to you, we are none.

Dogberry.—Well, stand aside. 'Fore God, they are both in a tale,

Have you writ down that they are none?

Much Ado about Nothing."

Here let me ask how it was necessary for the vindication of Mr. Tayler's character to introduce Dogberry into the scene?

"TO THE EDITOR OF THE "ENGLISHMAN."

"SIR.—Will you allow me a few more last words about the late assault of Mr. Justice Dwarkanath Mitter, and forgive me for again referring to the irrepressible 'Ego.' Thackeray's pithy defence of egotism is, that if a man tread on my corns, I am the sufferer, and who so well as myself can describe my woes? But this matter has public as well as private interest; others have corns, and there are more than one Mitter who may tread on them.

"But what I am now about to represent is a new incident in the case, and one which renders the Judge's accusation so thoroughly absurd that I am bound to give it publicity.

"The only conceivable ground hitherto supposed to exist for casting a stigma upon me was that the Judge sold my estates *under the former attachment*, and therefore, that that attachment did exist at the time of my private transfer of the estate.

"This could not really alter the case as far as my 'fraud' was concerned, because, even if he had done so, he would have acted in direct opposition to the established practice, and it was quite enough for my moral absolution to show that I believed, and was justified in the belief, that the attachment had ceased. No judicial '*ex post facto*' eccentricity could alter or affect this state of things.

"But I have within these two days ascertained that even this little homeopathic globule of justification does not exist! but that the Judge, before he brought the estate to sale, *directed a new order of attachment, thus showing by his own proceedings that he also deemed the old attachment to have become null and void.*"

Here there is again falsehood and concealment; falsehood in representing that the second attachment was a new incident in the case and concealment in keeping out of sight the fact that in one defence set up to the suit, the validity of the attachment or of the sale under it was never questioned. The question was, admitting the validity of the attachment and of the right to enforce it by sale of the estate, whether the plaintiff knew of it at the time of sale, and if not, whether Mr. Tayler knew of it and fraudulently suppressed or concealed it. The discovery of the fact of the second attachment, even if not known to Mr. Tayler before, could not affect the question whether he fraudulently concealed the first attachment, or the fact of the first attachment continuing in force. But it is clear that this attachment, stated to have been discovered by Mr. Tayler only two or three days before writing the letter, was a matter known when the written statement was put in on behalf of Mr. Tayler, and was actually referred to in the 3rd paragraph as the proceeding of the 13th February 1867, and was also decided by the Judge of Gya not to have affected the first attachment. The Judge speaks of the property having been again attached: of the intervenor's objection that she purchased before the second attachment, and he decided that the first attachment did not become null and void by reason of the second attachment. So much for Mr. Tayler's discovery.

The letter goes on:—

"Thus the infinitesimal peg upon which Mr. Justice Dwarkanath Mitter suspended his insulting imputation subsides into space!

"The confident and uncompromising tone of his accusation had deceived even me, and I had hitherto concluded that he had at least thus much of fact to justify his anathema.

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"But it now appears that he made no enquiry whatever as to whether the sale took place under a fresh attachment, or not!! before he thus vilipended me"

There was no necessity to enquire, because the matter was no part of the defence set up.

The letter concludes:—

"We have all heard or read among the mysteries of human nature of that strange idiosyncrasy which enables some men to detect, by a certain internal irritation, the presence, though unseen, of a *cat*. It appears to me that of late years some such element of anti-feline irritation must appertain to my unhappy person, for there is a certain class among the official principalities of Bengal who, directly I am brought into contact with them, appear to be at once affected by an overpowering internal excitability, which affects the understanding even of the wise and good, and intensifies the folly of the foolish, but at the same time always issues in one result—injury, insult, or wrong to myself.

"When the true history of mesmeric repulsion is unravelled, perhaps the cause may be traced."

Can any one doubt, after reading the context, the reference to the judgment of Mr. Justice Loch and Mr. Justice Norman in the first letter, that the words "official principalities" are intended to include the Judges of the High Court, or some of them, and to accuse them of a want of impartiality, fairness, and courtesy in all cases in which Mr. Tayler is concerned as a suitor, which always result in injury, insult and wrong to him?

I will read a passage or two from Lord Hardwicke's judgment in a similar case.

Lord Hardwicke said in *St. James's Evening Post case* (4):—

"Nothing is more incumbent upon Courts of Justice than to preserve their proceedings from being misrepresented; nor is there anything of more pernicious consequence than to prejudice the minds of the public against persons concerned as parties in causes before the cause is finally heard.

"It has always been my opinion, as well as the opinion of those who have sat here before me, that such a proceeding ought to be discountenanced.

"But, to be sure, Mr. Solicitor-General has put it upon the right footing, that, notwithstanding this should be a libel, yet unless it is a contempt of the Court, I have no cognizance of it. For whether it is a libel against the public or private persons, the only method is to proceed at law.

"The defendant's Counsel have endeavoured two things—1st, to show this paper does not contain defamatory matter; 2 dly, if it does, yet there is no abuse upon the proceedings of this Court, and, therefore, there is no room for me to interpose.

"Now, take the whole together, though the letter is artfully penned, there can remain no doubt, in every common reader at a coffee house, but this is a defamatory libel"

The Lord Chancellor then stated, with reference to the course which had been followed in that case of alluding to the persons libelled by the initial letters of their names, that—

"All the libellers of the kingdom know now that printing initial letters will not serve their turn, for that objection has been long got over."

He then proceeded:—

"It is plain, therefore, who is meant; and as a Jury, if this fact was before them, could make no doubt, so as I am a Judge of facts, as well as of law, I can make none.

"I might mention several strong cases, where even feigned names have been construed a libel upon those persons who were really meant to be libelled.

"I shall take notice but of one, and that is the case of Mrs. Dodd, who printed a letter abusing the late King, under the name of *Merriwe's Sophy of Persia*; it was tried before a Jury of gentlemen of great honour, who were so well satisfied of the real meaning, that, notwithstanding the whole was concealed under fictitious names, they found the publisher guilty.

"Next, as to the expression in the paper, that '*there were even here in England some gentlemen of note and character who did not scruple to turn affidavit men.*' Mr. Solicitor-General has insisted this may be taken in a good sense as well as a bad one, because a man who swears true, is as much an

affidavit man, as if he swears false, and the Court should take it *in mitiori sensu*.

"I will not take upon me to say whether, upon an action at law, this could be supported as libellous upon the strict rules.

'But, I believe, there is nobody who is conversant in the proceedings of this Court, but must know that this expression means persons who are ready, upon all occasions, to make affidavits, without regarding whether they have any conusance of the facts."

The use of the words "a certain class of official principalities of Bengal" cannot deceive the Court. There is no doubt it includes one or more of the Judges of the High Court, and I have no more doubt as to what Mr. Tayler meant by the words "being affected by an overpowering internal excitability which affected the principalities when they came into contact with him, and which always resulted in injury, insult, or wrong to him," than Lord Hardwicke had as to the meaning of the words 'affidavit men."

These letters are not fair criticisms: they are slanderous effusions, as regards the Ranee of a disappointed Mookhtear who has been dismissed from her service, and, as regards the Judge of a disappointed suitor who has failed in his case.

The charge against Mr. Justice Dwarkanath Mitter, of casting upon Mr. Tayler an unmeasured imputation without one tittle of evidence to support it, was not only false, but false within Mr. Tayler's own knowledge. This I will prove out of his own mouth.

In the letter to the Editor of the *Englishman*, dated 12th February 1869, Mr. Tayler says:—

"I have just arrived from England, and one of the first pleasant things presented to me has been your paper of December 1st, containing the decision of the High Court in the appeal *Musammat* Wuzeerun (appellant) *versus* William Tayler (respondent).

"From this decision I find that, in a suit instituted against me after I had left India, and conducted on my behalf by my native Mookhtear, Enayut Hossein, the High Court has declared me guilty of fraudulent concealment of attachment (*in its legal sense*) in regard to an estate which I sold.

"I do not complain of this decision, for it is based on statements and evidence put forward by Enayut Hossein *which are quite sufficient to justify the conclusions of the Court, which regards them as mine.*"

Again, in his petition of review, on the 17th February last, Mr. Tayler says:—

"Your petitioner, having just returned to India, has read, he need not say, with pain and mortification, the decision of the High Court in the case of *Musammat* Zuhoorun passed on the 19th November 18 8.

"*Your petitioner cannot reasonably demur to the decision, based as it is on the defence set up by his native Mookhtear, and supported by the evidence which he has volunteered in the case.*

"All your petitioner now desires to do is to inform the Court that the statement put in and the evidence given by Enayut Hossein and his creatures are totally false, made and given without the approval, concurrence, or knowledge of your petitioner, and in direct opposition to the instructions given by him to the said Enayut Hossein before his departure from India."

Holding this opinion, Mr. Tayler knew that, according to the case as it stood when Mr. Justice Dwarkanath Mitter pronounced judgment, he was fully justified in pronouncing it as he did. Mr. Tayler substituted a fresh state of facts, which was false, and wilfully concealed the real one, and he criticised the judgment with reference to that statement. Was this honest? Was it fair criticism, in good faith, of the acts of a public man?

I could scarcely believe that I correctly understood Mr. Tayler's observations which he made with reference to his letter of the 12th February, and his attempt to reconcile the passage which I have quoted with the slanderous imputations in his subsequent letters.

He stated that when he wrote the first letter he was under the impression that the Chief Justice as well as Mr. Justice Dwarkanath Mitter had imputed fraud to him, but that he had since been gratified by finding from the explanation of the Chief Justice that he had put only a hypothetical case; that if the observations of the Chief Justice had been to the effect which he had supposed, he would have had no cause to complain of Mr. Justice Dwarkanath

Mitter, as he would then have been concurring with the Chief Justice, after he had considered all the facts.

I called his attention to the fact that he had reiterated the same thing in his petition for review. He then stated that it was not until after the hearing of that petition that he had heard the explanation of the Chief Justice.

I can scarcely trust myself to characterise this explanation of Mr. Tayler. I wish merely to ask whether it was just and fair or manly on the part of Mr. Tayler to impute to Mr. Justice Dwarkanath Mitter that which he would not have imputed to the Chief Justice, if he had come to a similar finding. How is it possible that there could have been evidence sufficient to justify the Chief Justice alone, or the Chief Justice and Mr. Justice Dwarkanath Mitter jointly, in imputing fraud, if there was not one tittle of evidence to support the imputation when made by Mr. Justice Dwarkanath Mitter alone?

I have now shown beyond all doubt that there was not a shadow of justification for Mr. Tayler's charges against Mr. Justice Dwarkanath Mitter, and that the public could not have been misled by any criticisms if they had been based upon the truth, the whole truth, and nothing but the truth I have also criticised what Mr. Tayler has been pleased to style his intellectual and searching criticism, and I have no hesitation in declaring that his letters do not contain fair criticisms, but slanderous assertions and false statements. A fair critic must not misrepresent, and he must not wilfully conceal the truth. He is not bound to "extenuate," but he must not "set down aught in malice"

Mr. Tayler's first object in writing the letters may have been to vindicate his own character, but vindication was not the sole object of all that he inserted in them. Besides, every honest man knows that he has no right to vindicate his own character by reflections upon the character of another, based upon false statements and wilful suppression of the truth. I do not believe that there is an editor of a single journal in this country, or in any other, who, having all the facts before him, would, unless influenced by malice or improper motives, have criticised the judgments of Mr. Justice Dwarkanath Mitter in the way in which Mr. Tayler has had the audacity to write about them.

There can be no doubt that the publication of such letters is a contempt of Court. It is unnecessary to refer to many cases in support of that position.

"Nothing," said Lord Hardwicke in the case already cited, "is more incumbent upon Courts of Justice than to preserve their proceedings from being misrepresented." It is a matter of the greatest importance that Judges should possess the confidence of the public. Such confidence tends much to the satisfactory administration of justice.

In *Mr. Lechmere Charlton's case* (5) Lord Cottenham said:—

"The power of committal is given to Courts of Justice for the purpose of securing the better.....administration of justice. Every writing, letter, or publication which has for its object to divert the course of justice is a contempt of the Court. It is for that reason that publications of proceedings which have already taken place, when made with a view of influencing the ultimate result of the cause, have been deemed contempts. It would be strange, indeed, if the Judges of the Court were the only persons not protected from libels, writings, and proceedings, the direct object of which is to pervert the course of justice. Every insult offered to a Judge in the exercise of the duties of his office is a contempt; but when the writing or publication proceeds further, and when, not by inference, but by plain and direct language, a threat is used, the object of which is to induce a Judicial Officer to depart from the course of his judicial duty, and to adopt a course he would not otherwise pursue, it is a contempt of the very highest order."

In *Crawford's case* (6) Mr. Justice Patteson said:—

"It is.....objected that the Court could have no general power of commitment for

(5) ('837) 2 My. & Cr. 316 at p. 339; 40 E. R. 661; 45 R. R. 68.

(6) (1849) 13 Q. B. 613 at p. 627; 18 L. J. Q. B. 225; 13 Jur. 955; 116 E. R. 1397; 78 R. R. 479.

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a libel published out of Court some time before. This point has not been expressly decided upon. In *Van Sandau's case* (7), the libel appears to have been published both in Court and out of it. In *Reg.* v. *Almon* (8) there was a very learned judgment by Chief Justice Wilmot, which he intended to deliver, though it was not delivered in fact, the case having been dropped. He satisfactorily shews that a Court of Record has power to punish, by commitment for contempt, a libel published while the Court is not sitting. There must be a choice as to the mode of proceeding; for he says that the punishment may be by indictment or by committal for contempt: he treats it throughout as a matter of election. That may be an answer to the difficulty suggested by my brother Coleridge to Mr. Peacock." (The difficulty suggested was whether a commitment for contempt could be pleaded as an answer to an indictment for the same publication). "We need not, however, determine as to this: it is enough for us to see that the Court has the power; *and that is clear law.* If that be so, the question whether the particular publication be libellous or contemptuous is clearly, as has been said in many instances, a question for the Court which commits. We have not to enquire into this matter, which has been adjudicated upon by a Court of competent jurisdiction.....The fact of authorship is admitted by Mr. Crawford, who comes forward to avow it, openly and very properly. The construction of the publication was for the Court. We, therefore, cannot interfere unless there has been some error in the manner and form of the proceeding."

In the same case Mr. Justice Erle said:—

"Then is there here a lawful ground for committal? The power of Courts to commit for contempt in this country has been discussed: and it has been established, on good reason, that a Tribunal has power to protect itself by committing for a contempt relating to the exercise of its powers. *The commitment here was for a contempt in publishing, while the Court was not sitting, and perhaps at some distance of time and place, a libel on the proceedings of the Court.* In the elaborate judgment to which my brother Patteson has referred, it is shewn that such a publication may have a strong and immediate tendency to paralyze the proceedings of this Court. Such cases may easily be conceived; the propriety of the decision in the particular case is a question for the Court itself."

In re Wallace (9) a Barrister and Attorney of the Supreme Court of Nova Scotia wrote a letter to the Chief Justice reflecting on the Judges and the administration of justice in the Court. The Court suspended him for it. On appeal to the Privy Council, the suspension was reversed. Lord Westbury, in delivering judgment, said:—

"The letter was a contempt of Court which it was hardly possible for the Court to omit taking cognizance of. It was an offence, however, committed by an individual in his capacity of a suitor in respect of his supposed rights as a suitor and of an imaginary injury done to him as a suitor and it had no connection whatever with his professional character, or anything done by him professionally, either as an Advocate or an Attorney. It was a contempt of Court committed by an individual in his personal character only. To offences of that kind there has been attached by law and by long practice a definite kind of punishment, *viz.*, fine and imprisonment.....We think..... there was no necessity for the Judges to go farther than to award to that offence the customary punishment for contempt of Court."

After Mr. Tayler had been brought into Court, I asked him whether he had caused the letters in question which bore his name to be published. He at first hesitated. I do not state this by way of complaint against him, for he was possibly taken by surprise at the moment, and he almost immediately afterwards did, as I should expect Mr. Tayler or any other gentleman, who had sent a letter to a

(7) (1845) 6 Q. B. 773; 14 L. J. Q. B. 154; 9 Jur. 296; 115 E. R. 291.

(8) (1765) Wilm. 243, 252—271; 97 E. R. 94; See 19 How. St. Tr. 1082 note.

(9) (1863) 1 P. C. 283; 4 Moore P. C. (N. S.) 10; 36 L. J. P. C. 9; 15 W. R. 533; 16 E. R. 269.

newspaper for publication would do, he very properly admitted that he was the author of the letters, and that he had caused them to be printed and published. I am not quite certain whether I spoke before his admission of what I should do, or spoke after it of what I should have done, if he had not admitted the publication. My belief is that it was the former, and that I said that if Mr. Tayler disavowed the letters, I should be compelled to send for the printer and publisher of the paper, who was just as liable in point of law to be punished for contempt as Mr. Tayler, or words to that effect. This opinion has been challenged, and I proceed to prove that it was well founded.

There can be no doubt that the publication in a newspaper of letters like these has in fact a much more injurious effect than the mere writing and sending them to the editor of a newspaper. If the editor of the *Englishman* had torn up Mr. Tayler's letters and put them into his waste basket, no great injury to the public, or to any one else, would have been caused. But when they were published in the *Englishman*, they were spread over the country wherever that newspaper had circulation. If the writing of those letters was injurious, the injury was increased a thousand fold by the publication of them in the newspaper to all the readers of that journal. The printer and publisher of the paper doubtless had no feeling upon the subject. The real guilt of publication was mainly that of the author who sent them to the editor in order that they might be published. Under these circumstances, the Court had its election to punish both the author and publisher of the newspaper, or either of them.

In this case the Court saw no necessity to punish both. They intended to deal only with the author. If the author, when brought into Court, had disavowed the publication, the Court would not have allowed justice to be defeated or baffled. It would have sent for the publisher of the paper, and if he had failed to produce the letters or to bring the case home to the author, the Court would have held him responsible. If the printer of a newspaper publishes a letter with the name of an author attached to it, he must bear the responsibility if he is unable, when required, to prove that it was published with the authority of the person by whom it purports to have been signed. Notwithstanding all that has been said in the newspapers, I unhesitatingly affirm that that is the course which I should have adopted. I trust that I am firm enough and conscientious enough not to be influenced by anything that has been publicly said upon this subject. If I had intended to punish the publisher, I should have punished him, notwithstanding the remarks which have been made. I did not intend to punish him after Mr. Tayler avowed the authorship, and nothing that has been said would induce me to hold the publisher responsible. I have pursued the same course precisely as that which I should have pursued if no remarks upon the subject had been made in the public newspapers.

Now with regard to the liability of the printer, there can be no doubt, assuming that the letters are not fair criticisms. If they were fair criticisms, of course, both Mr. Tayler and the publisher of the newspaper were justified in publishing them.

In the case of *St. James's Evening Post case* (4), which I have already cited from 2 Atkyns, the contempt was committed by publishing a libel reflecting upon certain suitors in matters pending in the Court. The libel had been published in the *Champion* newspaper, and also in the *St. James's Evening Post*.

Lord Hardwicke said that there were three sorts of contempt:—

"One was scandalizing the Court itself: another was abusing the suitors: there may also be another contempt in prejudicing mankind against persons before the case is heard. There cannot be anything of greater consequence than to keep the streams of justice clear and pure, that parties" (and I may add the Judges) "may proceed with safety both to themselves and their character."

It was held that the libel was a contempt of Court, and Lord Hardwicke remarked:—

"With regard to Mrs. Read [the publisher of the *St. James's Evening Post*] by way of alleviation, it is said, that she did not know the nature of the paper which she had published, and that printing

papers and pamphlets was the trade which she got her livelihood by. But though it is true, this is a trade, yet they must take care to do it with prudence and caution; for if they print anything that is libellous, it is no excuse to say that the printer had no knowledge of the contents, and was entirely ignorant of its being libellous; and so is the rule at law, and I will always adhere to the strict rules of law in these cases.

"Therefore, Mrs. Read must be committed to the *Fleet*, according to the common order of the Court upon contempts.

"But as to Mr. Huggonson" (the printer of the "Champion" newspaper), "who is already a prisoner in the *Fleet*, I do not think this any motive for compassion, because these persons generally take advantage of their being prisoners to print any libellous or defamatory matter which is brought to them, without scruple or hesitation.

"If these printers had disclosed the name of the person who brought this paper to them, there might have been something said in mitigation of their offence; but as they think proper to conceal it, I must order Mrs. Read to be committed to the *Fleet*, and Mr. Huggonson to be taken into close custody of the Warden."

In *Crawford's case* (6), which has already been referred to, it was ordered that Robert Fargher, the printer and publisher of the *Mona Herald* newspaper, should attend the Court on 1st February "to answer for unlawfully and contemptuously printing and publishing" an article tending to scandalize and defame the Court. It appeared that Fargher attended and admitted that he was the printer and publisher, and expressed his regret that, in consequence of bad health, he had not given the article the consideration it ought to have had, and regretted that it should have given offence to the Court, and he tendered an apology and offered to publish it in all the insular newspapers. The Court did not accept the apology, but forthwith committed Fargher for contempt of Court. Crawford then stated to the Court that he was the author and was willing to take the responsibility, provided the Court relieved Fargher, but that he would not acknowledge the right of the Court to act in a vague, informal, and summary manner. The Court, however, committed Crawford, and he and Fargher were immediately removed from Court in custody.

In a case of *Cann* v. *Cann* (10) it appears that —

Mrs. Farley, having been committed to the *Fleet* upon motion of the plaintiff for having published an advertisement in the "Bristol Journal," relating to the answer in Chancery put in by the defendant, Sir Robert Cann, moved to be discharged, having paid for costs of the contempt and submitted; as also the defendant did, confessing the advertisement was put in at his instance. The plaintiff did not oppose the discharge of Mrs. Farley, and left the matter to the Court. Lord Hardwicke, Chancellor, said, his reason for committing was not only for the sake of the party injured by the advertisement, but for the sake of the public proceedings in Court, to hinder such advertisements, which tend to prepossess people as to the proceedings in the Court. But as on a prosecution for a libel in the King's Bench for publishing a scandalous advertisement, if they confess in what manner it was brought to them and everything about it, that Court takes the matter into consideration to alleviate the punishment; so here, though Mrs. Farley's ignorance of law was no justification for the publishing the advertisement, yet having discovered in what manner it was brought to her with other advertisements, and disclosed everything, it was a ground to alleviate the punishment. Therefore, he granted the motion.

In *Ex parte Jones* (11) Lord Erskine, whom no one will venture to charge with having endeavoured to shackle the liberty of the press, said: —

"In this dedication the object is avowed by defaming the proceedings of the Court, standing upon its Rules and Orders, and interesting the public, prejudiced in favour of the author by her own partial representation, to procure a different species of judgment from that, which would be administered in the ordinary course; and by flattering the Judge to taint the source

(10) (1754) 2 Ves. Sen. 520; 2 Dick. 795; 28 E. R. 332.

(11) (1803) 13 Ves. (Jun.) 237; 33 E. R. 283.

of justice. This pamphlet has been sent to me.

"As to the printers, as Lord Hardwicke observes, it is no excuse, that the printer was ignorant of the contents. Their intention may have been innocent; but, as Lord Mansfield has said, the fact, whence the illegal motive is inferred, must be traversed; and the party, admitting the act, cannot deny the motive. The maxim '*actus non facit reum, nisi mens sit rea*,' cannot be made applicable to this subject in the ordinary administration of justice; as the effect would be, that the ends of justice would be defeated by contrivance. But upon the satisfactory account, given by three of these printers, though undoubtedly under a criminal proceeding they would be in mercy (those words in their legal sense meaning amerced) in a case of contempt, though I have the jurisdiction, I shall not exercise it. The other printer appears upon the affidavits under different circumstances. Having made the observation that this pamphlet ought not to be printed, being totally uninteresting to the public, yet he does print it; and though the *locus pœnitentiæ* was afforded to him, and he was called upon not to print any more, he proceeded, until he had notice of this petition.

"Let the Committee and his wife, and the printer, to whom I have last alluded, be committed to the *Fleet* prison."

Let me not be misunderstood. I have not cited the above cases as precedents as to the mode in which the Court ought to exercise its discretion. Discretion as to punishment must depend upon the facts of each particular case. I cite the cases merely to show what the law is, and what the power of the Court, not to show what the Court ought to do in the exercise of that power. If a printer were to publish defamatory and contemptuous libels sent to him for publication by a gentleman beyond the jurisdiction of the Court, or libels published in another paper beyond the jurisdiction, or if a printer should refuse to give up the name of the real author of the libel, his case would be very different from that of a printer who, having committed an error, should apologize and give up the name of the author.

I am free to admit that I alone am responsible for all that has been done in this matter, though my honourable colleague does not desire to be relieved from any part of the responsibility. I sat with my honourable colleague both on the hearing of the appeal and on the hearing of the petition of the review. I knew him before he was raised to the Bench. I have sat with him frequently as a colleague, and I believe that I have had as good an opportunity as any one of forming a just estimate of his character. Though now speaking in his presence, I may be permitted to say that he is a man of ability and learning, very unassuming, yet high minded, of a gentle, kind, and amicable disposition, independent and always ready to maintain his opinion so long as he conceives it to be right, and equally ready to abandon it if convinced that it is wrong. He is a man to whom I am sure it would give pain to injure the reputation or to wound unnecessarily the feelings of any one. He is the second native gentleman who by his own abilities has raised himself to the high position of a Judge of the High Court.

I saw the letter of the 7th April on that day, but being particularly engaged I did not read it attentively. On the following Monday, the 12th, I saw the letter of that date, and in the evening, after I returned from Court, I read it carefully in conjunction with that of the 7th, to which it referred. I then considered it necessary to vindicate the honour and character of my honourable colleague and the dignity of the Court; and having heard and believed that Mr. Tayler was about to leave Calcutta for England on the following morning, I wrote to my honourable colleague at a late hour of the night to meet me at 6 o'clock on the following morning. He did so; after consulting together we considered it necessary to take proceedings for contempt. We adjourned to the Town Hall, where we were met by the Under-Sheriff and the Registrar, and we ordered a writ of attachment to be issued. I may here remark that, up to the time of our meeting on the Tuesday morning, my honourable colleague had never uttered one syllable of complaint to me regarding the charges that had been made against him. If the character of any other of the Judges had been

similarly assailed I should have thought it necessary to adopt a similar course. But it appeared to me to be especially necessary in the present case, when the attack had been made upon a native gentleman, the only one of his countrymen who had a seat on the Bench of the High Court.

It now appears from the affidavit of the Sheriff's officer that Mr. Tayler intended up to the Monday to leave for England in the steamer which was to sail on Tuesday, and that on that day he was allowed by the Peninsular and Oriental Company to postpone his passage until the next steamer. The letter of Monday, the 12th, could not have been sent to the editor of the *Englishman* later than Saturday or Sunday, at which time Mr. Tayler must have had the intention of leaving the jurisdiction of the Court on the day following that on which the letter could be published, and in all probability he had the same intention at the time when he sent to the editor the letter published on Tuesday, the 13th instant, which we also had before us when we issued the attachment.

There were two modes of proceeding open to us: one by a Rule calling upon Mr. Tayler to show cause why he should not be adjudged guilty of contempt of Court,—the other by attachment, under which Mr. Tayler might be arrested and brought into Court for a similar purpose. If we had gone through the farce of making an affidavit of the facts founded on our own belief, in order to satisfy our own minds that a contempt of Court had been committed and had issued a Rule to show cause, which Mr. Tayler probably considered was the only course which the Court could adopt (for on his being arrested he asked the Sheriff's officer why he had not had notice), if, I say, we had made such an affidavit and issued a Rule to show cause to be served on Mr. Tayler on board the steamer on the eve of his departure, we should have deservedly brought ourselves, and we should also have brought the Court and its process, into utter derision and contempt. If we had asked the Registrar to make an affidavit, he knew no more of the facts than we did. He could merely have sworn that he had seen the letters in the papers with Mr. Tayler's name attached to them, and that he verily believed that Mr. Tayler had caused them to be published; and, further, that he had heard and believed that Mr. Tayler was about to leave the jurisdiction of the Court. We had as much knowledge ourselves of the facts without such an affidavit as we should have had with it. We, therefore, determined to act upon our own knowledge of those facts, which, if sworn to by any one to the best of his belief, would have been sufficient to support a Rule to show cause. There was no private complainant. The charge was made by the Court itself upon its own knowledge of facts, which, if sworn to by any one to the best of his belief, would have made a *prima facie* case of contempt of Court. We concluded that the editor of the "Englishman" would not have published letters with Mr. Tayler's name attached to them without having had them authenticated, and we were right in our conclusion that Mr. Tayler had caused the letters to be published. The writ of attachment which was issued was not a commitment for contempt, but a process to bring Mr. Tayler into Court to answer a charge of contempt. It was necessary, under the circumstances, not merely to vindicate the honour of the Judge and the dignity of the Court, but also to teach gentlemen like Mr. Tayler that they cannot commit contempts of Court with impunity even though they are about to sail the next day for England, and also to prove to the public that justice is not to be baffled or defeated by artifice.

I will cite two or three out of many authorities to show that the Court is not powerless in such cases.

In Bacon's Abridgment, Tit. "Attachment," page 386, it is said:—

"An attachment is a process that issues at the discretion of the Judges of a Court of Record against a person for some contempt for which he is to be committed, and may be awarded by them *upon a bare suggestion, or on their own knowledge*, without any appeal, indictment, or information for though by the Statute of Magna Charta none are to be imprisoned *sine judicio parium vel per legem terræ*, yet this summary method of proceeding, being absolutely necessary to the furtherance and execution of justice, seems to have been long practised, and is certainly now established as part of the law of the land."

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The rule is laid down to the same effect in Comyn's Digest, Tit. "Attachment," A. i., and in Hawkins' Pleas of the Crown, 213.

In Rex v. *Jones* (12)—

"The defendant having treated the process of the Court contemptuously, an attachment went against him, without a Rule to show cause, (according to *Salk.* 84) and there being intimations that he relied on the assistance of his fellow workmen to rescue him, the Court sent for the Sheriff of Middlesex into Court, and ordered him to take a sufficient force."

I am now speaking in the presence of a large and enlightened audience, and before a learned and independent Bar, a profession of which the members, from their education and habits of mind, have ever been the watchful guardians of the rights and liberties of the people, and the foremost to protect against any arbitrary or unconstitutional exercise of power. If I have exercised tyrannically the powers committed to me (as I have been charged with doing), or if I have exercised them unconstitutionally, I know that my conduct is subject to be criticised by the Bar and by the public; but I have no misgivings, because I know that if criticised it will be criticised honestly and fairly, and independently. I claim not to be free from criticism: I am always open to conviction, and if convinced of error, I am ready to acknowledge it.

Before I conclude I wish to say a few words as to the course which has been taken out of doors since these proceedings were commenced.

On the 16th April, whilst this matter was pending, an article appeared in the "Englishman" which I will read:—

"We are not surprised to find that our views respecting the action of Sir Barnes Peacock, in summarily arresting and dragging Mr Tayler before the Court for writing to a newspaper, are likely to be shared in by contemporaries who have some influence on public opinion. The *Friend of India* says:—

'Sir Barnes Peacock stated that the printer and publisher of the *Englishman* also was liable to prosecution,—an opinion which raises an interesting question as to the liberty of the press in India.'

"The *Pioneer*, having heard the news of the arrest by telegraph, thus comments:—

"'If the letters alluded to be those in the *Englishman* of the 7th and 12th instant, and if the fact be that Mr. Tayler has been abruptly arrested by the High Court solely in consequence of having written them, we do not wonder at there being excitement. Such an act would naturally seem to every Briton an act of *presumptuous tyranny*. But we can hardly believe the fact of the arrest, or if it has been made, it must have been made on some other ground than merely that Mr. Tayler challenged and *quizzed* the decision of a Judge of the High Court. Sublime personage as he is, a Judge's judgment is no more sacred from fair criticism than any other publication, and well for the purity of justice that it is so.'"

Having made the above quotation from the *Pioneer*, the *Englishman* proceeds:—

"*We suspect that Sir Barnes, if he attempts to carry out his dictum too far, will raise a storm not easy to quell.* There are many people who do not care for the grievances of Mr. Tayler, but who will not brook an encroachment upon their right of appeal to the press concerning the public acts of public men. A Judge's acts are no more exempt from public criticism than those of a Chairman of the Justices."

Again, to show how little the facts of the case were understood, I will read an extract from an article in the same paper, dated the 19th April. It is there said:—

"Attention has been drawn to the fact, which no one, as far as we have heard, questioned, that Sir Barnes Peacock originally held, in the case which seems likely to gain so much notoriety, that Mr. W. Tayler had been guilty of fraud, and that this opinion had been concurred in by Mr. Justice Mitter. The contention raised in Tayler's letters is, however, that he was afterwards allowed an opportunity of explanation, and that the Chief Justice then acquitted him of fraud, whilst Mr. Justice Mitter moderated his decision in no way whatever."

I have already shown most distinctly that I never did find Mr. Tayler guilty of

(12) (1795) 1 Strange 185; 93 E. R. 462.

fraud; that I had no charge to retract, and that I never did, after hearing his explanation, acquit him of anything.

It would have been well if all the public newspapers had followed the calm and dignified course which in the first article which I have read is reported to have been taken by the *Friend of India*. In that paper the opinion expressed by the Chief Justice was brought to notice, and was treated as one which raised an interesting question as to the liberty of the press in India. That course left the question as to the liability of the printer and publisher open to discussion, after the Court should have explained the grounds upon which it had acted, and had referred to the authorities in support of the opinion which it had expressed. But, notwithstanding the very proper course which had been taken by the *Friend of India*, we were told in a journal published on Saturday evening last that the members of the Fourth Estate had protested against this unexpected attack on the liberty of the press, and that *with happy unanimity they had warmly denounced the action taken by the Chief Justice*. To say that the press had *unanimously denounced*, without waiting for the explanation of the Judges, is a libel rather upon the press than upon the Chief Justice.

I have referred to the above articles for the purpose of now declaring publicly that to charge a Judge with presumptuous tyranny for the mode in which he is proceeding in a matter pending before him, or to publish anything respecting that matter whilst it is under consideration, with a view to induce the Judge to alter his course, is a grave contempt of Court. The *Englishman* by publishing the article from the *Pioneer* has rendered itself as responsible for the article as though it had been one of its own. I am willing to believe that the expressions in the article of the 16th April, to which I have referred, were made without duly reflecting that the matters to which they related were then *sub judice*, though they would not have been justifiable at any time.

I am an unflinching advocate of the liberty of the press. I believe that its freedom is one of the main bulwarks of the rights of the people. I claim no exemption as regards my public acts from the most rigid scrutiny and the most unsparing criticism. All I claim is, that there shall be no misrepresentation and no wilful or unfair concealment of facts; and that those who deny infallibility to the Judges shall not claim infallibility for themselves. I have had no cause to complain of the public press since I have been in this country. Speaking generally, I believe it to be fair, independent, and impartial. There has not, I believe, been a single criminal prosecution against a newspaper since I have had the honour to hold the office of Chief Justice, and there have been only one or two private actions for libel. The press in this country addresses itself for the most part to readers of education and intelligence, men who judge and form opinions for themselves. The press is fair, it is not scurrilous: the public are not captious; and public men do not object to have their public acts freely discussed and fairly criticised. Our Courts, therefore, are generally free from all complaints against the press, either civil or criminal, on the ground of defamation.

And now I wish to declare publicly and emphatically that the Judges are not, and cannot be, influenced in the discharge of their duty by any attacks made upon them by the press. Nothing that has been said by the press upon this subject, and nothing that can be said, no fear of the threatened storm, can even divert me or my honourable colleague from pursuing that plain, straightforward course which our consciences dictate. No unfair criticisms can disturb my equanimity, nor in the slightest degree affect my happiness. They are based on the consciousness that the honest and conscientious discharge of my duty has ever been the ruling principle of my life. That is a foundation too strong to be undermined by critics, who attempt to criticise that which they do not understand, or to be shaken by any storms which it is in their power to raise.

I am a servant of the public, and I respect their opinion. If they believe that I have exercised in an arbitrary, tyrannical, or oppressive manner the great powers which have been entrusted to me, or if they believe that I have exercised them unconstitutionally, let them express that

opinion in a manner which cannot be misunderstood, and I am ready to bow to their verdict. But I shall not accept the expressions of a few newspapers as the general expression of public opinion. If ever I have the misfortune to lose, whether justly or otherwise, the confidence of the public, I shall be ready to lay down those powers which, without that confidence, I shall be no longer able to exercise for the public good.

And now permit me to conclude in the words of Lord Mansfield: —

"I wish popularity, but it is that popularity which follows, not that which is run after. It is that popularity which sooner or later never fails to do justice to the pursuit of noble ends by noble means. I will not do that which my conscience tells me is wrong, to gain the daily praise of all the papers which issue from the press. I will not avoid doing that which I think right, though it should draw upon me the whole artillery of libels, all that falsehood and malice can invent or credulity can swallow."

Mr. Tayler was then addressed by the Chief Justice as follows: —

William Tayler, the Court has considered all that you have urged, and it adjudges that you have committed grave contempts of Court in having published the letters of the 7th, 12th, and 13th April in the "Englishman". I have already fully stated my reasons for holding that those letters were not fair or honest criticisms, but that they were founded upon misrepresentation and wilful concealment of the true state of facts. There can be no doubt that you must have known, when you published those letters, that the reflections which you were casting upon the learned Judge had no reference to the state of facts which appeared before him when he pronounced the judgment complained of but to a new state of facts, which, whether true or false, you knew were not before him at the time. It is unnecessary for me to say whether your assertion that at the time you sold the estate you were under the belief that it was not subject to the attachment in execution of the Ranee's decree, was a wilful misrepresentation or not. You must have known, as I have already shown, that the charge which you preferred against Mr. Justice Dwarkanath Mitter, of casting an unmeasured imputation upon you without one tittle of evidence to support it, was false and without any foundation. You knew that, according to the case as it stood, when Mr. Justice Dwarkanath Mitter pronounced judgment, he was fully justified in saying what he did. You substituted a fresh state of facts, of which part, to say the least of it, was false within your own knowledge, and having wilfully concealed the real state of the case you criticised the judgment and founded the charges which you made against the Judge with reference to that statement.

It is not even necessary to show that any part of the misrepresentation was wilful, for, whether it was so or not, you are responsible for it. You knew that the learned Judge could act only upon the facts as they appeared before him at the time, and that according to those facts there was no ground of complaint. It is no justification or excuse to say that you were not in the country when the action against you was defended, and that your agent acted fraudulently in that defence which he set up. If a person undertakes to criticise the acts of a public man, he must take care not to assert that which is not true as the basis of his criticism, and he is bound not to conceal wilfully anything which would show that the criticism is not well founded.

You have stated in your affidavit that the letters written were written for the sole purpose of vindicating your own character. I have shown that, whatever were the reasons which induced you to write those letters, you introduced into them matters which were wholly unnecessary for that vindication, and which reflected on Mr. Justice Dwarkanath Mitter and others of the Judges. I have also shown the *animus* with which those reflections were made. This affidavit, instead of mitigating, rather aggravates the guilt of your contempt. When you were before the Court on Tuesday last, I called your attention to the difference between the statement contained in your first letter and in the grounds of review and the assertions which you made in the letters which you subsequently published in the newspaper. In the former you stated that

you had no ground of complaint against Mr. Justice Dwarkanath Mitter, based as it was on the defence set up by your native Mookhtear, and supported by the evidence which he volunteered in the case. In the letter you charged the learned Judge with casting upon you an unmeasured imputation without one tittle of evidence to support it.

I do not think that you have mitigated your offence by the mode in which you have endeavoured to reconcile those conflicting statements.

You have endeavoured to do so by stating that when you wrote your first letter to the *Englishman*, and when you applied for a review of the judgment, you believed that the Chief Justice as well as Mr. Justice Dwarkanath Mitter had imputed the fraud to you. I have shown in my judgment that if there was not one tittle of evidence to support the imputation when made by Mr. Justice Dwarkanath Mitter alone, there could not have been a tittle of evidence to justify the imputation if it had been made by Mr. Justice Dwakanath Mitter in conjunction with the Chief Justice. I have no doubt whatever, looking at that statement, that your charge was an unmanly one, and that you made a charge against Mr. Justice Dwarkanath Mitter which you would not have ventured to make against the Chief Justice.

Further, I am of opinion that you have aggravated the contempt by contending that the charge in the last paragraph of the letter of the 13th April was not intended to apply to any of the Judges of the High Court. I have not the slightest doubt that in using the words "official principalities" you did intend to refer to the Judges of the High Court. You say the words had reference to something gone by long ago. But the letter, on the face of it, could not have referred to those bygone acts, as those acts had, and could have, no connection with the charge against a Judge of the High Court. Besides, those transactions occurred many years ago and in the paragraph to which I am referring you say: —

"It appears to me *that of late years* some such element of anti-feline irritation must appertain to my unhappy person, for there is a certain class among the official principalities of Bengal who, directly I am brought into contact with them, appear to be at once affected by an overpowering internal excitability which affects the understanding even of the wise and good, and intensifies the folly of the foolish, but at the same time always issues in one result—injury, insult, or wrong to myself."

In one of the letters in which you charged Mr. Justice Dwarkanath Mitter with wanton insult and unfounded aspersion, you introduced the words which I have read, and if they apply to the transactions to which you say they do apply, they have no bearing whatever on the subject, and you have sworn positively that your only object in writing the letters was the vindication of your character. But, whether you had such intention or not, you made use of language which must have conveyed that meaning to others, and was such as to lead any ordinary reader to believe that you intended it to apply to at least one or more of the Judges of the High Court. I have no hesitation in saying that the words, in the reasonable and ordinary construction of them, had reference to one or more of those Judges, and charged them with a want of impartiality in all cases in which you were a suitor.

It is a high and serious offence to cast unjust and defamatory imputations on a Judge. Judges are subject to be criticised, but they must be protected from unfounded defamation. Had you been charged in an indictment in England with writing such letters, I cannot think that any less punishment than imprisonment and fine would have been passed upon you, and probably the imprisonment would have extended to a year.

It is not the wish or desire of this Court to impose any excessive punishment on you. You have admitted that you have committed a contempt. I do not say that that has aggravated your offence; it has mitigated it. You no doubt did intend to make charges against the learned Judge, which were not justified by the real facts, but which the public would be induced to believe were well founded, because they were based on misrepresentation, and because you concealed the real state of the case.

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Taking all the circumstances into consideration, the Court orders that you stand committed for one month to the civil side of the Presidency Jail, and that you pay a fine of Rs. 500, and that you be further imprisoned till the fine be paid.

You state that you are willing still further to apologise. I have endeavoured to show (whether I have been able to satisfy your mind or not I cannot say) that the charges against Mr. Justice Dwarkanath Mitter were without the slightest foundation. The other charge to which I have referred is equally unfounded; and whatever your intention in publishing that part of the letter may have been, or whatever meaning you intended to convey, you were not justified in using language which would induce an ordinary reader to believe that you referred to the Judges of the High Court. If you think fit to add to the apology which you have already published (and it is for you to decide whether you can conscientiously do so or not) the Court is willing to mitigate the sentence. If, after what you have heard, you state that, upon reflection, you find that the charges which you made against Mr. Justice Dwarkanath Mitter were unwarranted and wholly without foundation, and that you are sorry for having made them, you may do so: and you may add, if you wish it, either that you did not intend to cast any reflection upon any of the other Judges, or that the reflection cast was unfounded, and if you publish that apology in the "Englishman," you may apply on Monday, the 3rd of May next, for your discharge on payment of the fine.

On Tuesday, the 27th April, Mr. Tayler addressed a petition to the Chief Justice and Mr. Justice Dwarkanath Mitter, which was sent to the Chief Justice at an early hour in the morning.

A writ of *habeas corpus* was forthwith issued by the Chief Justice to the Superintendent of the Presidency Jail, commanding him to bring Mr. Tayler into Court at half-past nine o'clock.

The petition was as follows:—

"That on the 24th of April instant, your petitioner was committed for contempt of Court in having caused to be published in Calcutta certain letters in the *Englishman* newspaper relating to a decision of the Honorable Mr. Justice Dwarkanath Mitter in the case noted in the margin, and was ordered to pay a fine to Her Majesty of Rs. 500, and to be further imprisoned until such fine was paid, or until the further order of the Court.

"That the Court was pleased to intimate to your petitioner that, in the event of his publishing in the *Englishman* newspaper a further apology in the terms suggested by the Court, in addition to the apology published by him on the 22nd instant, he was to be at liberty to apply to the Court for his discharge.

"That your petitioner has paid the fine of Rs. 500 imposed upon him by the Court, as will appear from the certificate of the Accountant-General of the Court, already submitted.

"That your petitioner has also published in this morning's *Englishman* the further apology required of him.

"That your petitioner is very sorry for having written the letters against Mr. Justice Dwarkanath Mitter, and is also sorry for having made use of expressions which have been considered as reflecting upon the other Judges of the Court.

"That your petitioner can truly say that he never intended to reflect upon the other Judges of the Court.

"That your petitioner's health, which was previously in a weak state, has been seriously affected by the anxieties attending his trial, and by his imprisonment at this season of the year.

"That your petitioner had taken his passage to England, and arranged to leave by the steamer which will leave at 11 o'clock this morning.

"Your petitioner having fully complied with the order of the Court, and made all the reparation in his power, prays that the remainder of the term of his imprisonment may be remitted, and that he may be forthwith discharged from custody."

Upon taking his seat, the Chief Justice addressed Mr. Tayler to the following effect:—

Mr. Tayler,—The Court has read your petition, which is a very proper one. You have now fully submitted. You state that you have paid the fine, and that you have published in this morning's *Englishman*

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the further apology required of you. You further state that you are very sorry for having written the letters against Mr. Justice Dwarkanath Mitter, and that you are also sorry for having made use of expressions which have been condemned by the Court as reflecting upon the other Judges; and that you can truly say that you never intended to reflect upon them. You state that your health, which was previously in a weak state, has been seriously affected by the anxieties attending your trial and by your imprisonment at this time of the year; that you had taken your passage to England, and had arranged to leave by the steamer which is to leave at 11 o'clock this morning. You then, after stating that you have fully complied with the order of the Court and have made all the reparation in your power, pray that the remainder of the term of imprisonment may be remitted, and that you may be forthwith discharged out of custody.

You have also forwarded a copy of a medical certificate from Drs. Macrae and Brougham, dated 25th April, in which it is stated, amongst other things, that for the last three months you have been suffering from attacks of recurrent gout with aggravated dyspepsia, from which you have become greatly debilitated; that a prolonged imprisonment, from its depressing influences, would be attended with risk of serious impairment to your health, if not with more grave consequences, and that you ought not to remain in this country a day longer than can be avoided; in fact, that you had been advised to leave India a month ago.

When you were before the Court on Tuesday last you expressed yourself willing to apologize. I then stated that whatever apology might be made, it ought to be published as widely and extensively as your letters to the editior of the *Englishman*. The case was adjourned until Saturday last, in order to give you an opportunity of publishing in the *Englishman* such an apology as you might see fit; and, without dictating or recommending any particular form of apology, I called your attention to the fact that you had not retracted the charges which you had publicly preferred against Mr. Justice Dwarkanath Mitter.

In cases of this nature a proper apology may mitigate, but it cannot wholly excuse or justify, or form a ground for a total exemption from punishment.

On the 22nd April you published an apology in the *Englishman*, but it contained no denial or disavowal of the truth of the charges which you had preferred. The Court, considering all the circumstances of the case, ordered you to stand committed to the Presidency Jail for one month, or until further orders, and to pay a fine of Rs. 500. The month was fixed as the maximum of the imprisonment which, under any circumstances, you were to undergo. A maximum was fixed in consequence of a doubt thrown out in *Crawford's case* (6), whether a commitment for contempt could be "until further orders," which might amount to imprisonment for life.

It was not necessary to consider whether the usual mode of framing commitments for contempt until further orders, which was the form adopted by Lord Cottenham in *Mr. Lechmere Charlton's case* (5), and had been adopted in numerous other cases, could be supported or not. A month was fixed as the maximum, and the words "or until further orders" were added in order to enable the Court to discharge you at an earlier period if you should make your apology complete; and you were informed that you might apply for your discharge on Monday next. You have now made your apology complete and have sent it to this Court under your signature; and you have also published a copy of it in the *Englishman* this morning. In addition to the apology* which you published on the 22nd

*The apology is as follows:—

"TO THE EDITOR OF THE "ENGLISHMAN."

SIR,—You are no doubt fully informed of the result of yesterday's proceedings in the matter of the charge against me of contempt of Court, for which I was arrested on the 15th instant.

Considering that the fact of my arrest was sufficient evidence that the Court held my former letters to your address to "constitute such contempts," I resolved, after consultation with my friends and my learned Counsel, to submit on this point to the decision of the Court; and, as I had never intended to commit, and never thought that I had committed, such contempt, but had written with the sole purpose of vindicating my character, I at once tendered, both orally and by affidavit, a full and unreserved apology both to Mr. Justice

instant, you say that you regret to state that, upon reflection, you find that the charges made by you against Mr. Justice Dwarkanath Mitter were unwarranted and wholly without foundation. Further, you declare that you had no intention to cast any reflection upon the High Court or upon any of the other Judges of the Court. The Court has already determined that they could put no other meaning upon the last part of your letter of the 13th April than that it was intended to charge want of impartiality on the part of the Judges in cases in which you are concerned, which always resulted in injury, insult, or wrong to you. Whether you intended it or not you are responsible for publishing words which, in the opinion of the Court, were susceptible of no other meaning. You have been punished for your offence, you have now fully and very properly apologized; and whatever opinion the Court may entertain, it cannot fairly ask or endeavour to compel you to admit that in publishing the letters in the *Englishman* you had any intention or knowledge which, as a gentleman, you disavow.

The Court agrees with you that you have now made all the reparation in your power, or that the Court could fairly expect, and they do not wish to do anything which would add further pain to the anxiety which you have already undergone, and to the humiliation which you have suffered. You have already undergone sufficient punishment to be a warning to yourself and to others; no additional amount of punishment could add to that warning. The Court sat at this early hour, not for their own convenience, nor for any other reason, except that you might proceed to England by the steamer, and that you might not be detained in this country an hour longer than was absolutely necessary.

In the course of his address, the Chief Justice pointed out that there was a clerical error in the letter published in the *Englishman* this morning, which made Mr. Tayler say that he had no intention to cast any reflection "upon any of the Judges," instead of any of the *other* Judges, which were the words of the original apology signed by Mr. Tayler. He said this for the sake of the Court and for the sake of Mr. Tayler. The Court, after Mr. Tayler's apology with regard to Mr. Justice Dwarkanath Mitter, could not fairly ask him to say that he never intended to cast reflection upon any of the Judges, nor could Mr. Tayler, as a gentleman, have made such a statement.

Mr. Tayler wished to be allowed to say that the application for his discharge from imprisonment which had been made to the Lieutenant-Governor was made by his friends without his sanction. He was fully aware that the Lieutenant-Governor had no power to interfere in a case like the present, or to order his discharge from imprisonment.

The Chief Justice said that he had seen the medical certificates which had been forwarded to His Honour the Lieutenant-Governor, that without entering into the question whether the Lieutenant Governor had the power or not, he thought that the certificates were not such as could have justified the exercise of it. They were not even such as would have induced the Court to discharge Mr. Tayler before the end of the month, if the additional apology had not been punished; but they were certificates which might very properly influence the Court after that apology had been made.

Dwarkanath Mitter and the Court at large. But the Hon'ble the Chief Justice, in postponing the case for final orders until Saturday, suggested that I should give the same publicity to this apology as was given to my former letters In compliance with this intimation, and as my apology is in truth without reservation or stint, I shall be much obliged by your printing this letter, if possible, in your journal of to-morrow.

There is only one other point which it is desirable to mention.

The Hon'ble the Chief Justice remarked that he did not observe in my apology anything which showed that I retracted my charge against Mr. Justice Dwarkanath Mitter. In accordance with this suggestion, I beg to say that I have no hesitation whatever in retracting all such expressions and observations as may have been deemed by the Court to be improper or contemptuous; and I may observe that I had intended my apology to include such retraction.

I hope that this public expression will be satisfactory to Mr. Justice Dwarkanath Mitter, and meet the suggestion of the Hon'ble the Chief Justice.

W. TAYLER."

Calcutta, 21st April 1869.

Even without those certificates, the Court would have had no desire to inflict any further pain on Mr. Tayler, after he had so fully submitted, and had made so complete an apology, and presented so proper a petition.

Mr. Tayler was then discharged.

PUNJAB CHIEF COURT.

CRIMINAL PETITION No. 899 OF 1917.

November 27, 1917.

Present:—Mr. Justice Shadi Lal.

THAKAR SINGH—COMPLAINANT—PETITIONER]

versus

KIRPAL SINGH AND OTHERS—ACCUSED—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 203—Complaint, dismissal of—Further inquiry, order for—Dismissal of complaint under section 203 after enquiry by police validity of—District Magistrate, direction by, to Magistrate to pass particular order in case pending before him, validity of—Report of Police Officer, whether can be sent to Magistrate other than one directing investigation.

Where a Magistrate sends a case to the Police under section 202, Criminal Procedure Code, for investigation and report, the Police Officer to whom the case is sent acts wrongly in sending the papers after the investigation to another Magistrate and applying to him for a *kharij-ul-waqua* order, when the case is pending in the Court of the Magistrate who referred it to the Police. [p. 965, cols. 1 & 2.]

A District Magistrate acts wrongly in giving a direction to a Magistrate subordinate to him that he should pass a particular order with respect to a case which is pending before him in his judicial capacity. [p. 965, col. 1.]

A Sessions Judge ordered further inquiry in a case dismissed by a Magistrate under section 203 of the Criminal Procedure Code, pointing out that the complainant had other evidence to produce to show that the cattle in the possession of the accused were his and suggested that a Police Officer should be deputed to search for the missing cattle The Magistrate again dismissed the case under section 203, Criminal Procedure Code, upon the investigation and report of the Police:

Held, (1) that the Sessions Judge did not direct an investigation by the Police but simply pointed out that a Police Officer might be deputed to search for the cattle; [p. 964, col. 2.]

(2 that the complainant was entitled to produce evidence, oral and documentary, before the Magistrate, and the latter had no right to dismiss the complaint under section 203 when the order of the Sessions Judge clearly contemplated a trial of the case. [p. 964, col. 2.]

Petition, under section 439 of the Criminal Procedure Code, for revision of the order of the Sessions Judge, Gujranwala, dated the 2nd April 1917, affirming that of the Magistrate, 1st Class, Gujranwala, dated the 12th February 1917, dismissing the complaint for further inquiry.

Mr. *Jai Gopal Sethi*, for the Petitioner.

Lala *Durga Das*, for the Respondents.

JUDGMENT.—After hearing arguments on both sides and examining the record, I am constrained to say that this case has been mismanaged and that there has been no compliance with the order of the Sessions Judge directing further inquiry. The learned Judge pointed out that the complainant had other evidence to produce in order to show that the cattle taken were his, and that they were in possession of the accused; he referred to certain documents, Exhibit P—1 and Exhibit D.W. 2, produced before him by the complainant in support of his allegation, and lastly he suggested that a Police Officer should be deputed "*to search for the cattle.*"

The Sessions Judge's order was passed on the 2nd August 1915 and it was not until the 12th February 1917, that the Magistrate passed the order complained of, by which he dismissed the complaint under section 203, Criminal Procedure Code. Now, it is surprising that during this long period of 18 months not a single witness was examined by the Magistrate, nay, even the statement of the complainant was not recorded. The complaint has been dismissed simply upon the report of the Police. Now, in the first place the Sessions Judge did not direct an investigation by the Police, but pointed out that a Police Officer might be deputed only to search for the cattle. In the second place, the complainant was entitled to produce his evidence, oral and documentary, before the Magistrate, and the Court had no right to dismiss the complaint under section 203, when the order of the Sessions Judge clearly contemplated a trial of the case. The record shows that the complainant repeatedly asked the Court to make an inquiry into the matter as directed by the Sessions Judge, but no attention appears to have been paid to his request

His last application, dated the 4th December 1916, contains the following allegations and prayers.

"4. That in compliance with the order of the Sessions Judge the cattle were duly pointed out to the Police Officer by the petitioner in the month of August 1915, since when no further action has been taken in the matter, nor have the Police sent the property recovered to the Court."

"5. The petitioner prays that pursuant to the order of the Sessions Judge, an inquiry into his case be continued, the accused be summoned and the prosecution evidence recorded."

"6. The petitioner begs respectfully to point out that he is a poor man, while the principal accused is a person of great influence and wealth in the district and that the delay in the matter, which the petitioner fears may be due to the influence which the chief accused wields with the subordinate Police, is likely to be greatly prejudicial to the petitioner's case."

The prayer contained in the above application appears to have been ignored, and a perusal of the record shews that on the 19th January 1917 the District Magistrate took up the matter and suggested to the Assistant Commissioner that he should report to the Sessions Judge "that the further inquiry shews that Thakar Singh's case is false." It is hardly necessary to point out that the District Magistrate was wholly wrong in giving such a direction to the Magistrate with respect to a case which was pending before him in his judicial capacity. It was apparently in pursuance of this direction that the Magistrate made his order dismissing the complaint.

The case is undoubtedly an old one, but the complainant is in no way to blame for the delay which has occurred. It is clear that the Magistrate, who dealt with this case from time to time after the 2nd August 1915, took no judicial proceedings at all and simply depended upon the Police for investigation. Indeed, as the Sessions Judge in his order dated the 2nd April 1917 points out, the Sub Inspector of Police was wrong in sending the papers to the "Magistrate *Ilaqa*," and applying to him for a *khariji-ul-waqua* order when the case was pending in the Court of the Assistant Commissioner. Indeed the Assistant Commissioner in his order of the 11th July, 1916 himself refers to the impropriety of the procedure adopted by the Police, and remarks that "it is regrettable that the Court to which the case was originally submitted, *i.e.*, the Assistant Commissioner's Court, was not informed of the completion of the investigation of the Police. Much trouble and time would have been saved thereby. The case had no concern with the Magistrate of the *ilaqa*."

Having regard to the reasons stated above I consider that a further inquiry is absolutely essential; and I direct the Assistant Commissioner to inquire into the complaint of the petitioner and receive such evidence, oral and documentary, as he may wish to produce, and then proceed in accordance with law. I accordingly accept the application for revision and quash the order dismissing the complaint.

Application accepted.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 78 OF 1918.

February 27, 1918.

Present:—Sir Henry Richards, KT., Chief Justice.

MAHU AND OTHERS—APPLICANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 107—Security, when to be demanded—Wrongful act—Breach of peace—Proof.

Accused, owners of a certain piece of land, intended to open a market upon it for the sale of cattle near a place where there already was an old cattle market. The Magistrate, apprehending that that circumstance would very likely cause a breach of the peace, made an order against the accused under section 107, Criminal Procedure Code:

Held, that as the Magistrate was only informed that the accused intended to hold a market on their land without being at the same time informed that they intended to commit a breach of the peace by doing any wrongful act, the order of the Magistrate was illegal. [p. 966, col. 1.]

JASWANT SINGH *v.* EMPEROR.

Criminal revision from an order of the Magistrate, First Class, Aligarh.

Mr. *Satya Chandra Mukerji*, for the Applicants.

Mr. *E. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—In this case the Magistrate has made an order under section 107 against the applicants. It appears there is a cattle market at a certain place not very far from land which is owned by the applicants. The Magistrate had reason to think that the applicants intended to open a market upon their land for the sale of cattle. He thought, and I agree with him, that this circumstance would very likely cause a breach of the peace. What would most likely happen was that the owners of the older market would raise objection to the new market and that the applicants as owners of the land upon which the new market would be held would resist the action of the owners of the older market. The section, however, provides that where the Magistrate is informed that any person is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act which may occasion a breach of the peace or disturb the public tranquillity, the Magistrate may then make the order. It is not pretended that the Magistrate was informed that any of the applicants intended to commit a breach of the peace. He was only informed that they intended to hold a market on their own land. If this act was wrongful act then the Magistrate would be entitled to act. But it is not contended that the act would be wrong. Under these circumstances I do not think that the order could legally be made. I accordingly allow the application and set aside the order of the Magistrate.

Application allowed.

PUNJAB CHIEF COURT.

CRIMINAL PETITION No. 963 OF 1916.

July 14, 1916.

Present:—Mr. Justice Chevis.

JASWANT SINGH—ACCUSED—PETITIONER

versus

EMPEROR THROUGH BASANTA—COMPLAINANT—RESPONDENT

Criminal Procedure Code (Act V of 1898), s. 181 (4)—Penal Code (Act XLV of 1860), s. 498—Enticing away married woman—Detention for purpose of illicit intercourse—Detention, offence of, where to be enquired into—Jurisdiction.

A complaint under section 498 of the Penal Code for detaining a woman for the purpose of illicit intercourse can be enquired into only in the District where such detention occurs, as section 181 (4) of the Code of Criminal Procedure refers only to cases of kidnapping and abduction, offences dealt with in sections 359 to 369 of the Penal Code, but does not apply to offences under Chapter XX of the Code. [p. 966, col. 2.]

Petition, under section 437, Criminal Procedure Code, for revision of the order of the Sessions Judge, Hoshiarpur, dated the 15th May 1916, affirming that of the District Magistrate, Hoshiarpur, dated the 13th January 1916, reversing that of the Magistrate, 2nd Class, Garhshankar, dated the 4th December, 1915, discharging the accused, and ordering further enquiry.

Mr. *Nand Lal*, for the Petitioner.

Bakshi *Gokul Chand*, for the Respondent.

JUDGMENT.—The complainant lodged a case against the petitioner under section 498, Indian Penal Code, charging him with having enticed away his wife from his home which is in the Hoshiarpur District. The Magistrate discharged the accused. The District Magistrate has ordered further enquiry, holding that there is a *prima facie* case against the accused for the detention of the woman in the Jullundur District for the purpose of illicit intercourse. The learned District Magistrate quotes section 181 (4), Criminal Procedure Code, as authority for holding that the Hoshiarpur Courts have jurisdiction in such cases. But section 181 (4) refers only to cases of kidnapping and abduction, offences dealt with in sections 359 to 369 of the Indian Penal Code, and not at all to offences under Chapter XX of the Code.

The District Magistrate has sent the case back merely for further enquiry into an offence of detention in the Jullundur

District, an offence which can be enquired into only in that District.

I set aside the District Magistrate's order and restore that of the Magistrate. This will, of course, not prevent the complainant from bringing a fresh complaint in the Jullundur District, if so advised.

Revision accepted.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 3 OF 1918.

February 27, 1918.

Present:—Sir Henry Richards, KT., Chief Justice.

MAHABIR AND OTHERS—APPLICANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 107—Conviction for rioting—District Magistrate, power of, in appeal, to order security for good behaviour—Surety, whether particular person can be ordered to be—Jurisdiction.

A District Magistrate has no jurisdiction, in an appeal from a conviction under section 147 of the Penal Code, to order an accused person to give security to be of good behaviour although he may order security to keep the peace, nor is his order directing a particular individual to be one of the sureties a valid order.

Criminal revision from an order of the District Magistrate, Basti.

Mr. *Satya Chandra Mukerji*, for the Applicants.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—The applicants were charged under section 147 of riot and convicted by a Magistrate of the Second Class on the 31st of October 1917. The accused appealed and on the matter coming up before the District Magistrate of Basti, on the 5th of November 1917, he confirmed the order of the Court below but in addition to that he ordered the accused to furnish security to be of *good behaviour* and that one of the sureties must be a certain lady. Apparently the District Magistrate thought that the riot had been either instigated by or had been made on behalf of the lady and that, therefore, she would be a very good person to give security. The order directed that the security should be for *good behaviour*. This was clearly a mistake, because the District Magistrate would have no jurisdiction in appeal from conviction to order an accused person to give security to be of good behaviour, although he might no doubt order security to "keep the peace." It is admitted on both sides that this error must be corrected.

A further objection is taken to the order that the District Magistrate had no jurisdiction to direct that one of the sureties must be a particular individual. The Assistant Government Advocate admits that he cannot support this order, and I am also of opinion that the order directing that a particular person must be one of the sureties is not a valid order. I accordingly vary the order of the learned District Magistrate in this way. The applicants will themselves execute bonds in the sums of Rs. 200 with two sureties in like sums to keep the peace for one year in each man's case, from the date of the expiration of one month's rigorous imprisonment imposed for the offence. In default I direct simple imprisonment for the remainder of the year.

Order modified.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 354 OF 1917.

August 16, 1917.

Present:—Mr. Justice Leslie Jones.

GURDIT SINGH *alias* GURANDITTA—CONVICT—APPELLANT

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Evidence Act (I of 1872), ss. 27, 114, ill. (b)—Statement of accused leading to discovery, nature of, admissibility of—Approver, statement of—Confession of co-accused, whether corroboration—Material corroboration, what amounts to.

It is quite legitimate for a Magistrate to record evidence under section 27 of the Evidence Act that an accused person said "I will point out certain property," if that statement of the accused leads to a discovery, but it is not legitimate to record as

evidence that an accused person said, "I will point out certain property which I obtained as my share of the booty in the dacoity." [p. 964, col. 2.]

The confession of a co-accused does not rank as corroboration of the statement of the approver. [p. 968, col. 2.]

Where reasonable proof exists that a sum of money deposited by the accused with a banker was borrowed by him from a certain person for the purpose of redeeming a mortgage which existed on his land, the story as told, unless proved to be untrue, cannot be said to be material corroboration of the statement of an approver that the accused had got the money as his share of the booty in a dacoity. [p. 968, col. 2.]

Appeal from the order of the Special Magistrate, 1st Class, with section 30 powers in the Punjab at Lahore, dated the 3rd of March 1917, convicting the appellant.

Mr. *Lal Chand Mehra*, for the Appellant.

Lala *Narinjan Das*, R. B., for the Government Advocate, for the Crown.

JUDGMENT.—This judgment deals with Criminal Appeals Nos. 354, 513, 514, 600, 660, 613 and 616 of 1917. The appellants in this case are seven men who have been convicted of participation in a serious dacoity which occurred at Rangar Nangal in the Gurdaspur District on the night of the 30th of January 1916, when the house of a Brahman shop-keeper, named Devi Ditta, was raided. Devi Ditta was himself absent, but there were numerous other occupants of the house and there were a number of men playing a game called *chihri* in the verandah of the shop when the dacoits arrived. After threatening and also maltreating some of the inmates the dacoits went off with the booty, including jewelry and cash valued by Devi Ditta at Rs. 18,000. No clue to the dacoits was obtained until the following March, when Harnam Singh and others were arrested at Kathala Station in the Gujrat District for an offence under the Arms Act.

The whole story of this dacoity has been told at great length by the two approvers Harnam Singh and Surat Singh, and the greater part of it is no doubt minutely accurate. The only question arising in these appeals is whether there is sufficient material corroboration of the statements of the approvers against each of the appellants.

I must remark that in this case, as in many others of his which I have seen, the Magistrate, who evidently does not understand section 27 of the Evidence Act, has systematically used the provisions of that section to cover inadmissible statements to the Police. It is quite legitimate to record evidence that an accused person said "I will point out certain property", if that statement of the accused leads to a discovery; but it is not legitimate to record as evidence that an accused person said "I will point out certain property *which I obtained as my share of the booty in the dacoity.*"

I now proceed to deal with the case of each appellant.

* * * * * * *

I maintain the convictions and sentences of Fauja Singh, Ram Singh, Sundar Singh, Mahtab, Mastan Singh and Partap Singh, except that in order to prevent cumulation, the order of solitary confinement in the case of Mastan Singh is set aside.

The case against Gurdit Singh, the remaining appellant, stands in a different category. Beyond the statements of the approvers and the confession of his co-accused Partap Singh, which does not rank as corroboration of the statements of the approvers, there is nothing against him except that on the 12th of February 1916 he had deposited the sum of Rs. 300 with a banker named Dhanpat. Evidence was tendered by him to show that this money had been borrowed by him from one Jawahir Singh, and that it was lodged with Dhanpat so as to be ready for an intended redemption. The Magistrate has regarded this evidence for the defence as a pure fabrication; and he may in one sense be right, but there is no doubt that the money was lodged through Jawahir Singh with Dhanpat. Jawahir Singh could afford to lend the money, and the mortgage-debt existed. The story as told cannot be proved to be untrue, and unless it is so proved it cannot be said that there is any material corroboration of the statement of the approver. There is, of course, ground for grave suspicion against Gurdit Singh but the case against him has not been adequately proved. He is accordingly acquitted and will be set at liberty.

Appeal accepted.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 1028 OF 1917.

February 27, 1918.

Present:—Sir Henry Richards, KT., Chief Justice.

GOBARDHAN—APPLICANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (*Act V of* 1898), *s.* 110—*Security for good behaviour, order for—Approved sureties—Sureties residing in another Police district and helping accused in defence, whether ground for refusing to accept.*

Where an order to furnish security under section 110, Criminal Procedure Code, simply requires the sureties to be 'approved sureties', the mere fact that the sureties do not reside in the same Police district and have evidenced their friendship by helping the accused in his defence will not suffice in law to justify a refusal to accept the sureties.

Criminal revision from an order of the Officiating District Magistrate, Etawah.

Messrs. *Satya Chandra Mukerjee* and *Brij Mohan Vyas*, for the Applicant.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—In this matter it appears that Gobardhan was ordered to furnish security under section 110. The order upon him was that he should give security himself in the sum of Rs. 200 and two approved sureties of Rs. 100 each. If he complied with the terms of this order he was entitled to be released. Gobardhan has presumably given his own bond for Rs. 200. He has produced two sureties who are ready to give security to the extent of Rs. 100 each. The Magistrate has declined to accept the sureties on two grounds, first, that the sureties reside in another Police station. Apparently they are not very far removed from the residence of the accused but they are not in the same Police district. The second ground is that they assisted Gobardhan in his defence. It seems to me that the second ground is no legitimate ground for refusing to accept the sureties. Presumably it will always be some friends of a person against whom proceedings have been taken under section 110, who will give security for him. It is very unlikely that any complete outsider, who has no interest whatever in the person charged, will undertake the responsibility. As I said before, it must always be a friend who will undertake the responsibility. The mere fact that these sureties evidenced their friendship by helping in the defence seems to me to be no reason at all for refusing to accept them as sureties. The first ground is, as already stated, they reside in another Police district. The order simply required that the sureties should be "approved sureties." This I think to mean that they should be themselves persons of good character and solvent. I think, therefore, that both the grounds upon which the learned Magistrate refused to accept the sureties are not sufficient in law to justify his doing so. The matter will now go back to the Magistrate, who will deal with the matter having regard to what I have said above.

Case sent back.

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 924 OF 1917.

November 15, 1917.

Present:—Mr. Justice Leslie Jones.

AHMAD—PETITIONER

versus

EMPEROR—RESPONDENT.

Penal Code (*Act XLV of* 1860), *ss.* 497, 498—*Enticing away married woman—Intention—Adultery, proof of—Benefit of doubt.*

For a conviction under section 498 of the Penal Code there must be an intention that the woman should leave her husband's control without any definite intention that she should return to him or an intention that she should remain away indefinitely. [p. 970, col. 1.]

Where it was alleged that the accused committed adultery with a woman while shut up in a shop with her angry husband outside, their entry in the shop together having been discovered at once and the door having been chained on them immediately:

Held, that it did not appear likely that the accused would commit adultery under such circumstances. [p. 970, col. 1.]

Petition, under section 439 of the Criminal Procedure Code, for revision of the order of the Sessions Judge, Mianwali, dated the 24th May 1917, modifying that of the Magistrate, 1st Class, Mianwali, dated the 25th April 1917, convicting the petitioner.

Mr. *Mokand Lal Puri*, for the Petitioner.

GARIB LALL *v.* EMPEROR.

ORDER.—(*August* 15, 1917.)—There does not appear to be any evidence on which a conviction under section 498, Indian Penal Code, could be supported. Nor does it appear likely that the petitioner would commit adultery with *Musammat* Bakhtawar while shut up in the shop with her angry husband outside; apparently their entry into the shop together was discovered at once and the door chained on them immediately. The Magistrate appears to have relied on the statement of Bakhtawar, but she has told two different stories, and her evidence is not of adultery but of rape.

Admitted—Single Bench—Notice. The petitioner may be released on his own bond for Rs. 50.

JUDGMENT.—My order dated 15th August 1917 must be read as part of this order. I need only add as regards the conviction under section 498, Indian Penal Code, that I think that for the purposes of a conviction under that section there must be an intention that the woman should leave her husband's control without any definite intention that she should return to him, or an intention that she should remain away indefinitely—*vide Queen Empress* v. *Gaman* (1). See also *Paira Ram* v. *Emperor* (2) and *Ghulam Mahomed* v. *Crown* (3). If in those cases a visit with a view to adultery could be brought under section 498, Indian Penal Code, there would presumably have been convictions under that section. I allow the petition, set aside th conviction and sentence and release the petitioner from his bail.

Petition allowed.

(1) 9 P. R. 1899 Cr.
(2) 25 P. R. 1902 Cr.; 7 P. L. R. 1903.
(3) 13 P. R. 1879 Cr.

PATNA HIGH COURT.

CRIMINAL APPEAL No. 223 OF 1917.

December 13, 1917.

Present:—Mr. Justice Roe and Justice Sir Ali Imam, KT.

GARIB LALL—APPELLANT.

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 408—Appeal from sentence passed by Assistant Sessions Judge—Forum of appeal—Trial Judge officiating as Sessions Judge—Procedure.

An appeal from a conviction and sentence by an Assistant Sessions Judge, where the sentence is less than four years' rigorous imprisonment, lies to the Sessions Court, and the fact that by the time the appeal is ready the Assistant Sessions Judge who tried the case has been promoted to officiate as Sessions Judge does not give the High Court any jurisdiction to try the appeal. In such a case it is open to the Officiating Sessions Judge, on receipt of the appeal, to either send the case to the High Court for disposal or to admit the appeal and postpone it till the return of the Sessions Judge.

Criminal appeal from an order of the Assistant Sessions Judge, Muzaffarpur, dated the 13th August 1917.

Mr. *Lal Mohan Ganguly*, for the Appellant.

Mr. *Mohammad Fakhruddin* (Government Pleader), for the Crown.

JUDGMENT.—In this case the appeal is from a conviction and sentence by the Assistant Sessions Judge of Muzaffarpur, Mr. Raj Kishore. The sentence is less than four years' rigorous imprisonment. The appeal, therefore, lay to the Sessions Court at Muzaffarpur. It is explained that the appellant felt that it was impossible to appeal to the Court at Muzaffarpur, for the reason that by the time his memorandum of appeal was ready Mr. Raj Kishore had been promoted to the position of Officiating Sessions Judge. We are of opinion that this fact does not give us any jurisdiction to try the appeal. It would have been open to Mr. Raj Kishore, on receipt of the appeal, to either send the case to the High Court for disposal or to have admitted the appeal and postponed it till the return of Mr. Sheepshanks for hearing. We certainly have no jurisdiction to hear the case and must, therefore, send it to the Sessions Judge for disposal. Let the record be sent down at once.

Case sent back.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 170 OF 1917.

CRIMINAL REVISION PETITION No. 139 OF 1917.

August 17, 1917.

Present:—Mr. Justice Spencer.

GURVANNA GOWD AND OTHERS —ACCUSED—PETITIONERS

versus

GOVINDAPPA—COUNTER-PETITIONER —RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 145, 146—Possession, enquiry into—Attachment of property under s. 146—Cancellation of order before adjudication by Civil Court, legality of.

An order for attachment passed under section 146 (1), Criminal Procedure Code, must be kept in force till the adjudication of the rights of the parties by a competent Civil Court.

A Magistrate has no jurisdiction to cancel the attachment as a result of further enquiry and adjudication by him as to the right to possession.

Rajah of Venkatagiri v. *Isakapalli Subbiah*, 26 M. 410 at p. 415, followed.

Petition, under section 107 of the Government of India Act, praying the High Court to revise the order of the Court of the Sub-Divisional Magistrate, Bellary, in Miscellaneous Civil Suit No. 9 of 1915.

ORDER.—As stated in paragraph 6 of the Deputy Magistrate's Order of 8th September 1915, the question for consideration in these proceedings under Chapter XII was who was in possession of the Takrar land on July 1st, 1915.

No doubt the Divisional Officer's Court, which determined that Patta should be registered in the name of Venkamma, was a competent Court to decide the question of registry, and it appears from the records that it was this question of registry which was the principal cause of the dispute as to possession. Nevertheless, the Divisional Officer's Court was not a competent Court for deciding a question as to the person entitled to possession of the land in dispute. This question can only be finally decided in the Civil Court and the Magistrate having passed the order of attachment, not as an *interim* order under section 145 (4), proviso 2 of the Code of Criminal Procedure, but as an order under section 146 (1) made at the conclusion of his enquiry after hearing the parties and taking evidence, was bound to continue the attachment until a competent

Civil Court adjudicated on the rights of the parties. [*Vide Rajah of Venkatagiri* v. *Isakapalli Subbiah* (1)].

I must set aside his order of February 26th, 1917, as made without jurisdiction and restore the order of attachment and the appointment of a Receiver made on September 8th, 1915.

Each party will bear his or their own costs in this Court.

Order set aside.

M. C. P.

(1) 26 M. 410 at p. 415.

PUNJAB CHIEF COURT.

CRIMINAL PETITION No. 1389 OF 1916.

January 3, 1918.

Present:—Sir Henry Rattigan, KT., Chief Judge.

BELA SINGH—CONVICT—PETITIONER

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 90, 514—Penal Code (Act XLV of 1860), s. 498—Warrant issued for woman enticed away—Reasons not recorded, effect of—Bond executed by surety, whether can be forfeited on woman's failure to appear.

In a case under section 498 of the Penal Code the trying Magistrate is competent to issue a warrant instead of issuing a summons for the attendance of the woman alleged to have been enticed away, but in order to comply with the provisions of section 90 of the Criminal Procedure Code it is necessary to record reasons for issuing the warrant in the first instance and if the Magistrate fails to do so, the warrant must be regarded as wholly illegal and the bond given by the surety for the woman's attendance has no legal force and cannot be forfeited if the woman does not appear. [p. 972, col. 1.]

Criminal petition for revision, under section 439 of the Criminal Procedure Code, of the order of the District Magistrate, Lyallpur, dated the 19th July 1917, confirming that of the Magistrate, 2nd Class, Lyallpur, dated the 12th July 1917, directing the forfeiture of security worth Rs. 100.

Mr. *L. C. Mehra*, for the Petitioner.

The Government Advocate, for the Respondent.

JUDGMENT.—In this case it was competent to the Magistrate who tried the

case to issue a warrant for the attendance of the woman in question instead of issuing a summons, but in order to comply with the provisions of section 90, Criminal Procedure Code, it was necessary for him to record his reasons in writing for issuing the warrant in the first instance. No such reasons were recorded in the present case and upon the authority of *Sukheswar Phukan* v. *Emperor* (1) the warrant must be regarded as wholly illegal. In these circumstances *Kala Singh* v. *King-Emperor* (2) is authority for holding that the bond given by Bela Singh who stood surety for the woman's attendance has no legal force. I accordingly accept this application and set aside the order of the Magistrate, dated the 12th July 1917, and of the District Magistrate dated the 19th July 1917. The amount declared to be forfeited shall, if realised, be refunded.

Revision allowed.

(1) 11 Ind. Cas. 593; 38 C. 789; 12 Cr. L. J. 409; 15 C. W. N. 1001.
(2) 22 P. W. R. 1907 Cr.; 6 Cr. L. J. 275.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 7-B OF 1918.
January 25, 1918.
Present:—Mr. Kotwal, Offg. A. J. C.

SHESHARAO NAGORAO PATIL—APPLICANT
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 145 (1)—Preliminary order, condition precedent of—Jurisdiction.

The condition precedent authorizing a Magistrate to issue an order under section 145 (1), Criminal Procedure Code, is that he should be satisfied that a dispute likely to cause a breach of the peace exists.

The fact that the complaint shows that the complainant was out of possession of the property in dispute for over two months does not vitiate the proceedings under section 145, Criminal Procedure Code.

Petition for revision against an order passed under section 145, Criminal Procedure Code, by the Sub-Divisional Magistrate,

Darwah, in Miscellaneous Criminal Case No. 20 of 1917, decided on 31st October 1917.

Mr. *C. B. Parakh*, for the Applicant.

ORDER.—It is urged that the Magistrate had no jurisdiction to start the proceedings, when the complaint made to him on the face of it showed that the complainant was out of possession for over two months and in consequence he could not get an order in his favour. This contention is based upon a misapprehension of the conditions, the existence of which authorises a Magistrate to issue an order under section 145 (1), Criminal Procedure Code.

The Magistrate can issue the order if he is satisfied that a dispute likely to cause a breach of the peace exists. He was so satisfied in this case from the Police report, dated 6th April 1917. He could therefore, make the order and, therefore, decide the question of possession in favour of either party to the proceeding.

It is next urged that there is no finding that there is a danger of a breach of the peace, but such finding is involved in the order under section 145 (1) and the applicant's Pleader admits that no plea was raised under section 145 (5).

The proceedings do not appear to be open to objection on the score of want of jurisdiction. This application is dismissed.

Application dismissed.

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 1047 OF 1917.
June 29, 1917.
Present:—Mr. Justice Chevis.

EMPEROR—PROSECUTOR
versus
SAUDAGAR RAM—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 250—Compensation, order for, when to be made.

A Magistrate in acquitting the accused called upon the complainant to show cause why an order for compensation should not be made against him On the same day and on the next page he recorded the statement of the complainant and then made an order against him to pay compensation:

In re MANTRIPRAGADA MATTAPALLI NARASIMHA RAO.

Held, that this was sufficient compliance with the provisions of section 250 of the Criminal Procedure Code.

Case reported by the Sessions Judge, Lyallpur, with his No. 656 of 22nd June 1917.

ORDER.—The learned Sessions Judge is not correct in saying that the Magistrate acquitted and then called on complainant to shew cause. The Magistrate writes " in acquitting the accused I call on Saudagar to show cause, etc. "

On the same day and on the next page comes Saudagar's statement, and then the order to pay compensation. This I regard as sufficient compliance with section 250, Criminal Procedure Code, see *Emperor* v. *Punamchand Hirachand* (1). The present case is on all fours with the Bombay case, and I consider *Narpat Rai* v. *King-Emperor* (2) distinguishable.

I decline to interfere.

Revision rejected.

(1) 8 Bom. L. R. 847; 4 Cr. L. J. 423.
(2) 57 P. R. 1905 Cr.; 181 P. L. R. 1905; 3 Cr. L. J. 123.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 531 OF 1917.
(CRIMINAL REVISION PETITION No. 416 OF 1917.)
December 3, 1917.

Present:—Mr. Justice Spencer.

In re MANTRIPRAGADA MATTAPALLI NARASIMHA RAO—ACCUSED—PETITIONER.

Penal Code (Act XLV of 1860), ss. 44, 323, 341, 385—Threat to report suspected case of smuggling liquor, whether extortion—'Injury,' meaning of - Joint trial of charges of wrongful restraint, attempt at extortion and causing hurt in attempt, legality of—Criminal Procedure Code (Act V of 1898), s. 233.

Accused, who was the proprietor of a certain estate, stopped complainant, a cooly, whom he suspected of smuggling Arrack from the Nizam's Dominions into British Territory, on the way, took and kept his liquor jar for the night and threatened to report the matter to the Police unless he paid something. He was charged with wrongful restraint, threat of injury to commit extortion and causing simple hurt in the course of the attempted extortion and was sentenced to a single fine of Rs. 100 for the three offences:

Held, (1) that the conviction under section 385 was bad, as complainant was not put in fear of any injury within the meaning of section 44 of the Penal Code and the accused only threatened to do what he was bound by law to do; [p. 973, col. 2.]

(2) that the conviction under section 341 was bad, as there was no physical restraint of complainant's person; [p. 973, col. 2.]

(3) that the charge of voluntarily causing hurt, which was non-cognisable and for which there was no complaint to a Magistrate, should not have been tried on the Police charge sheet with the other charges and that this irregularity prejudiced the accused, as the evidence of hurt was not considered except as combined with the evidence on the other Police charges. [p. 974, col 1]

For the purpose of section 385, Indian Penal Code, it is necessary that the accused should have put some person in fear of injury in order to extort some property from him. 'Injury' includes only such harm as may be caused illegally to a person's mind, body, reputation or property. [p. 973, col. 2.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the judgment of the Court of the Joint Magistrate, Bezwada, in Criminal Appeal No. 92 of 1916, preferred against the judgment of the Court of the Second Class Magistrate, Bezwada, in Calendar Case No. 64 of 1916.

Mr. *B. Narasimha Rao*, for the Petitioner.

Mr. *A. Narasimham Ayyar*, for the Public Prosecutor.

ORDER.—The offences of which the accused has been found guilty are wrongful restraint, hurt, and putting a person in fear of injury in order to commit extortion. A single sentence of fine has been imposed for the three offences combined. The convictions for the first and the last of these offences, *viz.*, those under sections 341 and 385, Indian Penal Code, will not stand because it has not been found that any physical restraint was put on the person of P. W. No. 1. If he remained for the night in Lingagiri because the accused, a proprietor of that place, told him to stay, there was no offence within section 341. Again the threat that the accused is alleged to have used towards the cooly, who was discovered transporting Arrack from the Nizam's Dominions into British Territory, was to the effect that he would report him to British Police. For the purpose of section 385 it is necessary that the accused should have put some person in fear of injury in order to extort some property from him. The definition of 'injury' in section 44, Indian Penal Code, shows that it embraces only such harm to body, mind, reputation or property as may be caused illegally. There would have been nothing

JALAL v. EMPEROR.

illegal in a landed proprietor asking the Police to investigate a suspected case of smuggling liquor. It would, on the contrary, be his duty to give information. The offence of hurt is a non-cognisable one. It consisted here in the accused giving the cooly a stroke on his hands with his walking stick when he persisted in asking permission to be allowed to go on his way. There was apparently no complaint by the P. W. No. 1 to the Magistrate, and, in all probability, the charge of hurt would never have come into Court if the Police had not taken up the other charges. I think the accused has been prejudiced by being tried for this offence along with the other cognisable offences, as the evidence has not been considered separately.

I set aside the conviction and direct the fine to be refunded.

Conviction quashed.

M. C. P.

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 1017 OF 1917.

November 10, 1917.

Present:—Mr. Justice Shadi Lal.

JALAL AND OTHERS—CONVICTS—PETITIONERS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 107, 145, distinction between—Security to keep public peace—Possession of immoveable property, dispute as to—Procedure.

Proceedings under section 107 of the Criminal Procedure Code are only intended for the security of the public peace, not for the purpose of enabling one of the two contending parties to help themselves in recovering possession of immoveable property after having their adversaries' hands tied down by an order under this section. Where the dispute relates to the possession of immoveable property the proper course is to institute proceedings under section 145, and not under section 107.

Bejoy Singha Neogi v. *Empress*, 3 C. W. N. 463, followed.

Petition, under section 439 of the Criminal Procedure Code, for revision of the order of the District Magistrate, Shahpur, dated the 3rd March 1917, affirming that of the Magistrate, 1st Class, Shahpur, dated the 9th January 1917, directing the petitioners to furnish security under section 107, Criminal Procedure Code.

BALI SAHU v. EMPEROR.

Mr. *Mokand Lal Puri*, for the Petitioners.

Mr. *Ghulam Haider*, Moharrir, Court of Wards, for the Respondent.

JUDGMENT.—Upon an examination of the evidence upon the record, I am of opinion that there is a *bona fide* dispute in this case with respect to the petitioner's right of grazing and that the order under section 107, Criminal Procedure Code, is not justified—the report submitted by the Moharrir of the Court of Wards on the 19th October 1916 shows that the convicts had some sort of possession of the land in dispute, and there is also oral evidence to the effect that they have been exercising the right of grazing.

Proceedings under section 107 are only intended for the security of the public peace, not for the purpose of enabling one of the two contending parties to help themselves in recovering possession of immoveable property after having their adversaries' hands tied down by an order under this section. If it is thought necessary that an order should be made relating to the possession of immoveable property which is the subject-matter of the dispute between the parties, the proper course is to institute proceedings under section 145; then the parties will have notice of the case they have to meet, and each party could put forward evidence to prove his possession—*vide Bejoy Singha Neogi* v. *Empress* (1).

I accordingly accept the application for revision, and set aside the order requiring the petitioners to furnish security under section 107, Criminal Procedure Code.

Appeal allowed.

(1) 3 C. W. N. 463.

PATNA HIGH COURT.

CRIMINAL REVISION No. 402 OF 1917.

December 18, 1917.

Present:—Mr. Justice Roe and Justice Sir Ali Imam, KT.

BALI SAHU—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 235—General Clauses Act (X of 1897), s. 26—Opium Act (I of 1878), s. 9 (c), (f)—Bihar and Orissa Excise Act (II B. & O. of 1915), s. 47 (a)—Illegal possession and sale of opium—Joint trial under two Acts, validity of—Separate sentences, validity of.

EMPEROR *v.* GHULAM HUSAIN.

Separate sentences were passed on the accused under section 47 (*a*) of the Bihar and Orissa Excise Act and sections 9 (*c*) and 9 (*f*) of the Opium Act in the same trial in respect of two sales of opium to the same person and for possession of the residue of the opium left after the sales:

Held, (1) that the whole series of acts for which the accused was punished made one transaction within the meaning of section 235 of the Code of Criminal Procedure and the joint trial of the offences, therefore, was not illegal;

(2) that the conviction for possession was not in respect of the same article as that sold but for the residue, and that, therefore, separate sentences for the possession and the sale did not contravene the provisions of section 26 of the General Clauses Act.

Mr. *G. C. Pal*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—In this case the applicant has been sentenced under section 47 (*a*) of the Bihar and Orissa Act II of 1915 to pay a fine of Rs. 50, and under section (9) (*c*) of Act I of 1878 to undergo rigorous imprisonment for 3 months and to pay a fine of Rs. 50 and under section 9 (*b*) of Act I of 1878 to pay a fine of Rs. 50. The grounds on which we are asked to interfere are, *firstly*, that offences under the Bihar and Orissa Act of 1915 and the Opium Act should not have been tried together, *secondly*, that the possession and the sale constitute the same offence, and that, therefore, the separate sentences are against section 26 of the General Clauses Act, and *thirdly*, that the applicant was prejudiced by the admission of documentary and oral inadmissible evidence in the Magistrate's Court.

Upon the first ground taken it seems that the circumstances of the case fall well within section 235 of the Criminal Procedure Code. The two sales for which the applicant has been punished were made to the same person and the possession for which he has been punished was the possession of the residue of the opium left after the sale. The whole series of acts clearly made one transaction. This consideration also deals with the second ground taken on behalf of the applicant. The conviction for possession has not been in respect of the same article as that sold, but for the residue. With regard to the third ground the learned Sessions Judge most carefully discarded all the irrelevant evidence before dealing with the facts of the case. One lot of irrelevant evidence discarded he describes as based upon a palpable fallacy and the other lot he describes as rubbish and valueless. Certainly the applicant was not prejudiced in the Appellate Court by the irrelevant evidence adduced in the Court of first instance. We are dealing with the judgment of the Sessions Court and are unable to say that the judgment of the Sessions Court is in any way improper. The sentences are not excessive. The application is rejected. The applicant will surrender to his bail and serve out the remainder of his sentence.

Application rejected.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 93 OF 1918.

March 1, 1918.

Present:—Justice Sir P. C. Banerji, KT., and Mr. Justice Tudball.

EMPEROR—APPELLANT

versus

GHULAM HUSAIN—OPPOSITE PARTY.

Arms Act (XI of 1878), s. 19 f)—Minor in possession of arms without license—Offence.

There is nothing in law which prevents a minor from being in actual fact in possession of arms without a license or which prevents him from being guilty of an offence under section 19, clause (*f*), of the Arms Act. [p. 976, col. 2.]

An Honorary Magistrate, who was exempt from the operation of the Arms Act and kept certain arms, died leaving behind him a *pardanashin* woman as a widow and a minor son. No license was obtained by the son for the arms, but they were retained in the house and were properly looked after:

Held, that the arms were in the custody and under the control of the minor and that he was guilty of an offence under section 19 (*f*) of the Arms Act. [p. 976, col. 2.]

Criminal appeal by the Local Government from an order of acquittal passed by the Additional Sessions Judge, Gorakhpur.

Mr. *A. E. Ryves* (Government Advocate), for the Crown.

Messrs. *C. R. Alston* and *Abdul Raoof*, for the Opposite Party.

JUDGMENT.—This is a Government appeal against an order of acquittal passed by the Additional Sessions Judge of Gorakhpur in the case of the opposite party, Sheikh Ghulam Husain, who had been convicted by a Magistrate of the First Class

for an offence under section 19, clause (*f*), of Act XI of 1878 (The Arms Act). The facts are simple. Sheikh Ghulam Husain is the son of one Khadim Husain, who died in 1901. The family is of good social position and owns considerable property. Khadim Husain was an Honorary Magistrate and as such was exempt from the operation of the Arms Act. The family lives in a three-storied *pacca* building at Ganeshpur. At the death of Khadim Husain, Ghulam Husain was a boy of tender years. His younger brother was born a few months after his father's death. *Musammat* Amina Bibi is the widow of Khadim Husain. Apparently after the death of Khadim Husain, the weapons which he had in his possession remained in the family residence and no steps were taken to obtain a license for their possession. Ghulam Husain has grown up and at the time that this case occurred was on the verge of majority, being between the ages of 17 and 18 years. On the 12th of September 1917, at 3 P. M. in the absence of *Musammat* Amina Bibi and of Ghulam Husain, the family house was searched and in it were found in the *zenana* quarters, locked up in almirahs, three guns, 8 swords, one dagger, one *kukhri* and three old pistols. At the same time in the house were also found some spears on one of which was engraved Ghulam Husain's name. The weapons were all in good condition and apparently had been kept properly cleaned. There was some evidence given in the case to the effect that Ghulam Husain had been seen out in the open accompanied by a servant carrying a gun some days previous to the search. The Magistrate who tried the case held that the accused was in charge of the guns, that they were under his control and that he was responsible for their possession without a license under the Act. He, therefore, convicted him and sentenced him to a fine of Rs. 1,000. On appeal the learned Additional Sessions Judge has held that the mother, *Musammat* Amina Bibi, being the manager of the family, is the person who in law must be deemed to have been in possession of these weapons; that the accused being a minor cannot be held to have been in possession and, therefore, ought not to have been convicted. He accordingly set aside the conviction and sentence and acquitted Ghulam Husain. It is from this acquittal that the Local Government has preferred this appeal.

It is true that Ghulam Husain was not of full age at the time that these weapons were recovered, but there is nothing in law which prevents a minor from being in actual fact in possession of arms without a license or which prevents him from being guilty of an offence under section 19, clause (*f*), of the Act. It is difficult for us to believe that a *purdanashin* lady like *Musammat* Amina Bibi would have taken any care or specially retained in her possession the weapons which were found in her house. It is clear that these weapons were retained and that they were cleaned and properly looked after. In the same room with these weapons was the spear belonging to Ghulam Husain himself on which his name was engraved and it is clear, therefore, that he took an interest in the weapons. There is, we think, good reason to believe that they were in his custody and under his control and that he has, as a matter of fact, committed the offence under section 19, clause (*f*), of the Act. Whether his mother has committed the same offence or not is not a question which we have to decide in this appeal, but we can see nothing in the present case to prevent it being held on the evidence that the weapons were under the control of Ghulam Husain and not of his mother. In the circumstances of the case we do not think that so heavy a fine as Rs. 1,000 was called for. Khadim Husain left behind him a *purdanashin* woman as a widow and a small boy. These weapons had probably been lying in the house for years owing more or less to the neglect of the District Magistrate in not having taken proper action on the death of Khadim Husain. The offence committed is one for which a more or less nominal punishment will suffice. We, therefore, allow the appeal, set aside the order of acquittal and restore the conviction of Ghulam Husain under section 19, clause (*f*), of the Arms Act and sentence him to pay a fine of Rs. 100 or in default to one month's simple imprisonment.

Appeal allowed.

BROJENDRA NATH MITRA *v.* ARMAN SHEIKH.

CALCUTTA HIGH COURT.
CIVIL RULE No. 878 OF 1917.
February 11, 1918.
Present:—Mr. Justice Teunon and
Mr. Justice Newbould.
BROJENDRA NATH MITRA—
PETITIONER
versus
ARMAN SHEIKH—OPPOSITE PARTY.

Bengal Tenancy Act (VIII B. C. of 1885), s. 66—Payment of decree by under-raiyat of non-occupancy raiyat, whether can prevent ejectment.

Section 66 (2) of the Bengal Tenancy Act clearly contemplates that the payment of the amount decreed against a non-occupancy *raiyat*, in order to be a good payment, must be made by or on behalf of the judgment-debtor.

Where the under-*raiyat* of a non-occupancy *raiyat*, against whom a decree for arrears of rent was obtained by the landlord under section 66 of the Bengal Tenancy Act, paid the decretal amount expressly to protect his own interest and on the allegation that the judgment-debtor was in collusion with the decree-holder landlord:

Held, that the payment, not having been made on behalf of the judgment-debtor, was not a good payment under section 66 (2) of the Bengal Tenancy Act so as to prevent the execution of the decree for ejectment.

Rule against the order of the Munsif, 1st Court, Khulna, in Suit No. 1160/780 of 1917.

Babus *Sarat Chandra Roy Chowdhury* and *Satya Charan Sinha*, for the Petitioner.

Dr. *Jadu Nath Kanjilal*, for the Opposite Party.

JUDGMENT.—In this case it appears that the petitioner before us brought a suit for rent against his tenant, a non-occupancy *raiyat*, and obtained a decree for a sum amounting to some Rs. 80 and odd with an order providing under the provisions of section 66 (2) of the Bengal Tenancy Act that on failure of payment of that amount within 15 days from the date of the decree, the decree for ejectment should be executed. Thereafter the opposite party, one Arman Sheikh, claiming to be an under-*raiyat* under the non-occupancy *raiyat*, the judgment-debtor, tendered the amount due in order to prevent the execution of the decree for the ejectment of the non-occupancy *raiyat*. Having found the opposite party Arman Sheikh to be an under-*raiyat* the Munsif accepted the deposit, proceeding apparently on the analogy afforded by sub section (3) of section 170 of the Bengal Tenancy Act. It is contended before us that the provisions of section 170 and subsequent sections of the Bengal Tenancy Act apply only in cases of sale and have no application in cases of decrees for ejectment under the provisions of section 66 (2). On behalf of the under-*raiyat* opposite party it is not contested that section 170 and the following sections have no direct application in the present case. But it is contended that under section 66 (2) it is not specifically provided that the payment must be made by the judgment-debtor. It is suggested that the payment may be made by any third party and that such payment must be accepted by the landlord as good payment preventing the execution of his decree for ejectment. In support of that contention we have been referred to the provisions of section 114 of the Transfer of Property Act. But these provisions have no direct application here, and we cannot but hold that section 66 (2) clearly contemplates that the payment made, to be a good payment, must be a payment by or on behalf of the judgment-debtor. Now in the present case the payment was not made on behalf of the judgment-debtor. On the contrary the deposit was offered by the opposite party Arman Sheikh expressly to protect his own interest and on the allegation that the judgment-debtor was in collusion with the landlord, the decree-holder.

That being so, we are of opinion that the Munsif should not have accepted the tender by the under-*raiyat* opposite party. In coming to that conclusion we are not to be understood as deciding any question which may hereafter arise as to the recognition by the landlord of the opposite party as his tenant, or any question that may arise under section 85 of the Bengal Tenancy Act as to the validity of the sub-lease against the landlord. Those questions may be raised in appropriate proceedings.

For these reasons we make this Rule absolute, set aside the order of the Munsif complained of and direct repayment to the opposite party of the amount which has been deposited or paid by him into Court. Under the circumstances we make no order as to cost in this Rule.

Rule made absolute.

DEOBA *v.* LAXMAN.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 558 OF 1916.

December 5, 1917.

Present:—Mr. Batten, A. J. C.

DEOBA—DEFENDANT—APPELLANT

versus

LAXMAN—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 92—Transfer of Property Act (IV of 1882), s. 52—Execution—Sale—Property purchased by decree-holder—Re-transfer, oral, validity of—Possession, suit for, maintainability of—Estoppel, title by.

Defendant, a decree-holder, purchased certain immoveable property belonging to his judgment-debtor in execution of a money-decree. The sale was confirmed, but the defendant afterwards agreed to accept the decretal amount and to re-convey the property to the judgment-debtor. No document was, however, executed and the judgment-debtor sold the property to the plaintiff. The latter then sued for possession of the property:

Held, (1) that the defendant having on confirmation of the sale become absolute owner of the property under Order XXI, rule 92 of the Civil Procedure Code, a re-transfer of the property to the judgment-debtor could only be effected by a registered deed; [p. 978, col. 2.]

(2) that the plaintiff having purchased the property from the judgment-debtor during the pendency of the execution proceedings the purchase was void; [p. 978, col. 2.]

(3) that the plaintiff being the representative of the judgment-debtor, a separate suit for possession was barred by section 47 of the Civil Procedure Code; [p. 979, col. 1.]

(4) that the Court in which the suit was brought not being the Court which passed the decree or in which the decree was executed, the suit could not be treated as an application under section 47 of the Code. [p. 979, col. 1.]

A decree-holder, who is an auction-purchaser, remains a party to the suit for the purposes of section 47 of the Code of Civil Procedure. [p. 978, col. 2.]

There is no such thing in law as title by estoppel. [p. 979, col. 1.]

Appeal against the decree of the Appellate Court of the District Judge, Nagpur.

Mr. *K. K. Gandhe*, for the Appellant.

Messrs. *N. D. Udhoji* and *M. R. Indurkar*, for the Respondent.

JUDGMENT.—The facts of the present case are that the decree-holder was allowed to bid at an auction held on a simple money-decree and purchased the 1/3rd share in the land of his judgment debtor Gosavi. The sale was confirmed and, therefore, under rule 92 of Order XXI, the decree-holder, the present defendant's father, became the absolute owner of the 1/3rd share. After this had happened, he apparently accepted the decretal amount from the judgment-debtor and promised to give back the land to him, but no document of transfer was effected, though a legal transfer for the consideration of the decretal debt required a registered deed. After the decree-holder's death his son, the present defendant, applied for possession of the property purchased. The plaintiff has brought this suit asking for a declaration that the defendant has no right in the property. The plaintiff claims to be a purchaser from the judgment-debtor after the decree-holder had told the judgment-debtor that he would give him back the property. The First Court dismissed the suit; the lower Appellate Court has decreed the plaintiff's claim, apparently on the ground that the defendant is estopped from denying the plaintiff's claim because the defendant's father informed the plaintiff before he purchased the property that he had given up his claims to it. As a matter of fact the execution proceedings had not closed at the date of the plaintiff's purchase. They are still before the Collector and the Collector has not yet put the auction-purchaser in possession. It is accepted law in this Court that a decree-holder who is an auction-purchaser remains a party to the suit. As between the defendant and judgment debtor, therefore, the matter now in dispute would be one to be decided under section 47, both being parties to the suit. Supposing the sale by the judgment-debtor to the plaintiff to be a valid one, the plaintiff cannot possibly be in a better position than the judgment-debtor and the present claim is one which would fall under section 47. But the plaintiff has no valid title at all on two grounds: the first is that the execution proceedings still being in the hands of the Collector when he purchased from the judgment-debtor his purchase is void, the second is that his vendor had no title to convey to him.

Under rule 92 of Order XXI the defendant's father became the absolute owner of the property on the confirmation of the sale. He could only transfer that property back to the judgment-debtor by a registered deed. There might have been an alternative course, namely, for the Collector to refuse in the circumstances to put the auction-purchaser

decree-holder in possession. This course would not give the present plaintiff any title. Thus there was no legal transfer from the judgment-debtor to the plaintiff, nor had the judgment-debtor any subsisting title to convey to the plaintiff. I am unable to understand what the learned District Judge means when he says the relinquishment by the purchaser was perfectly valid and did not require registration. There is no such thing as title by estoppel. If there were such a thing, the whole of the Transfer of Property Act and Registration Act would become waste paper. If the plaintiff has any status at all in this case it is because he is the representative of the judgment-debtor. If he is such a representative a separate suit would not lie as action has to be taken under section 47. As a matter of fact, however, the plaintiff has no legal status on which he can either sue or make an application. I may note that the Court in which the suit was brought was not the Court which was executing the decree or by which the decree had been passed, so it could not treat the suit as an application under section 47. Combined with the claim as stated above is a second claim which is of a totally different nature, asking for a declaration that the defendant cannot get separate possession of the 1/3rd share but only joint possession. There is nothing on the record to show that defendant has applied for joint possession and the lower Courts have held that there is no cause of action for this part of the claim. This decision is undoubtedly correct. If at any time the defendant gets possession of anything more than he is entitled to, the plaintiff can take such action as he is advised.

For the above reasons I reverse the decree of the lower Appellate Court and dismiss the suit with costs in all Courts. I may add that the plaintiff has failed because he has not taken the pains to get his title perfected. This is lucky for the defendant, whose action cannot be said to be that of an honest man.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No 2893 OF 1916.

January 14, 1918.

Present:—Mr. Justice Leslie Jones.

Musammat AZIM BIBI—PLAINTIFF—APPELLANT

versus

Musammat UMTAN BIBI, MINOR, THROUGH SHAH ALI AHMAD AND ANOTHER—DEFENDANTS.—RESPONDENTS.

Custom—Succession—Ancestral property—Daughter, whether excludes another daughter's daughter—Onus—Sayads of Jullundur District.

Among Sayads of the Jullundur District a daughter's daughter succeeds to her mother's share of ancestral property in preference to another daughter.

The onus of proving that a sister excludes her sister's daughter in succession to ancestral property held by the latter's mother is on the person alleging it.

Second appeal from the decree of the District Judge, Jullundur, dated the 31st July 1916, reversing that of the Munsif, 1st Class, Jullundur, dated the 3rd March 1916, decreeing the claim, but directing the parties to bear their own costs.

Mr. *Oertel*, for the Appellant.

Bakhshi *Tek Chand*, for the Respondents.

JUDGMENT.—Akbar Shah, a Sayad of the Jullundur Tehsil, had three daughters, all of whom succeeded to his ancestral property. One of the daughters died and the other two *Musammat* Azim Bibi and *Musammat* Umar Bibi took her share. Then *Musammat* Umar Bibi died leaving two daughters, and *Musammat* Azim Bibi has claimed the whole estate. The onus was placed on her, and it is not contended even in the grounds of appeal that it was wrongly placed. Her suit was dismissed, but an appeal has been admitted to a hearing on a certificate by the District Judge.

Counsel for the appellant (who has not referred to any evidence) has not been able to cite any case in which it has been held that the daughter's daughter would be excluded by another daughter, and the authorities are against him. See paragraph 27 of Rattigan's Digest, 8th Edition, Remark 2, and *Ilahi Bakhsh* v. *Musammat Budhi* (1) which is very much in point. The appeal is dismissed with costs.

Appeal dismissed.

(1) 5 Ind. Cas. 247; 5 P. R. 1910; 10 P. W. R. 1910; 159 P. L. R. 1910.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 712 OF 1916.
March 13, 1918.
Present:—Mr. Justice Tudball and
Mr. Justice Raoof.
DEBI PRASAD AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
BADRI PARSHAD—DEFENDANT—RESPONDENT.

Limitation—Declaration, suit for—Right to take fallen wood, nature of—Invasion of right—Cause of action.

The right to take wood falling from certain trees is one which can only be exercised on occasion, that is, when any wood may fall or be cut from the trees. It does not occur every year or at stated times. Each invasion of the right gives rise to a fresh cause of action, and a suit for a declaration can be brought within six years of each invasion. [p. 982, col. 1.]

Second appeal from a decree of the Additional Judge, Farrukhabad, confirming that of the Officiating Subordinate Judge, Farrukhabad.

Mr. *Kailas Nath Katju*, for the Appellants.

Dr. *Surendra Nath Sen*, for the Respondent.

JUDGMENT.—This is a plaintiff's second appeal. The facts of the case are as follows. In the year 1867 the father of the two plaintiffs, one Madan Gopal, was the mortgagee of certain Zamindari rights in the village of Runni Chursai. There was a public unmetalled road which ran from the village lands of this village up to the *pucca* road some short distance away. This public road belonged to the State and still belongs to it. In 1867 there were no trees standing on it, and Madan Gopal applied to the Collector of the District in writing pointing out this fact and that he wished to plant trees upon the public road for the benefit of the public, that he would tend and look after them, and that he would only claim the wood that might fall from the trees as his own. He would have no right to sell the trees. The Collector agreed to this and Madan Gopal planted these trees along the public road. It is quite clear, as the land vested in the State, the ownership of the trees did not vest in Madan Gopal, but as the Collector had agreed to the condition that he was to take the fallen wood, he no doubt continued to take it so long as he remained in the village, but in the years 1885 and 1887 there were certain transfers of the Zamindari shares in the village and Madan Gopal lost all interest in the Zamindari of Mauza Runni Chursai. In 1887 Badri Prasad became a co-sharer in the village by a sale-deed, under which his transferor purported to sell to him not only the Zamindari share but also the trees which had been planted upon the road as being his. In 1890 and again in 1892 Badri Prasad sold the fruit of these trees to various persons. In 1899 he had some civil litigation in regard to the fruit of the trees against a third party. In 1901 the Chairman of the District Board, under whose control the road is, sold the fruit to a third party. Badri Prasad objected and the Collector cancelled his sale. In 1900 the trees were lopped and the loppings were sold by the District Board. Badri Prasad claimed title to the loppings. Madan Gopal objected to his claim. The Collector finally decided that Badri Prasad was entitled and paid over to him the proceeds from the sale of the loppings *minus* expenses. In 1901 Badri Prasad had some civil litigation against certain other persons who were co-sharers in this village. They had taken the fruit of the trees and he sued them for damages. They denied his title in every way to the trees or to the fruit. The Court of first instance gave Badri Prasad a decree. On appeal the suit was dismissed by the District Judge, on the clear finding that Badri Prasad had not a shadow of a title whatsoever to the trees or to the fruit or to any of the produce thereof. Madan Gopal in that suit was called as a witness and testified to his claim and to the proceedings of 1867 on the basis of which the District Judge decided against Badri Prasad. In 1910 some more branches fell from these trees and there was a dispute between the plaintiffs, who are the sons of Madan Gopal, on the one side and Badri Prasad on the other. Again the proceeds of the sale of the wood were made over to Badri Prasad by the District Board. The present suit was brought within six years from this, that is, on the 18th of March 1915, in the Court of the Subordinate Judge of Farrukhabad. The plaintiffs in their plaint claimed that they were the owners of and in possession

of the trees; that they had been protecting and looking after the trees and had been taking all the produce thereof; that their father had been in continuous possession of the trees and that they were like him still in possession; that the defendant Badri Prasad had no right or title or interest whatsoever in these trees; that in the absence of the plaintiffs the defendant had realised the value of the wood from the District Board; that they had got to know of it in the month of November 1914, hence the present suit. They asked for a declaration that the trees were planted by their father; that they were still in possession of the trees and that they were the owners thereof. They further asked for an injunction restraining the defendant from interfering with the plaintiffs' right. The defendant in reply pleaded that the land on which the trees stood was Zamindari land and not the property of the State and that it belonged to the defendant; that the property had been sold and purchased by him in 1887 and that he was the owner and in possession of the trees; that the plaintiffs had no title whatsoever; that even if the defendant had no real title in the beginning, still he and his predecessors had been in proprietary and adverse possession and enjoyment of the trees since the year 1881, and, therefore, the suit was barred by limitation, the defendant having acquired title by prescription. The Court of first instance found that the trees were planted on the land of the road; that the land was the property of the State; that the trees had nothing to do with the Zamindari of the defendant; that the plaintiffs' claim, however, was barred by twelve years' adverse possession and that they were not entitled to the declaration, the defendant having held adverse possession since the year 1885. In the course of the suit on the 16th of June 1915, the plaintiff's Pleader, *vide rubkar* 65 A, clearly stated to the Court that his client only claimed a right to tend the trees and to take the fallen wood; that he claimed no greater right than this; that he had nothing to do with the fruit, etc. The plaintiffs appealed.

The Court below has treated the case as if it was clearly a suit in respect to the ownership of the trees and the possession thereof. It has said that the questions for determination in the appeal are:—Whether the plaintiffs have been in possession within twelve years of the suit or whether the defendant has been in adverse proprietary possession for more than twelve years; also whether the suit is barred by limitation. In the preamble of its judgment the lower Appellate Court has stated the facts as to the planting of the trees. In the body of its judgment it has stated as follows:—"No trees nor any rights in them were transferred to the defendant, nor are the trees standing on village lands." Under the contract with the Collector the plaintiff's father reserved to himself only the right to take the fallen wood of the trees but nothing else. No rights in the trees could be transferred by the planter of the trees. The plaintiffs have no Zamindari left in the village and they do not reside in Mauza Runni Chursai. They brought this suit for a declaration that they were the owners of these trees and had the right to take the fallen wood and also for an injunction that the defendant should not interfere with the exercise of their right. The Appellate Court held that the defendant had been in possession (presumably of the trees, though it does not say so clearly) for more than twelve years and has dismissed the appeal and the suit. The plaintiffs come here in second appeal. It is clearly admitted before us that the only right which the plaintiffs claim and can claim is the right to tend the trees and to take any wood that may fall; that they have no concern whatsoever with the fruit, and that they have no other right whatsoever in the trees. It is conceded before us *on behalf of both parties* that these trees, planted in the manner stated above and standing on public property belonging to the State, do not belong to either party; that in so far as they are in any one's possession, they are in possession of the Government. It is urged on behalf of the plaintiffs that there has been no adverse possession and cannot be any such adverse possession in a case like this, such as is contemplated by section 28 of the Limitation Act. On behalf of the respondent, however, it is urged that so

far as any right could be exercised by the parties, it has been regularly exercised by the defendant and his predecessors-in-title for well over twelve years. We think it should be made quite clear that the only right which is in dispute before us is the right to take the fallen wood. Under the application of 1867 that was the only right which was given to Madan Gopal. The plaintiffs, therefore, are not and cannot be concerned with the fruit and if the District Board or the Collector has in the past allowed Badri Prasad to take the fruit, that is no concern of the plaintiffs, for they themselves have no right to it admittedly.

As to the fallen wood, there are only two years in which there has been any dispute whatsoever. One was in the year 1900 and the other was in the year 1910. In both these years there were disputes and in both years the Collector gave the value of the fallen wood to Badri Prasad. It is impossible, therefore, in our opinion to say that these two occurrences show that the defendant has been in adverse proprietary possession of the right which the plaintiffs now claim before us. There is no question of proprietary right in the trees. No doubt the parties litigated in respect thereto in the Courts below; but one fact is clear and that is that neither party is the owner of the trees and that the sole right in dispute before us is the right to take the fallen wood. We have considerable doubt whether section 28 of the Limitation Act has any application whatsoever to this case but even assuming that it has, it is impossible to hold that by reason of the two disputes in 1900 and 1910, the defendant has established continuous adverse possession of this right as against the plaintiffs. The right is one which clearly can only be exercised on occasion, that is, when any wood may fall or be cut from the trees. It does not occur every year or at stated times. It is urged that the plaintiffs' suit should have been brought at least within six years of the dispute of 1900, but we do not think the plaintiffs were bound to come into Court on the occasion of that invasion of their right. It was again invaded in the year 1910, and they have come into Court within six years of that invasion to establish their right to take the fallen wood. We, therefore, cannot agree with the Court below that the suit is barred by limitation in any way at all. It has, however, been urged before us that the plaintiffs have no right whatsoever even to the wood under the petition and order of the year 1867 and that this Court, therefore, should grant them no declaration whatsoever. This is a point which has not been raised before in the course of this litigation. It amounts to asserting that Madan Gopal's right under the transaction of 1867 was purely a personal right which could be transferred neither by inheritance nor by sale, but this has not been the position which the parties have taken up in the Courts below Badri Prasad's claim was actually based on a transfer in his own favour and the litigation having been fought out on the assumption that the right was a transferable and heritable one, we can see no necessity whatsoever to allow this point to be raised at this stage of the case. The District Board or the Secretary of State for India are neither of them parties to the present litigation and the decree therein will not affect them in any way. It will be time enough to decide this question when either of these two parties are involved in litigation with the plaintiffs or the defendant This appeal is decided on the assumption that the right of Madan Gopal to take the fallen wood is a transferable right which descends to his heirs. The result, therefore, of our findings is this, that the plaintiffs are entitled to a declaration that they are entitled to take the fallen wood of the trees in dispute which were planted by Madan Gopal on the basis of his application of 1867 and that the defendant has no right to interfere with the plaintiffs' taking of that wood. There is no necessity whatsoever for any injunction as the exercise of this right can only occur from time to time, and the person who will be in possession of the wood will be the Collector or the District Board until either party claims it. The rest of the plaintiffs' claim is dismissed. In view of the exaggerations on either side in the course of this litigation and the fact that both parties claimed originally much more than they were entitled to, we think that the proper order as to costs of this litigation will be that each party shall bear their

own costs throughout. We direct accordingly.

Decree modified.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 64 OF 1915.

February 14, 1918.

Present:—Mr. Justice Richardson and Mr. Justice Walmsley.

GENDU NASYA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SADI BANIA *alias* SADI SAHA AND OTHERS—DEFENDANTS—RESPONDENTS.

Fraud, decree obtained by, suit to set aside—Evidence—Process suppressed, effect of.

In a suit for a declaration that a certain decree was obtained by fraud and is of no effect, a solid foundation is furnished, if the plaintiff establishes that the usual processes were suppressed by the defendant.

Appeal against the decree of the District Judge, Dinajpore, dated the 26th August 1914, reversing that of the Munsif, 1st Court at that place, dated the 20th August 1913.

Babus *Mohini Mohan Chukraburtty* and *Phanindra K. Singh*, for the Appellants.

Dr *Dwarka Nath Mitter* and Babu *Bireswar Bagchi*, for the Respondents.

JUDGMENT.—This appeal is preferred by the plaintiff. He brought the suit for a declaration that a certain decree which had been obtained against him was fraudulent and of no effect. The plaintiff's case appears to be that summons in the suit in which the decree was made was not served on him and that the suit was based upon a forged document. In the Trial Court the learned Munsif found in his favour and made a decree accordingly. In the Court of Appeal below the learned District Judge has dismissed the suit.

As to the non-service of summons, if the plaintiff had been able to establish that the usual processes had been suppressed, no doubt, that would have furnished some solid foundation for the suit. The

learned District Judge, however, has found that the summonses were duly served in the usual course. That part of the case, therefore, goes.

There remains the case as to forgery. In view of the authorities on the subject, the judgment of the District Judge may be in some respects open to criticism in that he has not come to an express finding, but we may refer to the judgment delivered by the Munsif in this case. The learned Munsif begins by saying "it is scarcely possible to prove frauds of this description by direct evidence" Then he goes on to say that the plaintiffs "practically" have not been able to adduce any direct evidence. Then he deals with the evidence which the plaintiff did adduce. In view of the kind of evidence and the kind of materials the Munsif had before him and on which he acted I am of opinion that it would serve no useful purpose to remit the case to the District Judge for any further finding. The appeal will accordingly be dismissed with costs.

WALMSLEY, J.—I agree.

Appeal dismissed.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION NO. 142 OF 1917.

January 11, 1918.

Present:—Mr. Justice Leslie Jones.

RAMJI SHAH AND ANOTHER—PLAINTIFFS—PETITIONERS

versus

GHULAM—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11, O. II, r. 2—Previous suit for possession and interest—Suit dismissed as not maintainable—Second suit for interest, whether barred—Punjab Redemption of Mortgages Act (II of 1913).

Defendant mortgaged some land to the plaintiffs for a certain sum, a part of which was to carry interest. On an application to the Collector under Punjab Act II of 1913, the mortgagor was allowed to redeem the land on payment of the principal only. A suit was then brought by the mortgagees for possession of the mortgaged property and for a declaration of their charge together with interest, which was dismissed on the ground that no civil suit to disturb possession given under Act II of 1913 could lie and that the plaintiffs were not entitled to interest. In a subsequent suit brought by the plaintiffs for interest:

Held, that the finding of the Court in the former suit with regard to interest being superfluous, the present suit for interest was neither *res judicata* under section 11 nor barred under Order II, rule 2, of the Civil Procedure Code. [p. 984, col. 1.]

Petition, under section 44 of Act III of 1914, for revision of the order of the District Judge of Attock at Campbellpur, dated the 28th October 1916, reversing that of the Munsif, 1st Class, Pindigheb, dated the 9th February 1916, decreeing the claim.

Dr. *Nand Lal*, for the Petitioners.

Mr. *L. M. Dutta*, for the Respondent.

JUDGMENT.—The District Judge of Attock has dismissed this suit on the ground that it is barred by section 11, Civil Procedure Code. The defendant had mortgaged some land to the plaintiffs for Rs. 300. One of the conditions of the mortgage was that a sum of Rs. 160 out of the total mortgage-debt should carry interest. On application to the Collector under Punjab Act II of 1913 the mortgagor was allowed to redeem on payment of the principal only. The mortgagees then brought a regular suit for possession in the Court of a Subordinate Judge. They claimed at the same time that the amount of their charge, which they put at Rs. 1,305 including interest, should be declared. The Subordinate Judge dismissed the suit on the ground that once possession had been given under Act II of 1913, no civil suit to disturb that possession could lie. Whether that order was right or wrong, it was sufficient for the disposal of the suit and the subsequent finding of the Subordinate Judge that the plaintiffs were not entitled to interest was superfluous.

The plaintiffs then instituted a fresh suit for interest and obtained a decree for Rs. 165-13-0 in the Court of a Munsif. The defendants appealed to District Judge with the result already stated.

Obviously the finding of the Subordinate Judge on the question of interest is not *res judicata* nor is the present suit barred under Order II, rule 2, seeing that it was held in the former suit that possession was not a remedy to which the plaintiffs were entitled and it was not, therefore, one of the alternative remedies between which the plaintiffs could have chosen [see *Prab Devi* v. *Harkishn Das* (1)].

On the merits, as the Munsif found, the plaintiffs are clearly entitled to interest at the rate claimed; but they have claimed for a period of five years and six months, whereas they are precluded by limitation from claiming for more than four years and nine months. The sum to which they are entitled is Rs. 142-8-0.

I allow the revision and grant the plaintiffs a decree for that sum. They will get proportionate costs throughout.

Revision allowed

(1) 47 P. R. 1884.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2262 OF 1915.

July 12, 1917.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Richardson.

NIBARAN CHANDRA SEN—PLAINTIFF—APPELLANT

versus

NAGENDRA CHANDRA SEN AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), ss. 68, 69, 70, 71—Attestation of document—Admission by executant, effect of—Transfer of Property Act (IV of 1882), s. 43—Mortgage—Mortgagor having no title but subsequently obtaining one—Attesting witness of mortgage deed purchasing property, effect of.

An admission of execution of a document by the executant thereof dispenses with the necessity of complying with the provisions of section 68 of the Evidence Act as against the party making the admission. Those provisions, however, must be complied with in order to prove the execution of a document as against the other parties to the suit who do not admit such execution. The document must be proved as against them in accordance with the provisions of sections 68, 69, 70 and 71 of the Act. [p. 985, col. 2.]

A mortgagor had lost title to a property at the time he mortgaged it along with other properties. But the title to that property had come back to the mortgagor when an attesting witness to the mortgage bond purchased the equity of redemption:

Held, that the provisions of section 43 of the Transfer of Property Act would come into operation and that therefore the mortgagee's lien was enforceable against that property in the hands of the purchaser of the equity of redemption, who being an attesting witness to the mortgage bond could not be held to be a *bona fide* transferee without notice. [p. 986, col. 1.]

Appeal against the decree of the Additional District Judge, Chittagong, dated the 30th June 1915, reversing that of the Munsif of South Ranjan, dated the 18th December 1913.

Babu *D. L. Kastgir*, for the Appellant.

Babu *Khitish Chandra Sen*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit to enforce a mortgage bond executed by the defendant No. 1. The defendant No. 2, who is the purchaser of the equity of

redemption in respect of one of the properties in Schedule II at a sale held in execution of a decree upon a subsequent mortgage, and the defendants Nos. 3 and 4, who were subsequently added as parties defendants to the suit upon objection raised by the defendant No. 2, contested the suit. The defendant No. 2 in a written statement admitted that the defendant No. 1 had executed the bond but pleaded that the bond was not a *bona fide* transaction and that no consideration passed.

The Court of first instance decreed the suit, but that decree was reversed and the suit dismissed by the lower Appellate Court. The plaintiff has appealed to this Court.

The first question for consideration is whether the lower Appellate Court was right in holding the bond to be invalid because one of the attesting witnesses was not examined as required by section 68 of the Evidence Act. The learned Judge says:—"Under section 59 of the Transfer of Property Act, the bond must be attested by two witnesses and under section 68 of the Evidence Act, one of the attesting witnesses must be examined to prove execution if there be an attesting witness alive and subject to the process of the Court and capable of giving evidence. In this case one of the attesting witnesses is a defendant, another is related to the defendants and the third is a very old man who is said to have lost his eyesight. Even if it be supposed that the first two would not speak the truth, the third ought to have been examined, as there is no evidence that he has lost his memory and no reason why he could not have spoken to the execution of the bond. Under the circumstances, it is quite clear that Exhibit I cannot be used in evidence so that the plaintiff's claim must fail on this ground."

Having regard to the admission of the defendants, however, we do not think that it was necessary to examine any attesting witnesses in this case.

Section 70 of the Evidence Act lays down that "an admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested." The defendant No. 1, the mortgagor, admitted the execution of the bond and the defendant No. 2, who now represents the interests of the mortgagor also, clearly admitted in his written statement that the bond was executed by defendant No. 1, and it appears that he was himself an attesting witness to it. We think that the admission of the defendants in the suit dispenses with the necessity of calling attesting witnesses or giving any other evidence.

We may in this connection refer to the provisions of section 58 of the Evidence Act and Order XII, rule 1, Civil Procedure Code.

But although an admission of execution dispenses with the necessity of complying with the provisions of section 68 of the Evidence Act as against the party making the admission, the said provisions must be complied with in order to prove the execution of a document as against other parties to the suit who do not admit such execution. The document must be proved as against them in accordance with the provisions of sections 68, 69 and 71. This view was taken by Woodroffe and D. Chatterjee, JJ. (Newbould, J. differing), in the case of *Satish Chandra Mitra* v. *Jogendra Nath Mahalanobis* (1) and the learned Judges held that the effect of section 70 is that the proof by calling attesting witnesses is dispensed with when the party executant admits execution only as against himself. It may be pointed out that in that case Mr. Justice Woodroffe in referring to the case of *Jogendra Nath Mukhopadhya* v. *Nitai Churn Bundopadhya* (2) said that he was unable to agree with the decision if it meant that even when the executant admits execution, his admission or proof of execution or signing only does not dispense with the proof of attestation.

So far as the defendants Nos. 1 and 2 are concerned, therefore, it was not necessary to call any attesting witnesses and the document must be taken to be a valid document as against them.

There are, however, defendants Nos. 3 and 4 who were subsequently added as party defendants. It is contended on behalf of the appellant that they were not necessary

(1) 34 Ind. Cas. 862; 20 C. W. N. 1044; 24 C. L. 175; 44 C. 345.

(2) 7 C. W. N. 384.

parties to the suit. The defendant No. 2 alone purchased the mortgaged property at an auction sale and the defendants Nos. 3 and 4 have been made parties only in order to obviate the objection that they were also interested in the purchase made by him. Under the circumstances, the plaintiff prays that the defendants Nos. 3 and 4 may be dismissed from the suit and as they do not object, we order accordingly. Any question arising between the plaintiff and the defendants Nos. 3 and 4 is left undecided.

The next question is whether the learned Judge was right in holding that the plaintiff could not claim any right to the property described in Schedule II, as the mortgagor had no right to the property at the date of the mortgage. There is no dispute that originally the mortgagor had title to the property. It appears that at the date of the mortgage the title had passed to other persons; but before the defendant No. 2 acquired the equity of redemption, the title had come back to the mortgagor. Under the circumstances, the provisions of section 43 of the Transfer of Property Act will come into operation. It is contended on behalf of the respondent that the equity cannot be enforced as against the defendant No. 2 who is a purchaser, but he himself was an attesting witness to the mortgage-bond. He is not, therefore, a *bona fide* transferee without notice. This contention must, therefore, be overruled.

The result is that the decree of the lower Appellate Court will be set aside and that of the Court of first instance restored. It will, however, be stated in the decree that the defendants Nos. 3 and 4 are dismissed from the action and that all questions arising between the plaintiff and the said defendants are left open.

The plaintiff is entitled to costs of this Court and of the lower Appellate Court from the defendant No. 2, and the defendants Nos. 3 and 4 will be entitled to their costs of this Court and of the lower Appellate Court from the plaintiff.

Appeal allowed in part.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 520 OF 1917.

January 12, 1918.

Present:—Mr. Justice Leslie Jones.

RATAN LAL—DECREE-HOLDER—PETITIONER

versus

BALA PARSHAD, MINOR, THROUGH BRIJ NATH—OBJECTOR AND LALTA PARSHAD—JUDGMENT-DEBTOR—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 115, 151, O. XXI, r. 58—Mortgage decree, execution of—Attachment, whether necessary—O. XXI, r. 58, objection under, whether can be taken—Court, inherent power of, when to be exercised—Revision—High Court, power of interference of.

Where property is directed to be sold under a mortgage decree, no objection under Order XXI, rule 58, of the Civil Procedure Code can be entertained to the attachment of such property, the reason being that the property directed to be sold under a decree of that kind does not require to be attached by way of execution and the mere fact that there has been an unnecessary attachment does not make the rule applicable. [p. 987, col. 1.]

Duyachand Nenchand v. *Hemchand Dharamchand*, 4 B. 515 (F. B.), 2 Ind. Dec. (N s.) 852, *Himatram* v. *Khushal Jethiram Gujar*, 18 B. 98; 9 Ind. Dec. (N. s.) 574, *Deefholts* v. *Peters*, 14 C. 631; 7 Ind. Dec. (N. s.) 418, followed.

Order XXI, rule 58, Civil Procedure Code, applies only to attachments in execution of a decree and not to attachments made before decree. [p. 987, col. 1.]

An objection having been taken under Order XXI, rule 58, of the Civil Procedure Code to the attachment of property sold in execution of a mortgage decree, the Court, holding that Order XXI, rule 58, was inapplicable entertained the application under section 151 of the Civil Procedure Code to save the objector the trouble of bringing a regular suit:

Held, that the Court had no jurisdiction to entertain an application or to pass an order upon it and that the Court having entertained the application the High Court had power to interfere under section 115 of the Civil Procedure Code. [p. 987, col. 1.]

Petition, under section 44 of Act III of 1914, for revision of the order of the Subordinate Judge, 2nd class, Delhi, dated the 20th April 1917, dismissing the application under Order XXI, rule 58, and deciding to entertain the application under section 151, Civil Procedure Code.

Mr. *Mukerji*, for the Petitioner.

Lala *Moti Sagar*, R. S., for the Respondents.

JUDGMENT.—The petitioner obtained a preliminary decree for money on a mortgage of one-third of certain property

on 30th August 19 6. Before that decree he had secured attachment. On 16th December 1916, he obtained a final decree and the property was advertised for sale. Thereupon the respondent, a brother of the judgment-debtor, filed an objection that the share of the judgment-debtor in the property was not one-third as stated in the decree but one-fourth.

The Court of execution found that the application was not one under Order XXI, rule 58, but decided nevertheless to entertain the application in exercise of the powers conferred by section 151 of the Code of Civil Procedure. This was done in order to save the objector the trouble of bringing a regular suit.

The decree-holder has now filed a petition for revision in this Court. It is clear that the objection was not and could not be one under Order XXI, rule 58, as that rule does not apply where the property in dispute is directed to be sold under a mortgage decree. The reason is that the property directed to be sold under a decree of that kind does not require the property to be attached by way of execution [see *Dayachand Nenchand* v. *Hemchand Dharamchand* (1)]. *Himatram* v. *Khushal Jethiram Gujar* (2) and *Deefholts* v. *Peters* (3) are further authorities for holding that the mere fact that there has been an unnecessary attachment does not make the rule applicable. In the present case, moreover, as already remarked, the attachment was before the decree and rule 58 applies only to attachments in execution of the decree.

Hari Mohan Dalal v. *Lachmichand* (4) is authority for holding that in such a case a Court has no jurisdiction to entertain any application for claim or to pass any order upon it and if it does so, the High Court will interfere under section 115 of the Code of Civil Procedure. That Division Bench ruling of the Calcutta High Court is directly in point. I, therefore, allow the petition with costs and dismiss the respondent's application. Pleader's fee Rs. 32.

Petition allowed.

(1) 4 B. 515 (F. B.); 2 Ind. Dec. N. S.) 852.
(2) 18 B. 98; 9 Ind. Dec. (N. S.) 574.
(3) 14 C. 631; 7 Ind. Dec. (N. S.) 418.
(4) 18 Ind. Cas. 215.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 564 OF 1916.

November 28, 1917.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Phillips.

C. SUBRAMANIA IYER *alias* SUBBA IYER AND OTHERS—PLAINTIFFS —APPELLANTS

versus

MUTHU VAITHILINGA MUDALIAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, rr. 3, 5 —Representatives of deceased party, conflicting claims by, decision on—Duty of Court—Appellate Court, order by, effect of—Order, whether can be questioned in appeal from final decree.

When a question arises as to who are the representatives of a deceased party to a suit or proceeding, it is obligatory on the Court to decide it. [p. 988, col. 1.]

An order passed by an Appellate Court deciding the question is as final as a similar order passed by the Court of first instance and its propriety cannot be questioned in an appeal on the merits from the final decree. [p. 988, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge, Kumbakonam, in Appeal Suit No. 24 of 1915, preferred against the decree of the Court of the District Munsif, Tiruvalur, in Original Suit No 103 of 19:3..

FACTS.—The original plaintiff brought the suit to recover a site from the defendant. Pending suit she died, and the 2nd plaintiff applied to be brought on the record as her legal representative. Plaintiffs Nos. 3 to 12 also claimed to be her legal representatives; and the District Munsif, without adjudicating on the claims of the rival claimants, brought all of them on the record, and gave them a decree for a portion of the site in dispute. Second plaintiff alone appealed against the decree disallowing the remaining portion of the site; and in the appeal, also raised the contention that the lower Court ought to have raised the question as to who was the legal representative of the deceased. The Subordinate Judge framed a preliminary issue on the point and called for a finding. The District Munsif found in favour of the 2nd plaintiff; and the Subordinate Judge, after hearing the objections to the finding, passed a decree for the whole site.

Plaintiffs Nos. 3 to 12 preferred the second

appeal on the only ground that they were also entitled to be impleaded as the legal representatives and that the first order impleading all of them as representatives should not have been interfered with.

Mr. *T. R. Venkatarama Sastri*, for the Appellant.

Messrs. *A. Sambamurthi Iyer*, *K. Bhashyam Iyenyar* and *N. Kunjithapadham Iyer*, for the Respondents.

JUDGMENT.—In the First Court, on the death of the original plaintiff, the question arose whether Subramania Iyer (referred to as 2nd plaintiff) alone should be recognised as his legal representative or whether certain other persons (referred to as plaintiffs Nos. 3 to 12) should also be recognised along with him as legal representatives of the original plaintiff.

This is a question which under Order XXII, rule 5 of the Code of Civil Procedure, it was obligatory on the Court to decide; but it is clear from the order recorded and the Munsif's remarks in his finding dated the 15th October 1915 that he did not determine the question, but simply added all the claimants (plaintiffs Nos. 2 to 12) as legal representatives without enquiry or hearing 2nd plaintiff's objections and proceeded with the case.

When the case came up on appeal, the lower Appellate Court called for a finding as to who were the proper persons to be added as legal representatives of the original plaintiff, and passed an order adding 2nd plaintiff alone.

In our opinion, this order has the effect of removing plaintiffs Nos. 3 to 12 from the suit (except as regards their liability for costs) just as would have been the result of a similar order passed by the Original Court at the proper stage.

An order under Order XXII, rule 5, is not appealable and we do not think it is open to plaintiffs Nos. 3 to 12 to question it by way of appeal against the decree passed by the lower Appellate Court in favour of 2nd plaintiff against the defendant, which decree is not sought to be altered so far as defendant is concerned.

The present appeal does not lie and is dismissed with costs.

Appeal dismissed.

M. C. P.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 149 OF 1916.

March 9, 1918.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

MIR DAD KHAN AND ANOTHER—DEFENDANTS—APPELLANTS

versus

RAMZAN KHAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Agra Tenancy Act (II of 1901), ss. 10, 20, 21—Ex-proprietary tenancy, relinquishment of, validity of—Mortgage of sir land—Covenant to put mortgagee in possession—Relinquishment, deed of, simultaneous, effect of.

The object of section 10 of the Agra Tenancy Act is that a right of occupancy should be secured and preserved to a proprietor who becomes by a transfer the ex-proprietor, whether he wishes it to be secured and preserved to him or not, and notwithstanding any agreement to the contrary between himself and the transferee. [p. 989, col. 2]

If a covenant to relinquish the *sir* lands is part of a transaction of sale or of mortgage, then the agreement to surrender will be void and unenforceable, no matter what ingenious devices may be employed to give colour to it. If the Court is satisfied that there was first of all a transfer by way of sale or mortgage and that the transferee, having obtained the status of an ex-proprietary tenant, with full knowledge of that fact and of the rights preserved to him by the Statute, deliberately chooses, as a separate transaction, to relinquish his ex-proprietary tenancy into the hands of the new proprietor, or of the mortgagee in possession, then the law cannot go further in the way of protecting a reckless and imprudent man against the consequences of his own acts. [p. 990, col. 1.]

A Zemindar executed a usufructuary mortgage of a part of his *sir* lands for Rs. 8,000 and covenanted to put the mortgagee in actual cultivating possession of the land and not to assert his rights as an ex-proprietary tenant. By a deed of relinquishment executed on the same date the mortgagor purported to surrender or to relinquish in favour of the mortgagee, in return for a consideration of Rs. 1,000, his rights as an ex-proprietary tenant in the mortgaged lands. It was found that the mortgagee held a decree for Rs. 9,000 against the mortgagor, which was satisfied by the execution of the mortgage deed and the deed of relinquishment:

Held, that the transactions in the two deeds were in substance one transaction, and that the deed of relinquishment and the covenant to put the mortgagee in actual possession of the mortgaged land, being devices to evade the provisions of section 10 of the Agra Tenancy Act, were void and unenforceable. [p. 990, col. 2.]

First appeal from the decree of the Additional Subordinate Judge, Aligarh, dated the 26th January, 1916.

Mr. *Panna Lal*, for the Appellants.

Messrs. *M. L. Agarwala* and *G. L. Agarwala*, for the Respondents.

MIR DAD KHAN v. RAMZAN KHAN.

JUDGMENT.

PIGGOTT, J.—The suit out of which this first appeal arises is based upon the following state of facts:—

Mir Dad Khan and others were the owners of proprietary rights in a certain Mahal. Appurtenant to those proprietary rights was a considerable area of land of which these Zemindars were in possession either as *sir* or *khudkasht*. With reference to the *khudkasht* land it is sufficient to say that it was land which had been held by the proprietors in their own cultivation for the full statutory period and which had, therefore, acquired the essential character of *sir* land, so far as section 10 of the Local Tenancy Act No. II of 1901 is concerned. For purposes of brevity, therefore, it will be convenient hereafter to speak of these lands as the *sir* lands of Mir Dad Khan and others. Now these proprietors were indebted, and the evidence on the record shows that there was a decree out against them for a sum of Rs. 9,000 held by Thakur Das and others. The proprietors endeavoured to come to terms with these creditors and I do not think that there can be any doubt as to the nature of the arrangement effected. The creditors were willing to accept a usufructuary mortgage for Rs. 9,000, that is to say, for a sum sufficient to pay off their decree provided that the land mortgaged, being 30 *bighas* of the *sir* land of the debtors, should pass into their actual cultivating possession. In endeavouring to effect such a transaction the parties concerned had to get round the difficulties placed in their way by Statute, that is to say, by the Local Tenancy Act, and particularly by sections 10 and 20 of that Act. It so happens that the law on this point has been recently settled by the highest possible authority in the case in *Moti Chand* v. *Ikram Ullah Khan* (1). So far as I am concerned I think I am entitled to say that there is nothing in the propositions of law there laid down other than I have been consistently asserting for some years past, or other than were given effect to by Mr. Justice Tudball and myself in the case of *Dipan Rai* v. *Ram Khelawan Rai* (2). Their Lordships of the Privy Council, in deciding the case before them, by no means overlooked the provisions of section 83 of the Tenancy Act, according to which a tenant may at the end of any agricultural year surrender his holding to his proprietor. What they point out is that this right of surrender cannot be permitted to be used in such a manner as to defeat the provisions of the law by which ex-proprietary tenancies are created. They point out that the policy of Act No. II of 1901 is to secure and preserve to a proprietor, whose proprietary rights in a Mahal, or in any portion of it, are transferred, otherwise than by gift or exchange between co-sharers in the Mahal, a right of occupancy in his *sir* lands. Such right of occupancy is secured and preserved to the proprietor, who becomes by a transfer the ex-proprietary tenant, whether he wishes the right to be secured and preserved to him or not, and notwithstanding any agreement to the contrary between him and the transferee. It is further pointed out that the Courts must not allow the policy of the Act to be defeated by any ingenious devices, arrangements or agreements between a vendor and a vendee for the relinquishment by the vendor of his *sir* land. They go on to point out, more particularly, that devices to compel such a surrender by the inclusion in the deed of transfer of provisions amounting to a penalty against the transferor, in the event of his failing to relinquish the ex-proprietary tenancy, must also be regarded as devices or arrangements for defeating the policy of the Act. Cases in which attempts have been made, more or less openly, to evade the provisions of the law on the subject of ex-proprietary tenancies do from time to time come before the Courts, and we have to notice more particularly the decision of a Bench of this Court in *Lekhraj* v. *Parshadi* (3), in which it would appear that a transaction which one might at least suspect of having been of this nature was given effect to by the Court. According to their Lordships of the

(1) 39 Ind. Cas. 454; 39 A. 173; 5 L. W. 388; 15 A. L. J. 150; 21 M. L. T. 267; 32 M. L. J. 383; 21 C. W. N. 616; 19 Bom. L. R. 433; 26 C. L. J. 24; (1917) M. W. N. 453 (P. C.).

(2) 5 Ind. Cas. 557; 32 A. 383; 7 A. L. J. 330.

(3) 2 Ind. Cas. 409; 6 A. L. J. 713.

Privy Council I take the true test to be this:—If a covenant to relinquish the *sir* lands is part of the transaction of sale or of mortgage then the agreement to surrender will be void and unenforceable, no matter what ingenious devices may be employed to give colour to it. If the Court is satisfied that there was first of all a transfer by way of sale or mortgage and that the transferee, having obtained the status of an ex-proprietary tenant, with full knowledge of that fact and of the rights preserved to him by the Statute, deliberately chooses, as a separate transaction, to relinquish his ex-proprietary tenancy into the hands of the new proprietor, or of the mortgagee in possession, then the law cannot go further in the way of protecting a reckless and imprudent man against the consequences of his own acts.

In the present case what we have to consider is the nature of the agreement actually entered into between Thakur Das and his fellow creditors on the one hand and Mir Dad Khan and his fellow Zemindars on the other. Two documents were executed on one and the same date, namely, the 19th of June 1913. By one of these documents the proprietors covenanted to mortgage with possession 30 *bighas* of land forming part of their *sir* lands. They declared themselves to have put the mortgagees in actual possession of the land in question, surrendering all their rights in the *sir* and *khudkasht*. They further covenanted that, if the mortgagees should fail to obtain possession, or if the mortgagors should after all not give up the *sir* from their own cultivation, or should set up any claim to hold it as ex-proprietary tenants, then the mortgagees should be entitled to sue for their mortgage money with heavy interest and to enforce the same by sale of the proprietary rights of the mortgagors, not merely in the 30 *bighas* of land already referred to, but in a total area of 63 *bighas* and odd belonging to the mortgagors. The consideration for this document was stated at a sum of Rs. 8,000. A further attempt was made to safeguard the mortgagees in any event, against a possible refusal on the part of the mortgagors to carry out the contract in its entirety. The mortgagees did not content themselves with taking a usufructuary mortgage pure and simple. They inserted a covenant that, in spite of their right to obtain possession of the 30 *bighas* of land and to enjoy the usufruct in lieu of interest, they should nevertheless be entitled at any time to sue for the principal of their mortgage debt and to bring to sale the proprietary rights of the mortgagors in the area of 30 *bighas*, which were formally hypothecated as security for the debt. The other document of the same date was a deed of relinquishment, by which the mortgagors under the former deed purported to surrender or to relinquish in favour of the mortgagees, in return for a consideration of Rs. 1,000, their rights as ex-proprietary tenants in the 30 *bighas* of *sir* land in question. Whatever doubt there may be in particular cases as to the precise nature of the transaction entered into, it seems to me that there is no room for doubt in the present case. The total sum of money which Mir Dad Khan and his fellow Zemindars owed to Thakur Das and others was Rs. 9,000 and this was distributed between the two deeds, the mortgage-deed and the deed of relinquishment. Moreover, the mortgage-deed itself contained, not merely an express stipulation to put the mortgagees in actual cultivating possession of the *sir* lands, but a penalty clause binding the mortgagors not to assert their rights as ex-proprietary tenants. The transaction, therefore, was one single transaction effected under cover of two deeds. It was a determined attempt to evade "by ingenious devices and arrangements," as their Lordships of the Privy Council have put it, the provisions of sections 10 and 20 of Act No. II of 1901. It is quite immaterial that, according to the terms of the two documents, the surrender purports to have been actually effected. In any such attempt to get round the provisions of the law the transferee is certain to insist upon a statement that he has actually been put in possession and that the surrender which he desires has actually been effected. I must note, however, that the mortgage-deed in question is not a usufructuary mortgage pure and simple; to a certain extent it is a combination of a simple

and a usufructuary mortgage, and is, therefore, what the Courts in India commonly speak of as an anomalous mortgage. We are principally concerned in the present case with the effect of this document as a usufructuary mortgage. On the principles laid down by their Lordships of the Privy Council all the stipulations about the surrender of ex-proprietary rights and about the transfer to the mortgagees of actual cultivating possession over this area of 30 *bighas* are void and unenforceable. The penalty clause goes along with the rest, being strictly analogous to the sort of device spoken of by their Lordships of the Privy Council at the close of the judgment already referred to, whereby the vendor covenants to make himself liable to a suit for breach of contract on his failing or refusing to carry out the stipulated relinquishment of his ex-proprietary rights. Such a stipulation would, in the opinion of their Lordships, be void and unenforceable. I can see nothing in the stipulation in the deed in suit by which the mortgagors bound themselves, in the event of their setting up any claim to possession as ex-proprietary tenants, to submit to a decree for sale against their proprietary rights in an area of 63 *bighas* and odd, to distinguish it from a stipulation that they should be liable to a suit for damages, or to any other kind of penalty, in the event of their failure to relinquish. In the view of the case which I take I am by no means disposed to differ from such decisions as that which we have been referred to, *viz.*, *Rajendra Prasad* v. *Ram Jatan Rai* (4), where a mortgage affecting some property which was transferable, along with other property which was by law non-transferable, was allowed to be enforced against the former of the two properties. I do not say for a moment that the mortgage deed in suit, regarded as a usufructuary mortgage, was altogether void and of no effect. What it gave the mortgagees was the right affirmed by Mr. Justice Tudball and myself in *Dipan Rai* v. *Ram Khelawan Rai* (2), namely, the right to proprietary possession in respect of this area of 30 *bighas* and the right to have rent assessed thereon upon the mortgagors as ex-proprietary tenants and to receive and enjoy the said rent in lieu of interest on their money. This was no doubt less than the mortgagees wanted and hoped to secure by the transaction, but it was the legal effect of the transaction actually entered into, in view of the provisions of section 10 of the Tenancy Act by which the ex-proprietary tenure was preserved to the former proprietor, "whether he wished it or not," as the Privy Council have said.

We have been asked, however, to consider further the anomalous nature of this mortgage and the legal effect of hypothecation of the proprietary rights in this area of 30 *bighas* as security for re-payment of the principal loan. For reasons which I shall have to state presently I do not think that any decision on this point is necessary to the determination of this appeal. My own opinion undoubtedly is that the original mortgagees, Thakur Das and others, could have enforced this stipulation. They could have taken up the position that the contract of mortgage which they had entered into was a usufructuary mortgage combined with a simple mortgage; that they had made a mistake in attempting to evade the Statute Law by the terms of their usufructuary mortgage, and that they, therefore, claimed to fall back upon the document as a simple mortgage and to ask for a decree on that basis. It may, however, be noted at the same time that this remedy would have been worth extremely little to the mortgagees. If the proprietary rights of Mir Dad Khan and his fellow Zemindars in this area of 30 *bighas* had been brought to sale on a decree enforcing the hypothecation of the same for re-payment of the loan of Rs. 8,000, the sale itself would at once have given rise in favour of the mortgagors to this very ex-proprietary tenure which it was the object of the deed in suit to get round. The purchaser at auction, whether Thakur Das or another, would have had to be content with the rent assessed by the Collector on this ex-proprietary tenure as representing to him the usufruct of the property purchased. This right the original mortgagees could have enjoyed as mortgagee under the usufructuary part of the mortgage, and it would not have made much difference to them to have endeavoured to work out the same result

(4) 39 Ind. Cas. 785; 39 A. 539; 15 A. L. J. 544.

by enforcing the hypothecation lien, if that were limited (as it must be limited apart from the penalty clause) to the proprietary rights in the area of 30 *bighas*.

The case now before us is not between the mortgagors and the original mortgagees. The plaintiffs, who are the respondents to this appeal, were co-sharers in the same Mahal, and the transfer of the proprietary rights of Mir Dad Khan and others by way of usufructuary mortgage gave rise to a right of pre-emption on their part. This right they claimed to enforce and they brought a suit accordingly. That suit was finally settled by a compromise and the compromise decree, which is dated the 16th of June 1914, gives these plaintiffs as pre-emptors the right of possession as mortgagees over the property pre-empted, that is to say, over the 30 *bighas* of *sir* land in suit. It gives them nothing more: even if what I have called the penalty clause of the original contract of mortgage were enforceable by the original mortgagees, which I believe it was not, there is nothing in this decree to make it enforceable by the pre-emptors. Still less does this decree give the plaintiffs any right, under the mortgage-deed of June the 19th, 1913, to bring the property to sale under the hypothecation effected in the earlier part of the said deed. I doubt whether an alienation by way of simple mortgage would have given rise to any right of pre-emption. The presumption is that persons possessing the right of pre-emption would have had to wait until the property was brought to sale in enforcement of the hypothecation lien, and then to have asserted any rights of pre-emption which they might claim. However this may be, the pre emption decree actually passed does not transfer to these plaintiffs any rights as simple mortgagees in respect of the land in suit.

In the suit as brought the plaintiffs claim the full benefit of the terms of the mortgage of June the 19th, 1913. They say that they are entitled to actual possession over the area of 30 *bighas* in question or, failing this, that they are entitled to recover the mortgage debt of Rs. 8,000 with interest at 2 per cent. per mensem under the penalty clause of the mortgage deed, by sale of the area of 63 *bighas* and odd referred to in that clause. The learned Subordinate Judge who tried the case was not an officer with any revenue experience, nor had he before him at the time of his decision the clear pronouncement of their Lordships of the Privy Council to which reference has already been made. It is, therefore, no imputation against him to say that, in the very brief judgment pronounced by him, he has not shown much appreciation of the difficulties of the case. He has definitely held that the plaintiffs were not entitled to possession as mortgagees over the land in suit; but he has enforced in their favour the penalty clause in the original contract of mortgage, which they were most certainly not entitled to have the benefit of. The decree as passed is for recovery of the principal of Rs. 8,000, with arrears of interest and costs, by sale of the 63 *bighas* and odd of land already referred to. From the operation of this decree, however, a certain share has been excluded, on the ground that one of the former proprietors was a minor and that his certificated guardian joined in this mortgage on his behalf without having duly obtained the sanction of the District Judge. We have a petition of cross-appeal before us challenging the decision of the trial Court on this point; but in view of the decision which we have arrived at on the main question it seems unnecessary for us to go into it. If the appeal of the defendants succeeds the cross-objection must obviously fail.

Now, as regards the appeal of the defendants, I have already given abundant reasons why in my opinion the decree as passed cannot stand. In the very able and ingenious argument addressed to us by Mr. M. L. Agarwala on behalf of the respondents, although he very properly declined to give up any part of his clients' case, it is doing him no injustice to say that he could not make out much of a case for affirming the decree of the Court below as it stands. What he really pressed upon us was the right of his clients to one or other of two different reliefs. He contended that, in any event, his clients should be given the benefit of what I have called the hypothecation clause in the mortgage-deed of June 19th, 1913, and the proprietary rights of the mortgagors in the 30 *bighas* of land in question be brought to sale, at

least in satisfaction of the principal of the mortgage-debt. In reply to the suggestion that the right to enforce this hypothecation clause had not passed to his clients under the pre-emption decree, Mr. Agarwalla contended with much keenness that no plea to this effect had been taken in the written statement of any of the defendants. It seems a fair rejoinder to this to say that neither was any claim to this effect set up in the plaint. The claim in the plaint was for cultivating possession over the land in suit, by ejectment of Mir Dad Khan and his fellow mortgagors, or in the alternative for enforcement of the penalty clause by the passing of a decree for sale in respect of the entire area of 63 *bighas* and odd. I feel quite satisfied that, whatever might have been the rights of Thakur Das and others in respect of the hypothecation of the area of 30 *bighas*, those rights did not pass to the present plaintiffs under the pre-emption decree and that, therefore, this relief is not open to them.

The other contention pressed upon us by Mr. Agarwalla has caused me more difficulty. It is based not merely on the documentary evidence already referred to, but upon certain evidence as to transactions which followed the execution of the mortgage deed in suit. Broadly speaking, Mr. Agarwalla's contention is this:—That the mortgagors, Mir Dad Khan and others, whatever may or may not have been their rights under the deed in suit, did carry out their part of the contract by actually surrendering to the mortgagees, Thakur Das and others, the ex-proprietary tenancy which the Statute created in their favour. The argument is that the original mortgagees thus obtained actual cultivating possession of the land in question and enjoyed the same for the period of about a year; that by this possession the ex-proprietary tenure became finally extinguished and can no longer be set up against the plaintiffs, pre-emptors. I admit the contention to be a highly ingenious one and the question which it raises seems to me of some difficulty. In the first place, however, I think that on the evidence on this record Mr. Agarwalla is asking too much of us in the way of findings of fact in his favour. The Patwari of the village was not put into the witness box nor were any of the original mortgagees called. We know from the plaint that Mir Dad Khan and the other mortgagors were in actual cultivating possession of the 30 *bighas* of land when the suit was instituted on the 5th of July 1915, and the plaint certainly does not explain how or when they recovered that possession, if they did in fact surrender their ex-proprietary tenancy into the hands of the original mortgagees. One of the plaintiffs went into the witness box and deposed that the mortgagees, Thakur Das and others, had entered into actual possession of the land. He said he himself failed to get actual possession because Mir Dad Khan forcibly cultivated it. He was cross-examined on this point in a manner which clearly showed that the defendants did not admit the facts stated by him to be correct, but the only evidence by which he sought to support himself was the production of certain records of the Revenue Courts showing the mutation proceedings which followed the execution of the mortgage-deed in suit. Now the execution of that deed required in any event to be taken due notice of in the village records. There had to be some mutation of names in respect of it and the natural tendency of the Revenue Courts, unless their attention was specially called to the matter, would be to effect formal mutation of names in accordance with the terms of the deed. What I notice more particularly is that the Tahsildar, on whom the duty of making the necessary preliminary enquiries lay, when reporting the matter for the orders of the Assistant Collector in charge of the Sub-Division, contented himself with mentioning that there had been a surrender of the ex-proprietary holding, keeping back the very important fact which he should certainly have mentioned, that that surrender purported to have been made and attested by a deed of even date with the usufructuary mortgage itself, that is to say, at a time when it was at least doubtful whether the mortgagees were entitled to receive any such surrender, and under circumstances strongly suggestive on the face of them of an attempt to evade the law. The Assistant Collector appears to have passed his order for mutation of names, without further consideration or

enquiry, on the strength of the Tahsildar's report. I am not satisfied, therefore, that this evidence proves that there was an effective surrender of the land in suit into the hands of Thakur Das, much less that the possession of Thakur Das and his fellow mortgagees lasted for the entire period of one year, or for anything like that period. It is, of course, possible that, as between the original mortgagees and the original mortgagors, the contract would have been carried out according to its terms, if the plaintiffs had not interfered with their suit for pre-emption. The fact remains that, by the time when the present plaintiffs tried to obtain the benefit of their pre-emption decree, they found the original mortgagors in effective possession of the land in suit and claiming to be exactly what the law says they are, namely, ex-proprietary tenants of the same. Looking at the matter in its broadest aspect, I would say that the rights which these plaintiffs took under their pre-emption decree in respect of the mortgage deed in suit, regarded as a usufructuary mortgage, were simply the rights which the law would permit the original mortgagees themselves to take under the same, namely, the right to proprietary possession subject to an ex-proprietary tenancy in favour of the original mortgagors. This is the position taken up by the defendants in this suit, and I think, that position is correct in law and that the plaintiffs are not entitled, either to the relief which has been decreed to them by the Court below, or to any of the reliefs which have been claimed on their behalf in the alternative. In this view of the case I would allow the appeal, set aside the decision of the Court below and dismiss the plaintiffs' suit with costs, including fees on the higher scale, and similarly dismiss with costs the cross-objection filed by the plaintiffs-respondents.

WALSH J.—I agree. I think this is a colourable transaction. The two deeds were in fact an attempted sale of the ex-proprietary rights. If so, the case is clearly covered by the decision of my learned brothers Tudball and Piggott, JJ., in *Dipan Rai* v. *Ram Khelawan Rai* (2) and also by the observations of the Privy Council reported as *Moti Chand* v. *Ikram Ullah* (1), where Sir John Edge in delivering judgment affirmed the principle laid down by the High Court that the transaction was not a lawful one, whether it was regarded as an attempted sale of the ex-proprietary rights or an agreement to relinquish those rights when they should arise, and he pointed out that the policy of Act No. II of 1901 was that the right of occupancy should be secured and preserved to the proprietor who becomes by a transfer the ex-proprietor, whether he wishes it to be secured and preserved to him or not and notwithstanding any agreement to the contrary between himself and the transferee.

The transactions in these two deeds are in substance one transaction which took place on the same day—they are in form inseparable, but I think that the same principle would apply even if they were in form separable. I apply the same reasoning which was applied by the House of Lords in the case of *Maas* v. *Pepper* (5), the law being in England that no mortgage of moveable chattels could be entered into where the chattels remained in the possession of the grantor without a registered document. There had been a sale of furniture to an alleged purchaser who by a contemporaneous document re-let them on a hire agreement for the original price at which he had bought them *plus* an addition to that sum which the Court regarded as merely interest under another name, the agreement giving to the hirer the right to become the owner by re-purchase if he paid the instalments under the agreement. Now those two documents were entirely independent in form. Nonetheless the House of Lords held that the trial Court had been right in going behind the form and deciding what was in substance the real transaction, and pointed out that the sale was really a colourable sale to disguise what was in substance a loan. I think by the same reasoning this was a colourable relinquishment to disguise what was in fact a sale. No doubt an ex-proprietary tenant can, as such, surrender his rights by proper relinquishment. Nobody can put the point, I think, better than it has been put by Mr. M. L. Agarwalla at page 69 of his book on the Tenancy

(5) (1905) A. C. 102; 74 L. J. K. B. 452; 92 L. T. 371; 53 W. R. 513; 12 Manson 197; 21 T. L. R. 304.

Act in this sentence: "It comes to this that though a proprietor can, in fact, give up his ex-proprietary rights, when they accrue, by not availing himself of them he cannot bind himself by an express stipulation to that effect in a deed of transfer of the property or the like."

I think that is what these documents purported to do. I agree with what my brother has said about the decision in *Lekhraj* v. *Parshadi* (3). Unless the facts of that case are distinguishable from this case by something which does not appear in the judgment, I am bound to say, having regard to the facts reported, that the two transactions in that case being contemporaneous in date, I should have found difficulty in holding that the alleged relinquishment in that case was not also a colourable transaction. To that extent I am unable to agree with the decision.

BY THE COURT.—We allow the appeal, set aside the decision of the Court below and dismiss the plaintiffs' suit with costs, including fees on the higher scale. We also dismiss with costs the cross-objection filed by the plaintiffs-respondents.

Appeal allowed.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 62 OF 1916.

July 19, 1917.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Oldfield.

GANTASALA KUPPIAH CHETTY—DEFENDANT No. 1—APPELLANT

versus

N. GUNAVATHIAMMA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Madras High Court Fees Rules, r. 40—Fees, award of, on higher scale—'Special grounds', meaning of—Fraudulent or reprehensible conduct of party, whether 'special ground.'

The 'special grounds' which would justify an award of fees to a party on the higher scale under rule 40 of the High Court Fees Rules are limited to cases where the special grounds are such as to affect the costs of the litigation. The reprehensible or fraudulent conduct of a party is not such a 'special ground' as would justify such an award. [p. 994, col. 1.]

Assets Development Company Ltd. v. *Close*, (1900) 2 Ch. 717; 69 L. J. Ch. 715; 83 L. T. 162; 48 W. R. 699, considered.

Appeal from the judgment of Mr. Justice Coutts Trotter, dated the 15th September 1916 passed in the exercise of the Ordinary Original Civil Jurisdiction of this Court, in Original Suit No. 100 of 1916.

Messrs. *Venkatasubba Rau* and *Radhakrishnayya*, for the Appellant.

Mr. *M. A. Tirunarayanacharri*, instructed by Mr. *P. Kandasami*, for the Respondent.

JUDGMENT.

WALLIS, C. J.—(After discussing the facts) * * * * * *

There only remains one other question. The learned Judge, in view of the conduct of the 1st defendant of which he takes a very unfavourable view, granted plaintiffs' costs on the higher scale. Rule 40 of the High Court Fees Rules provides "on special grounds the Court may..... order that the fees set forth in the column headed higher scale, shall be allowed." This rule is adopted from Order LXV, rule 9, of the Rules of the Supreme Court, which sets forth that fees on the higher scale may be allowed "if on special grounds arising out of the nature and importance, or the difficulty or urgency of the case the Court or a Judge shall.....so order." Some difficulty was experienced by the Courts in England in interpreting the words which I have read as to what was meant by "nature and importance or the difficulty or urgency of the case." Standing by themselves it might have seemed at first sight that they were wide enough to authorise the Court to grant costs on the higher scale where it thought that the conduct of one of the parties to the suit had been particularly reprehensible, or to cover a case in which an unfounded charge of fraud had been made. That was the case in *Assets Development Co. Ltd.* v. *Close* (1), where not only was an unfounded charge of fraud made, but also the facts required a great deal of investigation and a lengthy trial. It was, however, held by Mr. Justice Buckley in accordance with the previous decisions that these facts were not enough to justify a grant of costs on the higher scale. The learned Judge says: "I think the meaning of the rule is that it is to apply where the nature and importance or

(1) (1900) 2 Ch. 717; 69 L. J. Ch. 715; 83 L. T. 162 48 W. R. 699.

difficulty or urgency of the case necessitates the expenditure of more money," that is to say, that the special grounds must affect the costs of the litigation. I do not think that the omission of the words, to which I have called attention, in our reproduction of the rule affords any ground for disregarding the restricted construction which was put upon the rule by English Courts, and I think that we should do well to follow the example of the English Courts in limiting the rule as to the power of the Court to award costs on the higher scale on special grounds to cases in which the special grounds are such as to affect the costs of the litigation, and I do not think that that is so in this case. We must, therefore, vary the order of the learned Judge to that extent by reducing the costs to costs on the ordinary scale while otherwise dismissing the appeal with costs.

OLDFIELD, J.—I entirely agree.

Order varied.

M. C. P.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1162, 1507 TO 1516 OF 1915.

February 4, 1918.

Present:—Mr. Justice Richardson and Mr. Justice Beachcroft.

MAHAMAD JALIS AND OTHERS—PLAINTIFFS—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—RESPONDENT.

Limitation—Suit for declaration of title and confirmation of possession, whether can be treated as suit for recovery of possession for purpose of limitation.

Where a plaintiff in a suit for declaration of title and confirmation of possession alleges facts which show that he was out of possession, his suit, even though framed for confirmation of possession, may be treated as one for recovery of possession if his title to recover possession has not been barred by limitation; but where the plaintiff in such a suit makes a case that he is in possession, but fails to prove his possession, the Court will not give him recovery of possession, even though he proves his title and the suit has been instituted within the limitation period prescribed for suits for recovery of possession. [p. 997, col. 2.]

Moulvie Abdoollah v. *Shaha Mujeesooddeen*, 16 W. R. 27 and *Bisseswari Koer* v. *Ram Protap Singh*, 4 Ind. Cas. 547; 14 C. W. N. 366, explained.

Appeals against the decrees of the District Judge, Noakhali, dated the 27th of January 1915, modifying that of the Munsif, Additional Court at Sundwip, dated the 30th of April 1914.

FACTS appear from the judgment.

Dr. *Jadu Nath Kanjilal* (with him Babu *Girija Prosanna Sanyal*), for the Plaintiff-Appellants.—The twelve years' law of limitation will apply in this case under Article 142 of the Limitation Act, and not the six years' law of limitation. The suit was no doubt for declaration of title and confirmation of possession and the six years' rule of limitation would apply to the suit as it was framed. But when it has been found that the plaintiff was not in possession, he might very well ask for recovery of possession and the twelve years' rule of limitation will apply. Referred to *Rash Dharee Singh* v. *Nuthoonee Singh* (1).

[RICHARDSON, J. referred to *Secretary of State* v. *Kalika Prosad* (2).]

Of course if the suit is a *mala fide* one, the plaintiff may not be allowed the benefit of the twelve years' rule of limitation in such cases but where there is no question as to the *bona fides* of the plaintiff and his title has been established in both Courts, there is no reason why his suit should be dismissed on the ground of limitation, on the finding of the Court that his suit was a mere declaratory one and not for recovery of possession. The lands in dispute being accretions there might be *bona fide* dispute between the parties as to which of them was in possession. The plaintiff, *bona fide* believing that he was in possession, merely asked for declaration of title and confirmation of possession. But when it was found by the Court that he was not in possession, he ought to have been allowed to amend the plaint by adding a prayer for recovery of possession. That would have caused no injury to the other side. Referred to *Amir Hossein* v. *Imambandi Begum* (3). The recovery of possession of the land

(1) 24 W. R. 301.
(2) 14 Ind. Cas. 609; 15 C. L. J. 281.
(3) 11 C. L. R. 443 at p. 451.

might be regarded as a consequential relief in the suit. Referred to *Chukkun Lal Roy* v. *Lolit Mohan Roy* (4).

Babu *Ram Charan Mitter*, for the Respondent.—The six years' rule of limitation is applicable to suits for confirmation of possession. See *Mohabharat Shaha* v. *Abdul Hamid Khan* (5). The case of *Chukkun Lal Roy* v. *Lolit Mohan Roy* (4) is distinguishable. The plaintiff might have asked that if his possession was not found his suit might be treated as for recovery of possession, but when he came with a definite case that he was in possession and he only asked for declaration of title, he cannot change the nature of the suit by converting it into a suit for recovery of possession.

Dr. *Jadu Nath Kanjilal* replied.

JUDGMENT.

RICHARDSON, J.—Having read my learned brother's judgment I concur in the conclusion at which he has arrived. The question is merely on which side of the line of demarcation drawn by the authorities the present case falls. That depends on the facts, and the facts as found bear out the view which the District Judge has taken on the point of law.

The appeals are dismissed with costs. We assess the hearing fee in all the appeals at five gold *mohurs* to be paid in equal shares by the appellants in each case.

BEACHCROFT, J.—These appeals relate to a large area of riverside land in the Hudrakali Khas Mahal in the Noakhali District. The plaintiffs who are the appellants got settlement of some land, bounded on the north by the river, in 1893. Since then there has been a considerable accretion of land on the north side of the plaintiffs' holding and this land has been dealt with in three separate strips. The strip immediately to the north of the plaintiffs' holding was kept as *gopat*, the strip to the north of that was settled with the plaintiffs in 1905, and the northernmost strip, which is now the riverside land, was settled, also in 1905, with some persons other than the plaintiffs.

In the present suit the first Court gave the plaintiffs a decree in respect of all the accreted land, but on appeal the District Judge reversed the Munsif's decision in respect of the northernmost strip of land and the present appeals concern only that strip.

The learned Judge found that though the plaintiffs had title to the land in dispute as being an accretion to their holding, their suits were barred by limitation as they were not for recovery of possession but for declaration of title and confirmation of possession. The period of limitation for such a suit is six years and the learned Judge found that the persons with whom the strip in dispute was settled in 1905 had been in possession for over 7 years when the suit was brought in 1912.

In appeal it is argued with reference to the question of limitation that though the suit was framed as one for confirmation of possession the Court may treat it as one for recovery of possession and give plaintiffs the appropriate relief, as admittedly the land had only been formed within 12 years of the date of filing the suit.

We have been referred to a number of authorities ranging from the case of *Moulvie Abdoollah* v. *Shaha Mujeesooddeen* (6) decided in 1871 to the case of *Bisseswari Koer* v. *Ram Protap Singh* (7) decided in 1909. These authorities establish this, that where a plaintiff alleges facts which show that he was out of possession, his suit, even though framed as one for confirmation of possession, may be treated as one for recovery of possession, but where he makes a case that he is in possession and fails to prove his possession, the Court will not give him recovery of possession even though he proves his title.

There is no hardship in this rule. Apart from the fact that a plaintiff cannot complain of the Court's refusal to give him relief if he comes with a false story, it is clear that if he came after 6 years with an allegation that he was in possession and succeeded in proving that possession, his suit would be barred: *Shyamanand Das* v. *Raj Narain Das* (8). It is obvious that he ought not to be placed in a better position because part of his case turns out to be false.

(4) 20 C. 906; 10 Ind. Dec. (N. S.) 609.
(5) 1 C. L. J. 73.
(6) 16 W. R. 27.
(7) 4 Ind. Cas 547; 14 C. W. N. 366
(8) 4 C. L. J. 569; 11 C. W. N. 186.

In the present case plaintiffs alleged that they were in possession and had brought the land under cultivation at great expense, and they brought their suits because the land had been settled with others. Their allegations have been found to be false.

That being so, I am of opinion that the suits were rightly dismissed by the learned District Judge and that these appeals ought to be dismissed with costs.

Appeals dismissed.

ALLAHABAD HIGH COURT.

EXECUTION FIRST APPEAL No. 279 OF 1917.

March 2, 1918.

Present:—Mr. Justice Tudball and Mr. Justice Rafique.

BASANTI—DECREE-HOLDER—APPELLANT

versus

KUNJ BIHARI LAL—JUDGMENT-DEBTOR—RESPONDENT.

Mortgage decree, execution of—Property assessed to revenue—Decree describing property as muafi—*Objection by purchaser in execution of money decree—Identity of property—Objector not deceived—Court, duty of, to correct error in decree where no question of doubt.*

A mortgage-deed described the mortgaged property as *muafi* whereas it was assessed to a small sum of revenue. The mortgagee sued upon the basis of the mortgage and obtained a decree in which the property was again described as *muafi*. In execution it was objected by a previous purchaser of the property in execution of a money-decree that the property was not revenue-free and was, therefore, not the property mortgaged. At the time of the objector's purchase the burden of the mortgagee's loan had been duly notified:

Held, that as the objector was not in any way deceived when he purchased the property, the burden of the mortgage having been clearly notified at the time of his purchase, it was utterly unjust to allow a slight misdescription to prevent a Court from doing what was right. [p. 999, col. 1.]

It is the Court's duty to see that all errors in the decree are amended when there is no question of doubt. [p. 999, col. 1.]

Execution first appeal from a decree of the Subordinate Judge, Moradabad.

Messrs. *Narain Prasad Asthana* and *Shiam Krishna Dar*, for the Appellant.

Mr. *Surendro Nath Sen*, for the Respondent.

JUDGMENT.—This appeal and Execution First Appeal No. 280 of 1917 cover the same point and are connected. One Jamil-ur-Rahman in the year 1910 borrowed Rs. 4,000 from *Musammat* Basanti, the appellant, under a mortgage deed and hypothecated certain property in two villages. The description of the property is as follows:—No. 1, Mauza Daranagar *muafi Mahal Mustahkam Rang Surkh* three *biswas* fifteen *biswansis* out of fifteen *biswas*, situate in Pargana Hasanpur, district Moradabad (the names of the villages on boundaries of the village are also given); No. 2, Mauza Walipore, *Mahal Sutaid muafi*, $2\frac{1}{2}$ biswas out of 20 *biswas*, Pargana Hasanpur, District Moradabad. In this case also the bounding villages were named. The description in the mortgage-deed contained one error. These properties were not revenue-free but actually were assessed to small sums of revenue. It is probable that they were commonly spoken of as revenue-free. The mortgagee sued upon the basis of the mortgage and obtained a decree. The preliminary decree and the final decree described the property as it is described in the mortgage-deed. In the meantime these properties had been attached in execution of a simple money-decree against the mortgagor and were purchased in case of one village by the respondent in the present appeal, Kunj Behari Lal, and in the other by the respondents, Muhammad Hashmat Ali, etc. When proclaimed for sale the burden of the mortgagee's loan upon the property was duly notified. The mortgagee has now applied for execution of the decree by sale of the mortgaged property. The auction-purchasers under the simple money-decree have objected that there is no *muafi* in these villages or *mahals*, that the property that they have purchased is not revenue-free property and is, therefore, not the property mortgaged. Inquiry has been made and it is established beyond all doubt whatsoever that these properties are not revenue-free and never have been; that the description "revenue-free" entered in the mortgage-deed was a mistake, though the properties may perchance have been locally spoken of as revenue-free, but it is also equally clear that the property purchased by the respondents is the property that was mortgaged to the appellant. The Court below has held that

it is prevented by reason of the misdescription in the decree from putting this property to sale and has refused the decree-holder's application. It is not as if the opposite party had been in any way deceived when they purchased the property, for the burden upon it was clearly notified and we think it utterly unjust to allow a slight misdescription, such as has crept in in the present case, to prevent a Court from doing what is right. We allow the appeal. It is the Court's duty to see that all errors are amended when there is no question of doubt. The Court executing the decree is the Court which passed the decree. We direct that the word "*muafi*" be struck out of the decree and direct that the Court below proceed to put the property to sale in the manner laid down by law. The appellant will have her costs in both Courts.

Appeal allowed.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 19 OF 1917.

August 22, 1917.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, Mr. Justice Teunon and Mr. Justice Walmsley.

JAGAT CHANDRA ACHARJI AND ANOTHER —PLAINTIFFS—PETITIONERS—APPELLANTS

versus

SYAMA CHARAN BHATTACHARJEE AND OTHERS—DEFENDANTS—OPPOSITE PARTIES—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLVII, r. 5—Review, jurisdiction of one of two Judges constituting Division Bench of High Court to hear application for—Appeal from judgment of single Judge of High Court, disposing of application for review without jurisdiction—Letters Patent (Cal.), cl. 15.

Want of objection by or consent of the parties to the exercise of jurisdiction by a Court will not give a jurisdiction to the Court which it does not possess under the law. [p. 999, col. 2.]

During the absence on leave of one of two Judges of a High Court constituting a Division Bench, the other Judge has no jurisdiction to hear an application for review of its decree, unless the former Judge has ceased to be a member of the Court or is precluded by absence or other cause, for a period of six months next after the application, from considering the decree to which the application refers. [p. 1,000, col. 1.]

The judgment of a single Judge thus disposing of an application for review without jurisdiction is subject to appeal under clause 15 of the Letters Patent. [p. 1,000, col. 2.]

In the matter of an application for a review of the judgment of this Court, dated the 11th May 1914, passed in Appeal from Appellate Decree No. 527 of 1914, being an appeal from the decree of the Sub-Judge, 1st Court, Chittagong, passed in Title Appeal No. 449/337 of 1912 dated the 26th November 1913, modifying the decree of the Munsif, 1st Court, Patiya, passed in Title Suit No. 220 of 1911, dated the 12th June 1912.

FACTS appear from the following

JUDGMENT.

SANDERSON, C. J.—In these two cases the point which has been raised (the same point has been raised in each case), is a very unusual point, and one upon which there is no authority.

What happened is as follows:—Mr. Justice Holmwood sitting with Mr. Justice Chapman heard these second appeals under Order XLI, rule 11, of the Civil Procedure Code and dismissed them. After that Mr. Justice Chapman took a month's leave immediately before the long vacation, and while he was away applications were made to Mr. Justice Holmwood for a review of the judgments which had been delivered by him and Mr. Justice Chapman. Mr. Justice Holmwood heard the applications for review and dismissed them. As far as I understand the facts, the parties did not object at the time of his hearing the applications on the ground that he had no jurisdiction so to do: but, of course, that fact or the consent of parties will not give jurisdiction if he had no jurisdiction under the Act.

The learned Vakil who appeared in the first of these cases mentioned to us a case* which was decided by Mr. Justice Woodroffe and Mr. Justice Mookerjee and seemed to think that his case was covered by that decision. But in that case the facts were materially different from those in this case. There Mr. Justice Teunon sitting with Mr. Justice Smither, who was then acting as a Judge of the High Court, had dealt with a second appeal. Then after Mr. Justice Smither left the Court, *i. e.*, after his officiating period had come to an end and he ceased to be a member of the Court, an application was made to Mr. Justice Teunon for a review of the judgment delivered by him and Mr. Justice Smither, and he dealt

*See 41 Ind. Cas. 183.—*Ed.*

with that application; and then an appeal was filed against the decision of Mr. Justice Teunon under section 15 of the Letters Patent. That appeal came on for hearing before Mr. Justice Woodroffe and Mr. Justice Mookerjee who came to the conclusion that no appeal lay. They referred to the Code, and amongst other reasons they referred to the fact that if they had heard the appeal from Mr. Justice Teunon they would in effect be hearing an appeal from a decision of two Judges, because after Mr. Justice Smither had ceased to be a member of the Court. Mr. Justice Teunon represented the Court which had been constituted by the two Judges, and, therefore, to hear an appeal from Mr. Justice Teunon would be to hear an appeal from the two Judges, which, of course, they could not. If I may say so, I entirely agree with the judgment of Mr. Justice Woodroffe and Mr. Justice Mookerjee, but that judgment does not cover the present cases, because Mr. Justice Chapman did not cease to be a member of this Court, nor was he in the words of the rule "precluded by absence or other cause for a period of six months next after the application from considering the decree to which the application referred"—he was merely away on a month's leave prior to the usual long vacation and, the applications, if they had been postponed, could have been heard by Mr. Justice Holmwood and Mr. Justice Chapman after the expiration of the long vacation in the beginning of the next term. In my judgment, therefore, Mr. Justice Holmwood, when he heard the applications and refused them, was acting without jurisdiction. I ought to have mentioned that the rule which applies to this matter is rule 5 of Order XLVII.

Now, if Mr. Justice Holmwood acted without jurisdiction, the next question which arises is whether there is a right of appeal from his judgment. If there was any doubt, the matter has been set at rest by the judgment of the Privy Council in the case of *Hurrish Chunder Chowdhry* v. *Kali Sunderi Debi* (1), the passage which is material being at page 493. There His Lordship Sir R. P. Collier said: "Their Lordships do not think that Mr. Justice Pontifex can be properly treated as having usurped jurisdiction; but if he had, this would have been a valid ground of appeal," and they are unable to agree with the Chief Justice that if a Judge of the High Court makes an order under a misapprehension of the extent of his jurisdiction, the High Court have no power by appeal, or otherwise, in setting right such a miscarriage of justice." Acting on that judgment I am of opinion that we must hear the appeals, even though the learned Vakil in one of the cases brought to our attention—and quite properly brought to our attention—the judgment of Mr. Justice Woodroffe and Mr. Justice Mookerjee, to which I have alluded, and even though he seemed to have thought that his case was covered by that judgment. We must treat both the cases alike, and we will hear both the appeals.

We, therefore, direct that notices of the appeals be served on the respondents and that Rules be issued on them to show cause why the applications for review should not be granted.

Both the appeals and the review Rules will come for hearing to the same Court at the same time, and they will be heard by the Court taking the Letters Patent Appeals.

CHATTERJEA, J.—I agree.

The Letters Patent Appeal and the Rule came on for hearing before the Court taking the Letters Patent Appeals.

Babu *Khitish Chandra Sen*, for the Appellant.—The second appeal was heard under Order XLI, rule 11, of the Civil Procedure Code by two Judges of this Hon'ble Court, *viz.*, Mr. Justice Holmwood and Mr. Justice Chapman, and was dismissed. Then there was an application for review of judgment which was heard and decided by Mr. Justice Holmwood alone, as Mr. Justice Chapman was then absent on leave. Mr. Justice Holmwood dismissed the application for review of judgment. The present Letters Patent Appeal has been preferred against the decision of Mr. Justice Holmwood dismissing the application for review of judgment, on the ground that Mr. Justice Holmwood acted without jurisdiction in hearing the application and dismissing it. The case in *Kailash Chandra Somaddar* v. *Revati Mohan Roy* (2)

(1) 9 C. 482 at p. 493; 10 I. A. 4; 12 C. L. R. 511; 7 Ind. Jur. 161; 4 Sar. P. C. J. 406; 4 Ind. Dec. (N. S.) 970 (P. C.).

(2) 41 Ind. Cas. 183; 25 C. L. J. 360; 21 C.W.N. 652.

does not apply to this case as in that case the circumstances were somewhat different. As regards the competency of this appeal from the judgment of Mr. Justice Holmwood, reference may be made to the case of *Hurish Chunder Chowdhry* v. *Kali Sunderi Debi* (1).

[WALMSLEY, J.—When the applications were heard by Mr. Justice Holmwood alone did you object to his jurisdiction so to do?]

No. But that would not, I submit, give jurisdiction if he had no jurisdiction under the Act.

Babu *Dhirendra Lal Kastgir*, appeared for the Respondents but said he had no instructions).

JUDGMENT.

This Letters Patent Appeal is decreed, the judgment of Mr. Justice Holmwood on the application for review is set aside, the Rule is made absolute and the appeal from the appellate decree is admitted.

Let the record be sent for and the usual notices be issued.

Appeal decreed.

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NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 477 OF 1916.

September 24, 1917.

Present:—Sir Henry Stanyon, KT., J. C.

Musammat KALWA—PLAINTIFF—APPELLANT

versus

BHAWAR SINGH AND ANOTHER—DEFENDANTS NOS. 1 AND 2—RESPONDENTS.

C. P. Tenancy Act (XI of 1898), s. 46—Suit for possession of occupancy tenancy by heir—Civil Court, jurisdiction of, whether barred—Gift of occupancy holding by widow, validity of—Testamentary direction for disposal of occupancy holding, whether can be given by occupancy tenant—Occupancy tenancy, devolution of—One of several tenants, whether can take up entire holding.

In a suit for possession of an occupancy holding in the Civil Court on the ground that it devolved on the plaintiff after the death of the former holder, her mother, the defendant resisted the claim on the ground that as the land was gifted to him by a registered deed by the plaintiff's mother the suit was barred by the Central Provinces Tenancy Act:

Held, (1) that as the suit was one for possession of an occupancy tenancy and not a suit to set aside an alienation made by the former tenant in contravention of the provisions of the Tenancy Act, the Civil Court had jurisdiction to entertain the suit. [p. 1002, col. 1.]

(2) that irrespective of the provisions of the Central Provinces Tenancy Act the deed of gift regarded as an attempt to alienate anything more than the life-interest of a Hindu widow was invalid. [p. 1002, col. 2.]

An occupancy tenant in the Central Provinces cannot leave any testamentary direction for the disposal of his tenant right by his widow after his death. [p. 1002, col. 2.]

In the absence of legal necessity a Hindu widow cannot alienate more than her life-interest merely because to do so would be to give effect to some wish, indicated but not carried into effect, by her husband during his lifetime. [p. 1002, col. 2.]

On the death of an occupancy tenant the occupancy right devolves by operation of law on all the heirs as co-tenants and any one of them willing to do so can take up the whole tenancy in the event of the other heirs being unwilling to do so. [p. 1003, col. 1.]

Appeal from the decree of the Court of the District Judge, Raipur, dated the 29th July 1916, in Appeal No. 178 of 1916.

Mr. *D. T. Mangalmurti*, for the Appellant.

Mr. *J. C. Ghosh*, for the Respondent No. 1.

JUDGMENT.—It is necessary to state the facts of this case. One Badri Lodhi was a tenant of an occupancy holding. He died some three years before the suit, leaving him surviving a widow Durpat, three daughters (1) Kalwa, (2) Kelhi and (3) Mathura, and a nephew Bhawarsingh, the son of his younger brother Gopy Lodhi. During his lifetime Badri executed a document purporting to gift some of his holding to his nephew but the document was never registered or acted on. After Badri's death the tenancy devolved on his widow Durpat. On the 21st December 1912, Durpat executed a deed of gift in favour of Bhawarsingh in respect of 12 of the occupancy fields and a house. This deed (Exhibit D1) does not purport to transfer anything except Durpat's right, title and interest in the gifted property. Durpart died in or about October 1914. On the 28th July 1915, *Musammat* Kalwa, one of the daughters of Badri, sued Bhawarsingh for possession of the property included in

Durpat's gift. Her two sisters being unwilling to join in the suit as plaintiffs were impleaded as defendants. *Musammat* Mathura died soon after, and as her legal representatives in the estate of Badri were her two sisters her name was expunged from the record without any other person being substituted. Kelhi stated that she had no objection to the disposition made by her father. The suit, therefore, resolved itself into a contest between the plaintiff and Bhawarsingh. The defendant Bhawarsingh pleaded that he had become re-united with his uncle and was entitled to the fields gifted to him by survivorship. He also relied upon the unregistered document executed by Badri and the registered deed of gift executed by Durpat. The first Court found for the plaintiff and gave her a decree. The lower Appellate Court has reversed that decree and dismissed the plaintiff's suit with costs. The plaintiff has, therefore, made this second appeal.

I have no doubt whatever that the decision of the lower Appellate Court is wrong. It was urged before the Judge that this suit was barred by the Central Provinces Tenancy Act, as being a suit to set aside an alienation made by Durpat in contravention of the provisions of section 46 of the Tenancy Act, and the case of *Ganeshdas* v. *Shankar* (1) was cited in support of that contention. The lower Appellate Court rightly found on the pleadings that the ruling cited had no application. No doubt Durpat made an alienation of her own interest in the occupancy holding in contravention of section 46 of the Tenancy Act and if the plaintiff, as one of the persons upon whom the tenancy would devolve on the death of Durpat, had sought to set aside Durpat's alienation of her own tenant right, the ruling would have been applicable and the Civil Court would have had no jurisdiction. But the suit is not one to set aside the alienation by Durpat. It is a suit for the possession of an occupancy right which, according to the Tenancy Act, devolved upon the plaintiff and her sisters on the death of Durpat. It is the defendant who sets up Durpat's gift and the plaintiff's reply is that the gift has been exhausted by the determination of the subject-matter of it, *viz.*, the life-interest of Durpat. Regarded as an attempt to alienate anything more than that life interest the deed of gift is invalid irrespective of the provisions of the Central Provinces Tenancy Act, and, therefore, that enactment is not called into operation.

But after having gone right up to this point, the lower Appellate Court went completely off the rails and expounded the so-called law which is without foundation or authority. It held the deed of gift of an occupancy holding made by the widow to be binding upon the person on whom the holding would devolve under the Tenancy Act, because the gift was made by Durpat, (in the Judge's own words) "in order to complete the wish of her husband." This decision is unsustainable from every point of view. In the first place it was never pleaded that the widow executed the gift under the authority, or in furtherance of any wish, of her husband; nor does the deed itself contain any recital of such an authority or purpose. Therefore, the decision of the learned District Judge is of a case neither pleaded nor put in issue nor proved. The mere fact that during his lifetime Badri made an abortive attempt to gift certain property to his nephew raises no presumption that he left authority behind to his widow to complete his intention. Next, it is manifest that an occupancy tenant cannot leave any testamentary direction for disposal of his tenant right in the Central Provinces by his widow after his death. Finally, it is an entirely novel proposition that, in the absence of legal necessity, a Hindu widow can alienate more than her life-interest merely because to do so would give effect to some wish indicated, but not carried into effect, by her husband during his lifetime.

In this second appeal the learned Advocate for the respondent has felt the difficulty of supporting the obviously unsound view of the law adopted by the lower Appellate Court, and he attempted to sustain the verdict in favour of his client by putting forward a number of pleas which were neither pleaded nor put in issue; such as that the gift was for legal necessity or for the securing of religious benefit to Badri, or was part of a family arrangement made

(1) 13 Ind. Cas. 909; 8 N. L. R. 22.

by Badri. I give no consideration to these irrelevant pleas.

An attempt was also made, for the first time before me, to set up a *jus tertii*, *viz.*, that of the plaintiff's sister *Musammat* Kelhi; but I am clear that the defendant Bhawarsingh cannot resist the suit on that ground. On the death of *Musammat* Durpat the occupancy tenant right devolved by operation of law upon the three daughters as co-tenants. Any one of those three daughters willing to do so can take up the whole tenancy in the event of her sisters being unwilling to do so. The decree of the first Court was perfectly correct, and the lower Appellate Court was not justified in interfering with it.

I, therefore, allow this appeal. I reverse the decree of lower Appellate Court and restore the decree of the first Court. The defendant Bhawarsingh must pay the costs of the plaintiff-appellant in both the Appellate Courts.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 577 OF 1915.

January 7, 1918.

Present:—Mr. Justice Teunon and Mr. Justice Newbould.

GOPI NATH MONDAL—APPELLANT

versus

ASHUTOSH GHOSE, RECEIVER TO THE ESTATE OF NILRATAN MONDAL, AND OTHERS—RESPONDENTS.

Mortgage—Priority—Property belonging to five brothers mortgaged by four of them—Mortgagees, rights of, on partition.

A property belonging to five brothers, one of whom was a minor and was represented by his duly appointed guardian, the eldest of the four adult brothers, was mortgaged to *N.*, and then it was mortgaged by the four adult brothers to *G.* On the adjudication of the four adult brothers as insolvents the Receiver in insolvency got the joint properties partitioned and the mortgaged property was allotted to the four adult brothers, which was then sold by the Receiver at the instance of a prior mortgagee who was paid off out of the sale-proceeds:

Held, that *N.* was entitled to the whole of the balance of the sale-proceeds in priority to *G.* as he had not lost the priority to the extent of the 1/5th share which belonged to the minor brother by reason of the partition and sale of the property. [p. 1004, col. 2.]

Appeal against the order of the Additional District Judge, 24-Pergannahs, dated the 28th of September 1915.

FACTS appear from the judgment.

Sir *Rash Behary Ghose* (with him Babus *Mohendranath Ray* and *Panchanon Ghose*), for the Appellant, contended that having regard to the facts and circumstances of the case the Court below was wrong in allowing the prior mortgagee to appropriate the whole of the proceeds of the sale held by the Receiver in insolvency in satisfaction of the whole of his dues under the mortgage, in preference to the appellant who was a subsequent mortgagee and who had been allowed to appropriate in part satisfaction of his mortgage the small balance that was left after paying off the prior mortgagee in full. The insolvent mortgagors could not, by any admission on their part, affect the rights of the appellant whose case was that Nripendra, the prior mortgagee, was entitled only to the extent of 4/5th share of his dues under the mortgage, because he released the share of the fifth brother. He could not, however, release that share from liability without allowing a proportionate abatement of the money due under his security.

Babu *Provash Chandra Mitter* (with him Babus *Jogesh Chandra Bose* and *Bhupendra Nath Bose*), for the Respondents.—There was a mortgage by the five brothers, and those five brothers were liable under the mortgage. In the insolvency proceedings four out of the five brothers were declared insolvent. Nripendra's mortgage was previous to the present appellant's mortgage and, therefore, Nripendra was entitled to have his dues under the mortgage satisfied in full before the appellant.

[TEUNON, J.—To whom was the property sold allotted?]

To the four brothers.

TEUNON, J.—Nripendra accepted that allotment.]

He was not a party to the partition proceedings.

In the insolvent proceedings both Nripendra's and Gopi's names and their respective dues appear, but Gopi did not ever object that Nripendra, whose mortgage was

prior to his, was not entitled to have his dues satisfied in full. Sections 81 and 82 of the Transfer of Property Act which deal with the question of marshalling and contribution do not apply to this case, and so the appellant's case must fail.

[TEUNON, J.—Nripendra is said to have released the minor's share in the property allotted to the four brothers and sold by the Receiver in insolvency.]

There is nothing on the record to show that.

Sir *Rash Behary Ghosh* in reply.

JUDGMENT.—In this case it appears that four brothers mortgaged their share in certain properties to one Rai N. N. Sahu Bahadur. On the 4th day of December 1911 they and a fifth brother, a minor represented by his duly appointed guardian the eldest of the four adult brothers, executed a second mortgage of the same properties in favour of one Nripendra Nath Sahu. The four adult brothers next executed a third mortgage in favour of one Gopi Nath Mondal.

On the 10th of May 1912 the four adult brothers were adjudicated insolvent and on the 27th of June of that year a Receiver of their properties was appointed.

It thus became necessary to effect a partition between the five brothers, and by the decree in the partition suit dated 4th January 1913 the three properties now in question were allotted to the four adult brothers. Next followed a sale by the Receiver at the instance of the 1st mortgagee on the 22nd and 23rd April 1913. The properties were sold free of incumbrances and, with a certain amount (Rs. 2,002) due or realised from the minor brother as owelty money, fetched a sum of Rs. 25,320. Out of this sum Rs. 7,846 odd was paid to the 1st mortgagee, and the only question argued in this appeal is whether the 2nd mortgagee Nripendra is entitled to priority over the 3rd mortgagee Gopi in respect of the whole of the balance Rs. 17,473 odd or in respect only of 4/5ths of the same.

It is argued that by reason of the partition and by the sale of these properties as the sole property of the four insolvent adult brothers, Nripendra the 2nd mortgagee has released or exonerated the share of the fifth brother, and to the extent of the 1/5th which that share was liable to contribute to the debt secured by Nripendra's mortgage has, therefore, lost priority over the 3rd mortgagee.

We are unable to accede to this contention.

It does not appear that the partition or the sale proceedings were at the instance of the 2nd mortgagee. It is exceedingly doubtful whether any liability under the 2nd mortgage, executed ostensibly on his behalf by the eldest brother, could be fastened upon the minor. In any case it is not disputed that the four adult brothers are jointly and severally liable to pay the whole debt due under that mortgage, and it cannot, we think, be said that by demanding payment out of the surplus sale-proceeds now in the hands of the Receiver the 2nd mortgagee has done anything which can be appropriately described as a relinquishment or release of any portion of the property mortgaged to him.

In this view this appeal fails, but we should further point out that the whole question raised appears to be academic.

Out of the balance Rs. 17,473 odd, payment of a sum of Rs. 13,221 odd has been made or directed in favour of the 2nd mortgagee in full satisfaction of the mortgage debt. This is less than 4/5ths of the balance.

The appeal is dismissed with costs. We assess the hearing fee at five gold *mohurs*.

The appeal having been dismissed, the connected Rule No. 647 of 1917 is discharged.

Out of the hearing fee assessed one gold *mohur* will be given to the Receiver and four gold *mohurs* to the respondent Nripendra Nath Sahu, who will also have the costs incurred by him in the preparation of the paper book. Let the record be sent down at once.

Appeal dismissed.

GOKUL *v.* MOHRI BIBI.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 51 OF 1916.

January 18, 1918.

Present:—Mr. Justice Piggott and Mr. Justice Rafique.

GOKUL—PLAINTIFF—APPELLANT

versus

MOHRI BIBI—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 58—Limitation Act (IX of 1908), Sch. I, Art. 11, scope of—Objection, dismissal of, without investigation—Suit to establish right, limitation for—Non-production of evidence, effect of—Inquiry into objection, materials for.

An objection under Order XXI, rule 58, of the Civil Procedure Code, if dismissed without investigation, takes the case of the objector out of the operation of the one year's rule of limitation prescribed by Article 11, Schedule I, of the Limitation Act for the establishment of his right by a suit. [p. 1006, col. 2; p. 1007, col. 1.]

The only order under Order XXI, rule 58, upon which the character of finality is impressed, is an order made upon enquiry. It does not follow, however, that merely because the claimant does not advance evidence or is absent, there are no materials before the Court to enable it to inquire into the matter [p 1007, col. 1.]

Where, therefore, plaintiff made an objection under Order XXI, rule 58, the correctness of which was disputed by the opposite party, and no evidence having been produced to make out the truth of the claim, the Court dismissed the objection and the plaintiff brought a suit to establish his right more than a year after the date of the order:

Held, that though the plaintiff produced no evidence in support of his objection, it did not follow that there was no material on the record to enable the Judge to dispose of the objections, which could not, therefore, be said to have been decided without investigation and that as the plaintiff failed to bring a suit to establish his right within one year from the date of the order, his claim was barred under Article 11, Schedule I of the Limitation Act. [p. 1007, col. 1.]

Second appeal from a decree of the Subordinate Judge, Mirzapur.

Mr. *S. A. Haidar*, for the Appellant.

Mr. *Surendra Nath Sen*, for the Respondent.

JUDGMENT.—The facts which have given rise to this appeal are as follows :—

There were three brothers, Kauleshar, Chandu and Jageshar, who owned a fixed-rate holding of seven *bighas* and five *biswas*. According to the plaint the three brothers separated and the holding was privately divided amongst them. On the 9th of January 1900, the name of Jageshar was entered in respect of two *bighas* and five *biswas* and the rest, five *bighas*, stood in the name of the two brothers, Kauleshar and Chandu. Kauleshar died leaving him surviving his son, Gokul. Chandu died leaving him surviving a widow only and no issue. One Basant Lal obtained a simple money-decree against Jageshar, one of the brothers mentioned above, and against Govind, a third party. In execution of his decree Basant Lal attached the whole of the holding, namely, the fixed-rate holding of seven *bighas* and five *biswas*. At the time of the attachment the two widows of Kauleshar and Chandu were alive, as also the son of Kauleshar, called Gokul, who was a minor at the time. On the 27th of March 1901, Gokul filed an objection through his mother as guardian, objecting to the attachment, presumably on the ground that his father and uncle, Chandu, were separate from Jageshar and their property was not liable to sale and attachment in the decree of Basant. On the 5th of June 1901, the date fixed for hearing the objections, an application was presented to the Court on behalf of the guardian of the minor praying for an adjournment, on the ground that the information of the date of hearing had reached the guardian too late to take steps for production of evidence. The learned Subordinate Judge rejected the application for adjournment and proceeded to dispose of the objections. The order, he made on the objections, is as follows :—" This is an objection under section 278 of the Civil Procedure Code. The correctness of it is disputed by the defendants. The objector has produced no evidence to make out the truth of his claim and it is dismissed with costs." After the rejection of the objection the entire holding of seven *bighas* and five *biswas* was put up to auction and purchased by Basant Lal, the decree-holder. On the 21st of June 1902, the Amin, who was deputed to deliver possession to the purchaser, reported that the widows of Kauleshar and Chandu had obstructed him in his duties. The purchaser having taken no steps, his application for delivery of possession was rejected on the 5th of July 1902. On the 19th of July 1903, he again applied for delivery of possession and succeeded in getting it on the 23rd of February 1904. On the 20th of June 1914, Gokul, the plaintiff-appellant, instituted the suit out of

which this appeal has arisen, for possession of five *bighas* of the fixed-rate holding on the allegation that the said land was not liable to attachment and sale in execution of the decree of Basant Lal against Jageshar. Gokal further stated in his plaint that his father Kauleshar and his two uncles Jageshar and Chandu had separated long prior to the decree of Basant and had divided the holding equally amongst themselves. After the separation each brother was in possession of his own share. Basant Lal, the decree-holder, could only sell the share of Jageshar. At the time of the execution of the decree of Basant Lal he, the plaintiff, was a minor and was entitled to object as regards the share of the holding that belonged to his father only. Chandu's widow, *Musammat* Katwari, was alive at the time of the attachment and the sale of the holding. She died some years after. On her death the share of Chandu came to the plaintiff as the reversionary heir. He attained majority in June 1912, hence the suit was brought for recovery of possession of that portion of the holding which belonged to his father and his uncle, Chandu. The claim was resisted on various pleas. It was urged on behalf of the defendant that the three brothers were joint and had never separated and that the decree against Jageshar had been passed in the capacity of the *karta* of the family. It was, therefore, binding on all the three brothers and their legal representatives. The plea of limitation was urged in respect of the entire claim on the basis of the plaintiff's objections, dated the 27th of May 1901. The learned Munsif, in whose Court the suit was filed, held that the three brothers were joint and therefore the decree of Basant Lal was binding on the plaintiff. He further found that the objections, dated the 27th of May 1901, made by the plaintiff through his mother related to the whole of five *bighas*, the alleged share of Chandu and Kauleshar, and the objections having been dismissed and the suit having been brought more than one year after the dismissal, the present claim was barred under Article 11 of Schedule I of the Limitation Act. The plaintiff preferred an appeal to the District Judge, who disagreed with the First Court as to the status of the family of the three brothers but agreed with it as to the plea of limitation. The learned District Judge held that the three brothers were separate but that the claim was obviously barred under Article 11 of Schedule I of the Limitation Act.

The plaintiff in his second appeal to this Court advances two contentions. He says that his claim is not barred under Article 11 of Schedule I of the Limitation Act, inasmuch as his objection was dismissed without any investigation and, secondly, in any case his claim with regard to 2 *bighas* 10 *biswas* of the holding, which he inherited from his uncle, Chandu, after the death of the latter's widow, cannot be said to be barred by limitation as the lady died after the dismissal of the objections and she had taken no objection to the attachment and sale of the holding. The second contention may be dismissed in a few words. There is a distinct finding of the learned Munsif that the objections of the plaintiff related to 5 *bighas* of the holding, that is, the share of his, *i.e.*, plaintiff's father and uncle. The plaintiff took no objection to this finding in his appeal to the District Judge. There is nothing on the record to make us come to a different conclusion and hold that the objections related only to the share of Kauleshar. In the plaint itself the plaintiff does not mention the fact of having made an objection in 1901 and there does not seem to be any replication or any statement by him in reply to the written statement that his claim was barred because it was brought a year after the order of the 5th of June 1901. In support of the first contention a number of cases have been cited by the learned Counsel for the plaintiff-appellant. The following cases have been relied upon by the plaintiff, namely, *Kullar Singh* v. *Toril Mahton* (1), *Kunj Behari Lal* v. *Kandh Prashad Narain Singh* (2), *Sarat Chandra Bisu* v. *Tarini Prasad Pal Chowdhry* (3), *Sarala Subba Rau* v. *Kamsala Timmayya* (4) and *Sajan Ram* v. *Ram Rattan* (5). According to these cases an objection, made under section 278 of the old Code of Civil Procedure, corresponding to Order XXI, rule 58 of the present Code,

(1) 1 C. W. N. 24.
(2) 6 C. L. J. 362.
(3) 34 C. 491; 11 C. W. N. 487.
(4) 31 M. 5; 17 M. L. J. 554; 3 M. L. T. 106.
(5) 87 P. R. 1904; 119 P. L. R. 1904.

if dismissed without investigation, would take the case of the objector out of the operation of one year's rule of limitation. But the question is, what does the word "investigation" mean? There are cases which go to show that the circumstances under which the objections of the plaintiff were disposed of were not such as to warrant the conclusion that they were decided without investigation, *vide Rahim Bux* v. *Abdul Kader* (6), *Shagun Chand* v. *Shibbi* (7) and *Chandi Prasad* v. *Nand Kishore* (8). We would also refer to *Lachmi Narain* v. *Martindell* (9), for the principle according to which the limitation of one year should be enforced. Most of the case-law has been discussed by Mr. Justice Mookerji in the case of *Kunj Behari Lal* v. *Kandh Prashad Narain Singh* (2). After the consideration of the case-law the learned Judge concludes thus:—"It is manifest, therefore, from the language of the Code itself, that the only order upon which the character of finality is impressed is an order made upon enquiry." He also remarks: "It does not follow, however, that merely because the claimant does not advance evidence or is absent, there are no materials before the Court to enable it to enquire into the matter." In the present case the learned Subordinate Judge dismissed the objections of the plaintiff, not in default, nor without any investigation. It is true that the plaintiff produced no evidence in support of his objections but it does not follow that there was no material on the record to enable the Judge to dispose of the objections. We think that the cases relied upon by the plaintiff-appellant are distinguishable from the case before us.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

(6) 32 C. 537.
(7) 10 Ind. Cas. 401; 8 A. L. J. 626.
(8) 20 Ind. Cas. 369.
(9) 19 A. 253; A. W. N. (1897) 60; 9 Ind. Dec. (N. S.) 166 (F. B.).

CALCUTTA HIGH COURT.

CIVIL RULE No. 65 OF 1917.

January 25, 1918.

Present :—Mr. Justice Richardson and Mr. Justice Walmsley.

KAMALA KANTA SEN—CLAIMANT—PETITIONER

versus

DURGA KUMAR SEN AND OTHERS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 58 59, 60—Claim proceedings—Order allowing claim conditionally, validity of—Revision.

A Court has no jurisdiction to make an order allowing a claim preferred under Order XXI, rule 58, Civil Procedure Code, to a property attached in execution of a decree, conditional on the claimant paying a certain sum to the decree-holder, on the ground that in the conveyance by which the claimant purchased the property there was an undertaking on his part to pay that sum to the decree-holder as part of the consideration. If such a claimant is in possession of the property on his own account under title of a conveyance executed in his favour by the judgment-debtor, his claim should be allowed and allowed unconditionally. [p. 1003, cols. 1 & 2.]

Rule against the order of the Sub-Judge, 1st Court, Chittagong.

FACTS appear from the judgment.

Babu *Charu Chandra Sen*, for the Petitioner.—The Court below was not entitled and had no jurisdiction to pass an order conditionally allowing the claim. A conditional order is bad in law. The claimant petitioner purchased the property before the attachment and is in possession since the purchase and he adduced evidence under Order XXI, rule 59, Civil Procedure Code, which has been accepted. The property ought to have been released from attachment under Order XXI, rule 60, Civil Procedure Code. The question whether he gave an undertaking by his sale-deed to pay off the decree-holder or whether this undertaking is binding upon him or whether he is liable to pay this debt because he has agreed with the judgment-debtor, cannot be gone into in this proceeding, which is a summary one. I rely on *Sheoraj Nandan Singh* v. *Gopal Suran Narain Singh* (1) and *Manmohiney Dassee* v. *Radha Kristo Dass* (2).

Babu *Khitish Chandra Sen*, for the Opposite Party.—The claimant is bound by his under-

(1) 18 C. 290; 9 Ind. Dec. (N. S.) 193.
(2) 29 C. 543.

taking and is a mere trustee in respect of the money agreed to be paid and for the ends of justice the conditional order can be passed. No application lies under section 115 of the Code; he has got a remedy open to him by a suit under Order XXI, rule 63, Civil Procedure Code.

JUDGMENT.

RICHARDSON, J.—The petitioner in this Rule preferred a claim under Order XXI, rule 58, Code of Civil Procedure, in respect of a property which had been attached by the opposite party in execution of a decree. The petitioner's plea was that he had purchased this property from the judgment-debtor under the decree prior to the attachment and was in possession of the property on his own account. The learned Subordinate Judge in the Court below states in his order under appeal that the petitioner has proved his Kobala. There is, however, no clear finding in the order whether the petitioner is or is not in possession of the property on his own account. On the strength of the terms on which the property was purchased as evidenced by the conveyance, the learned Subordinate Judge has made a conditional order. It appears from the conveyance that as part of the consideration the petitioner gave an undertaking to the vendor to pay the sum of Rs. 2,500 on account of the Execution Case No. 1392 of the Court of the First Munsif of Chittagong. Execution Case No. 1392 was pending at the date of the conveyance and execution was sought thereby of the decree which is now again under execution, the present case being No. 1651 of 1916. As I have said, on the strength of that undertaking the learned Subordinate Judge has allowed the petitioner's claim conditionally, the directions are that if the petitioner pays Rs. 2,500 within ten days the property claimed will be released from the attachment and if that amount is not paid the claim is to stand rejected and the property sold for the sum of Rs. 2,500 or any larger sum it may fetch. Without expressing any opinion as to the precise meaning or effect of the conveyance, I am of opinion that the learned Subordinate Judge on the facts, so far as he has found them, was not entitled and had no jurisdiction to make any such conditional order. The transaction on which the petitioner's claim is based bears a strong resemblance to the transaction which this Court had before it in the case of *Sheoraj Nandan Singh* v. *Gopal Suran Narain Singh* (1) and the observations of Sir Comer Petheram, C. J., in that case are pertinent in the present connection. The learned Chief Justice said: "If the object of the decree-holder is to get rid of the effect of that transaction by showing that it is not binding upon him under section 53 of the Transfer of Property Act, or by contending that notwithstanding that transaction the applicant is liable to pay this debt because he has agreed with the judgment-debtor to pay that for her, he must be made liable to pay it in some other proceeding much more elaborate than this one." These observations are strictly applicable in the present case, if the petitioner is in possession of the property on his own account. If he is not in possession on his own account other consideration will, no doubt, arise. The order in the mode in which it was made is clearly bad, as the learned Subordinate Judge has not determined the crucial question whether the petitioner is in possession on his own account or is in some way in possession on account of the judgment-debtor or the representative of the judgment-debtor. The order, in my opinion, must be set aside in its entirety and the case remitted to the Subordinate Judge to be re-heard with reference to the observations I have made. If the learned Subordinate Judge finds on the materials on the record that the petitioner is in possession on his own account under title of the conveyance executed in his favour by the original judgment-debtor, the claim should be allowed and allowed unconditionally; otherwise the learned Subordinate Judge will make such order as he thinks fit. To this extent the Rule is made absolute. The costs of this Rule will abide the result. We assess the hearing fee in this Court at three gold *mohurs*.

WALMSLEY, J.—I agree.

Rule made absolute.

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Abwab—Peshkash, *whether* abwab—*Antiquity and purpose of payment, whether ground for inferring legitimate origin—Jalamutha and Majnamutha estates in Midnapore.*

The levy of *peshkash* by the proprietors of the two estates known as Jalamutha and Majnamutha in the District of Midnapore from the *nisfidars* (holders of resumed *lakheraj* lands) and *lakherajdars* of those estates is not illegal, as *peshkash* cannot be regarded as an imposition in the nature of an *abwab* but a right to it is an interest in the land to which a title may be made out by prescription.

From the peculiar situation and character of the lands of the estates and the antiquity and purpose of the payment of *peshkash*, it may be inferred that a right to levy it had a legitimate contractual foundation at its inception. **C** LAKSHMI NARAYAN ROY *v.* SECRETARY OF STATE, 22 C. W. N. 824 **497**

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5 & 6 GEO. V., C. 61. *See* GOVERNMENT OF INDIA ACT.

Admiralty Offences (Colonial) Act (12 & 13 Vict., C. 96), s. 1—*"Sea", meaning of.*

The word "sea" in section 1 of the Admiralty Offences (Colonial) Act means only that part of the sea over which the Admiral or Admirals has or have jurisdiction, that is to say, territorial waters. **B** PUNJA GUNI *v.* EMPEROR, 20 BOM. L. R. 98; 19 CR. L. J. 337 **449**

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Agra Tenancy Act (II of 1901), s. 10.

Section 10 of the Agra Tenancy Act fixes a maximum rent and there is nothing to prevent the parties concerned from contracting for the payment of a lower rate, or from coming to an understanding amongst themselves as to what the prevailing rates of rent are and what advantages the ex-proprietary tenant is likely to get under the section. Such an agreement is not enforceable in itself and cannot be sued upon as it stands. What is wanted is an order under section 10 (5) fixing the rent to be paid by the ex-proprietary tenant, but the law does not lay down that this order cannot lawfully be based upon an agreement come to by the parties, still less that in passing it the Collector must not take into account the terms of such an agreement. **A** JAHANGIRA *v.* KARRAR HUSAIN, 16 A. L. J. 212 **513**

Agra Tenancy Act—contd.

—— **ss. 10, 20, 21**—*Ex-proprietary tenancy, relinquishment of, validity of—Mortgage of sir land—Covenant to put mortgagee in possession—Relinquishment, deed of, simultaneous, effect of.*

The object of section 10 of the Agra Tenancy Act is that a right of occupancy should be secured and preserved to a proprietor who becomes by a transfer the ex-proprietor, whether he wishes it to be secured and preserved to him or not, and notwithstanding any agreement to the contrary between himself and the transferee.

If a covenant to relinquish the *sir* lands is part of a transaction of sale or of mortgage, then the agreement to surrender will be void and unenforceable, no matter what ingenious devices may be employed to give colour to it. If the Court is satisfied that there was first of all a transfer by way of sale or mortgage and that the transferee, having obtained the status of an ex-proprietary tenant, with full knowledge of that fact and of the rights preserved to him by the Statute, deliberately chooses, as a separate transaction, to relinquish his ex-proprietary tenancy into the hands of the new proprietor, or of the mortgagee in possession, then the law cannot go further in the way of protecting a reckless and imprudent man against the consequences of his own acts.

A Zemindar executed a usufructuary mortgage of a part of his *sir* lands for Rs. 8,000 and covenanted to put the mortgagee in actual cultivating possession of the land and not to assert his rights as an ex-proprietary tenant. By a deed of relinquishment executed on the same date the mortgagor purported to surrender or to relinquish in favour of the mortgagee, in return for a consideration of Rs. 1,000, his rights as an ex-proprietary tenant in the mortgaged lands. It was found that the mortgagee held a decree for Rs. 9,000 against the mortgagor, which was satisfied by the execution of the mortgage deed and the deed of relinquishment:

Held, that the transactions in the two deeds were in substance one transaction, and that the deed of relinquishment and the covenant to put the mortgagee in actual possession of the mortgaged land, being devices to evade the provisions of section 10 of the Agra Tenancy Act, were void and unenforceable. **A** MIR DAD KHAN *v.* RAMZAN KHAN, 16 A. L. J. 329 **988**

—— **ss. 20, 21** **988**

—— **ss. 20, 122**—*Transfer of occupancy holding, whether permissible—Tenancy acquired by one member of joint family—Profits thrown into common stock, effect of.*

Where a tenancy is created in favour of one member of a joint Hindu family, his throwing of the profits derived from the tenancy into the common stock of the joint family does not change the tenancy from a tenancy in favour of that member to a tenancy in favour of the entire joint family inasmuch as if that were so, it would mean a transfer of the holding from that member to a body of persons, namely, the members of the joint family, in contravention of the provisions of section 20 of the Agra Tenancy Act.

The interest of a non-occupancy tenant or of an occupancy tenant under the Agra Tenancy Act is not transferable except under the restrictions laid down by section 20 of the Act. **A** KALLU *v.* SITAL, 16 A. L. J. 225 **717**

——— **ss. 34, 199**—*Landlord and tenant—Mortgage of* sir *lands, before Act—Mortgagee, possession of—Equity of redemption, purchaser of, possession by, without landlord's consent—Question of title, determination of, by Civil Court—Revenue Court, ejectment by - Appeal, whether lies to District Judge.*

Plaintiffs, as usufructuary mortgagees of certain *sir* lands, brought a suit in the Revenue Court for ejectment of the defendant, on the allegation that they were in possession of the lands under a mortgage existing before the passing of Act II of 1901 and that the defendant was a non-occupancy tenant of the same. The defendant, who had acquired a part of the equity of redemption of the mortgaged land, denied the relationship of landlord and tenant between himself and the plaintiffs. The Revenue Court referred the parties for the determination of the question of title to the Civil Court, which held that the plaintiffs were entitled to remain in exclusive possession as mortgagees and that defendant had acquired a share in the equity of redemption. In accordance with this the Revenue Court, holding that defendant was a non-occupancy tenant, ordered his ejectment. On the Commissioner's refusal to entertain the defendant's appeal, the latter appealed to the District Judge who rejected it, holding that the question of title had been finally and completely disposed of by the Civil Court in the civil suit:

Held, (1) that the District Judge was right in holding that no appeal lay to his Court;

(2) that the defendant had been rightly ejected by the Revenue Court.

Per *Walsh, J.*—The words "a person occupying land without the consent of the landlord" in section 34 of the Agra Tenancy Act mean one who enters into occupation without the express consent of the landlord or without any previous arrangement with him. **A** JAGARDEO SINGH *v.* ALI HAMMAD, 16 A. L. J. 249 **919**

——— **s. 95** **608**

——— **s. 122** **717**

——— **s. 164**—*Profits, suit for, against* lambardar *—Interest, when allowable—Accounts, falsification of, effect of*—Lambardar, *liability of.*

In a suit by a co-sharer against the *lambardar* for his share of the profits, the *lambardar* is liable to pay interest on the amount of profits awarded to the co-sharer, where it is found that the *lambardar* has falsified the accounts. **O** DORI LAL *v.* RAM CHARAN LAL, 4 O. L. J. 708 **415**

——— **s. 164**—*Suit for profits—Profits, mode of calculation of*—Sir *and* khudkasht, *profits of.*

If different co-sharers in a *mahal* are entitled to different portions of the *mahal* as their *sir* or *khudkasht*, each co-sharer would be entitled to the profits of his own *sir* and *khudkasht* and would not be obliged to account for those profits to the other co-sharers. On the other hand, if any co-sharer has in his hands and in his own cultivation an excess of land, over and above his proper share of *sir* and *khudkasht*, he must account for the excess. The share of each co-sharer need not necessarily be identical in area, because a larger share of inferior land might be given to one co-sharer where the others have land of superior quality. If some co-sharers neglect to cultivate their shares of *sir* and *khudkasht*, they are not entitled to call upon the other co-sharers to account for the profits of their *sir* or *khudkasht* unless the latter are cultivating an area in excess of their shares. **A** ANGAD SINGH *v.* ZORAWAR SINGH, 16 A. L. J. 146 **542**

——— **ss. 177, 198**—*Ejectment, suit for—Tenant denying plaintiff's proprietary title—Appeal, forum of.*

In a suit for ejectment in the Court of a 1st Class Assistant Collector, on the allegation that the defendants were the plaintiff's tenants without rights of occupancy, the defendants denied the title of the plaintiff, alleging that they were lessees from other persons and that the plaintiff had no right to sue them. The Court of first instance dismissed the suit:

Held, that the defendants' plea raised a question of proprietary title and as it was in issue in the Court of first instance and was also a matter in issue in appeal, the appeal lay to the District Judge under the provisions of section 177 of the Agra Tenancy Act. **A** HAR PRASAD *v.* TAJAMMUL HUSAIN, 16 A. L. J. 239 **720**

——— **s. 198** **720**

——— **s. 199** **919**

Ala and adna maliks—*Right to share of produce—Declaratory suit to establish right as* adna *maliks—Burden of proof.*

Plaintiffs sued for a declaration that they were the *adna* proprietors and in possession of the land in suit and that the defendants were merely *ala* proprietors entitled to receive *malikana* dues at 25 per cent of the land revenue. It appeared that the land in dispute had been entered in the successive settlement records as the property of the defendants whose names were written across both the columns relating to *ala* and *adna maliks*:

Held, (1) that the onus was on the plaintiffs to establish their claim to inferior proprietorship and to prove that the defendants were merely superior proprietors entitled to recover only 25 per cent. on the land revenue;

(2) that the mere fact that tenants had been located by the village officers was no adequate ground for depriving the defendants of their right of ownership when the entries with regard to that matter had all along been in their favour;

(3) that the plaintiffs having failed to discharge the onus that lay on them, the defendants were entitled to the ownership, both *ala* and *adna*, of the land in suit **P** AHMAD YAR *v.* MUHAMMAD KHAN, 63 P. W. R. 1918 **534**

Amendment of plaint **447**

———, effect of **287**

Amendment of Statute, *effect of—Precedents, value of.*

Where there have been decided cases before an Act is amended, if the amendment does not expressly show that the law as interpreted by the decisions is altered, the rule laid down by the decisions is to be adhered to. **A** MOHAMMED ISHAQ KHAN *v.* MOHAMMED RUSTAM ALI KHAN, 16 A. L. J. 182 **88**

Appeal (Civil) 416, 666, 671, 690, 847, 870

——— *Appellate Court, failure of, to consider admission—Remand.*

A Munsif made the following statement in the course of his judgment: "The learned Pleader for the plaintiff concedes in his argument that the land in suit is included in the lands mentioned in the sale certificate." In decreeing the appeal from the decision of the Munsif, the Appellate Court entirely ignored this admission or concession of the Pleader made in his argument in the Trial Court:

Held, that as the Appellate Court did not appreciate or realise the legal effect of the admission by the Pleader, the case must be remanded to that Court in order that the appeal thereto might be re-heard, on the footing that the admission in question was in fact made in the Trial Court. **C** JAHADALI *v.* AJIMANNESSA BIBI **18**

———, forum of **287**

——— *from judgment of single Judge of High Court, disposing of application for review without jurisdiction—Letters Patent (Cal.), cl. 15.*

The judgment of a single Judge thus disposing of an application for review without jurisdiction is subject to appeal under clause 15 of the Letters Patent. **C** JAGAT CHANDRA ACHARJI *v.* SYAMA CHARAN BHATTACHARJEE, 22 C. W. N. 550 **999**

——— *Judgment containing unfavourable observation against person in whose favour decree passed—Appeal, whether lies.*

No appeal lies from a decree merely on the ground that certain observations made in the judgment of the Court below are unfavourable to the person in whose favour the decree is passed. An opinion of the Appellate Court in the course of a judgment in such an appeal cannot operate as *res judicata* when in point of law, no appeal lay and the Court had no power to adjudicate on the rights of the parties on an appeal from such a decree. **N** NARAYAN *v.* SYED BAHADUR **723**

——— *on particular point—Appellate Court, duty of.*

Where a defendant appeals only on a particular point and not on the whole case, the Appellate Court is precluded from taking up a point which would involve the dismissal of the suit *in toto*. **P** HUKAM SINGH *v.* SHAHAB DIN, 14 P. W. R. 1918 **890**

———*—Pleadings—New case, whether can be set up.*

A new case cannot be allowed to be set up in appeal. **O** FARKHUND ALI *v.* MOHAMMAD SAHIB, 4 O. L. J. 731 **624**

———, whether lies against award **622**

———**(Criminal)**, forum of **120**

———, temporary dismissal of, legality of **582**

———**(Second)**—*Construction of document—Question of law.*

The interpretation of a document is a point of law which can be taken in second appeal and that, taken with the intention of the parties, is a mixed question of law and fact which the High Court can itself deal with in second appeal. **M** KRISTNASWAMI IYENGAR *v.* SUBRAMANIA GANAPATHIGAL, 23 M. L. T. 85; 7 L. W. 210; (1918) M. W. N. 231 **523**

——— *— Cross-objections rejected—Appeal, whether lies—Revision.*

An appeal, purporting to be filed on behalf of the defendant, was dismissed by the lower Appellate

Appeal (Second)—concld.

Court on the ground that it was not filed by the defendant or his duly authorised agent. In the meantime an appeal was filed by the plaintiff and the defendant preferred cross-objections challenging the decree on practically the same grounds as were taken in his memorandum of appeal. The cross-objections were rejected by the lower Appellate Court, on the ground that as the defendant had already preferred an appeal which had been dismissed he was not entitled to re-open the matter by filing cross-objections to the plaintiff's appeal:

Held, (1) that a second appeal was not competent from the order rejecting the cross-objections;

(2) that the defendant's appeal having been held not to have been filed by the defendant, he was entitled to file cross-objections and the order rejecting the cross-objections was, therefore, subject to revision. **P** ALLAH BAKHSH *v.* NUR BAKHSH, 20 P. R. 1918 **812**

——— *— Judgment based on conjectures and presumptions, whether liable to be set aside—Succession to occupancy holding—Burden of proof.*

A judgment based on mere conjectures and presumptions is liable to be set aside in second appeal.

Where on the death of an occupancy tenant his collaterals claim to succeed to the tenancy, the onus lies on them to establish affirmatively that the common ancestor occupied the land. In such a case conjecture cannot be accepted as a substitute for proof. **P** BHAGWAN DAS *v.* SHAMSHER SINGH, 55 P. W. R. 1918; 33 P. L. R. 1918 **433**

——— *—New point involving question of fact, whether can be taken.*

A point involving questions of fact, which was not taken in either of the lower Courts, cannot be taken for the first time in second appeal.

Where such a point was allowed to be taken in second appeal, the High Court reversed the decision of the Court of second appeal. **C** JADUB CHANDRA MAULIK *v.* MANIK SARKAR, 22 C. W. N. 156 **91**

——— *—Suit undervalued by plaintiff—Defendant's appeal heard by inferior Court—Jurisdiction—Plaintiff, whether can object.*

When an inferior Court disposes of a case which should have been heard by a superior Court, there is ground for thinking that the parties are prejudiced.

Where the plaintiff undervalued his suit for an injunction and the defendant, putting the same value on the appeal as had been put upon the suit, preferred his appeal to the Court of the Senior Subordinate Judge instead of the District Judge and the former Court heard and decreed the appeal:

Held, that the plaintiff was entitled in second appeal to raise an objection to the jurisdiction of the lower Appellate Court notwithstanding his own undervaluation of the suit. **P** CHELOO *v.* KALI DAS, 21 P. R. 1918 **816**

Appellate Court, *order by, effect of—Order, whether can be questioned in appeal from final decree.*

An order passed by an Appellate Court deciding the question is as final as a similar order passed by the Court of first instance and its propriety cannot be questioned in an appeal on the merits from the final decree. **M** SUBRAMANIA IYER *v.* MUTHU VAITHILINGA, 1918) M. W. N. 198 **987**

Approver, *statement of.*

Where reasonable proof exists that a sum of money deposited by the accused with a banker was borrowed by him from a certain person for the purpose of redeeming a mortgage which existed on his land, the story as told, unless proved to be untrue, cannot be said to be material corroboration of the statement of an approver that the accused had got the money as his share of the booty in a dacoity. **P** GURDIT SINGH *v.* EMPEROR, 9 P. W. R. 1918 CR.; 19 CR L. J. 439 **967**

Arbitration **122**

——— *Reference on application of some of the parties, validity of.*

Quære.—Whether an order of reference to arbitration made by the Court on the application of the plaintiff and one of the defendants is legal? **C** HARIDAS DEY *v.* KAILASH CHANDRA BOSE **480**

Arbitration Act (IX of 1899), ss. 5, 8—*Arbitration—Arbitrator neglecting to act—Reference, whether revocable without leave of Court—Procedure.*

Once a valid submission has been made to an arbitrator, it is irrevocable without leave of the Court, under section 5 of the Arbitration Act, and if the arbitrator refuses or neglects to act, the procedure laid down by section 8 of the Act should be adopted. So long as the arbitrator holds his mandate unrevoked, the parties cannot appoint a fresh arbitrator. **S** DWARKAPARSAD *v.* DIPCHAND PARSRAM, 11 S. L. R. 101 **360**

Arms Act (XI of 1878), s. 8 **360**

——— **s. 19 (f)**—*Minor in possession of arms without license—Offence.*

There is nothing in law which prevents a minor from being in actual fact in possession of arms without a license or which prevents him from being guilty of an offence under section 19, clause *(f)*, of the Arms Act.

An Honorary Magistrate, who was exempt from the operation of the Arms Act and kept certain arms, died leaving behind him a *pardanashin* woman as a widow and a minor son. No license was obtained by the son for the arms, but they were retained in the house and were properly looked after:

Held, that the arms were in the custody and under the control of the minor and that he was guilty of an offence under section 19 *(f)* of the Arms Act. **A** EMPEROR *v.* GHULAM HUSAIN, 16 A. L. J. 323; 19 CR. L. J. 447 **975**

Benami transaction, *tests of—Burden of proof.*

With regard to the question whether a sale is a *benami* or a real transaction, the fact that the transactions relating to the property sold were carried out in the name of the transferee is not conclusive. Though the question of actual possession is in some cases a test and an important test, yet where the property transferred is a house and the transferor is the husband of the transferee, much importance cannot be attached to the fact of actual possession, inasmuch as the husband might after the sale not unnaturally live in the house which he has transferred to his wife.

The question of the burden of proof retains little, if any, importance where there is evidence on both sides. **C** BASIRUDDIN *v.* MOKIMA BIBI, 22 C. W. N. 709 **915**

Benefit of doubt **969**

Bengal Amending Act (I B. C. 1907) **922**

Bengal Cess Act (IX B. C. of 1880), ss. 54, 56—*Plaintiff, whether can recover road-cess on basis of re-valuation without notice under s. 54.*

Plaintiff brought a suit to recover arrears of road cess due and payable under the re-valuation of 1907 in respect of certain rent-free lands held by the defendants within the plaintiff's tenure:

Held, that under the terms of section 56 of the Cess Act the notice required by section 54 not having been published by the plaintiff the defendants were not bound to pay cesses upon the basis of the re-valuation of 1907. **C** BARANASHIBASI MUKERJEE *v.* HARI KRISHNA SHAHA **32**

——— **s. 56** **32**

Bengal Land Revenue Sales Act (XI of 1859), ss. 31, 53—*Revenue sale—Encumbrances—Sale-proceeds, disposal of—Purchase by proprietor—Sale brought about by proprietor from dishonest motives.*

Section 31 of the Bengal Land Revenue Sales Act provides that the purchase-money, after paying the public claims, shall be held on account of the recorded proprietor or proprietors, provided that if before payment the same be claimed by any creditor in satisfaction of a debt, it shall not be paid over without a decree of the Court, but the section nowhere transfers any charges on the property from the property to the proceeds, and as the revenue sale conveys a title free from encumbrances to the purchaser the mortgagees are clearly entitled to claim the same as creditors under the section and the Court would undoubtedly direct that such claims, in due order of priority, should be satisfied out of the sums in the hands of the Collector.

Where the property is bought by the recorded proprietor and the estate is acquired, under section 53 of the Act, subject to all its encumbrances existing at the time of the sale, the transaction of the sale merely provides money for payment of the Government claims, and the encumbrances are left entirely unaffected and can only be enforced against the property and the rights to the sale-proceeds of the recorded proprietor, who has purchased the property, are those under section 31, notwithstanding the fact that the motives which led him to cause the sale or purchase were dishonest. **P C** TARINI CHARAN SARKAR *v.* BISHUN CHAND, 23 M. L. T. 147; 7 L. W. 315; 27 C. L. J. 303; 34 M. L. J. 361; 4 P. L. W. 249; 16 A. L. J. 271; 22 C. W. N. 505; (1918) M. W. N. 295; 20 BOM. L. R. 553 **304**

——— **s. 37**—*Occupancy tenant at fixed rent, whether liable to ejectment.*

A *raiyat* who has acquired a right of occupancy before the passing of the Bengal Tenancy Act can retain the privileges of an occupancy *raiyat*, although his rent has been fixed in perpetuity by reason of which he becomes a *raiyat* holding at fixed rates according to the classification of *raiyats* in the Bengal Tenancy Act.

A person who has already acquired an occupancy right does not by obtaining a grant of fixed rent lose that occupancy right, and such a person is protected from ejectment under section 37 of the Bengal Revenue Sales Act. **C** LAKHI CHARAN SAHA *v.* HAMID ALI, 27 C. L. J. 284 **543**

——— **s. 53** **304**

Bengal Tenancy Act (VIII B. C. of 1885), ss. 3, 4, 5 94

——— **ss. 22 (2), 85 (1)**—*Landlord purchasing* raiyati *interest in execution of money decree, whether can eject under-*raiyat—*Amending Act I B. C. of* 1907, *change made by, in s.* 22, *cl.* (2), *of Bengal Tenancy Act.*

A landlord who purchases a *raiyati* interest at a sale in execution of a decree for money is in no better position than the landlord who purchases such interest under a private alienation; consequently he cannot insist upon any right which he as landlord might otherwise have had under section 85 (1) of the Bengal Tenancy Act to treat the under-*raiyat* as a mere trespasser.

As regards clause (2) of section 22 of the Bengal Tenancy Act the change made by the Amending Act of 1907 does not seem to have altered the law as previously understood. A fractional landlord who gets a transfer of an occupancy holding still acquires from the *raiyat* some sort of tenancy or intermediate interest (except the right of occupancy) which prevents him from treating the under-*raiyat* as a trespasser. **C** BABU RAM DHENG *v.* UPENDRA NATH 922

——— **s. 23** 451

——— **s. 29**—*Compromise enhancing rent in contravention of section, legality of.*

An enhancement of rent of an occupancy holding in excess of that allowed by section 29 of the Bengal Tenancy Act agreed to by means of a compromise is illegal. **Pat** SRIKISHUN LAL *v.* SHEOBALAK GOPE, 4 P. L. W. 247 638

——— **s. 29**—*Landlord and tenant*—Hajat *or rent kept in abeyance—Landlord's right to realise full nominal rent.*

Where a tenant by a *kabuliyat* agreed to pay rent at the rate of Rs. 37-1-0 per annum subject to a *hajat* or deduction of Rs. 21-10-0 and the *kabuliyat* contained the following clause: "If after the expiry of the term I do not within a year deliver a fresh *dowl kabuliyat* for the whole amount inclusive of the sum kept in abeyance I shall pay Rs. 37-1-0, being the iull amount of actual rent inclusive of the sum kept in abeyance:"

Held, (1) that the clause in the *kabuliyat* was in the nature of a threat that the rent at the full nominal rate would be levied in case the tenant did not execute a *kabuliyat* within a year after the expiry of the term;

(2) that the landlord's claim at the full nominal rate was inadmissible, as the stipulation in the *kabuliyat* with regard to the deduction to be allowed was a device to evade the provisions of section 29, Bengal Tenancy Act;

(3) that as in cases of this nature each case must depend on its own facts, it would be better in all such cases for the lower Courts to record an express finding one way or the other whether or not the agreement was a device to evade the Statute. **C** PRODYAT KUMAR TAGORE *v.* CHUNDRA MOHUN SIL 574

——— **s. 37**—*Enhancement of rent—Illegal contract for enhancement, whether bars subsequent suit for enhancement.*

Section 37 of the Bengal Tenancy Act contemplates a prohibition against enhancement of rent in respect of a contract validly made and binding between the parties; an illegal or invalid contract made within fifteen years of the last enhancement does not come within the provisions of the section so as to operate as a bar to the institution of a suit for enhancement of rent. **Pat** BUDHAN MAHTON *v.* WAZI HUNNISSA BEGUM, 4 P. L. W. 210; (1918) PAT. 162 292

Bengal Tenancy Act—contd.

——— **ss. 49, 85**—*Lease from year to year—Ejectment—Notice—Lease in contravention of s.* 85—*Grantor, whether can question lease.*

In 1891 plaintiff granted an under-*raiyati* lease to the defendant. The lease was not for any specified term, but was described as a *harsana patta* (yearly lease). The plaintiff stated that she had a *raiyati* interest in the land and the defendant was enjoined to have an entry made in the Survey and Settlement Record that the grantor possessed a *raiyati* right and the grantee himself a *harsana* right:

Held, that the lease was terminable by a notice to quit under section 49 (*b*) of the Bengal Tenancy Act.

Per *Mookerjee, J.*—It is of the very essence of an annual tenancy that it is terminable by the landlord on notice to quit.

Section 49 of the Bengal Tenancy Act prescribe no form of notice, nor does it give any indication as to the length of notice. An under-*raiyat* is protected from ejectment until the end of the agricultural year in which a notice to quit is served upon him by his landlord, and this indicates the time when it becomes obligatory upon him to leave.

Per *Beachcroft, J.*—A sub-lease by a *raiyat* for a period exceeding nine years, whether registered or not, is void, and can be questioned by the grantor or a person claiming through him.

Where a *raiyat* giving a permanent sub-lease in contravention of the provisions of section 85 (2) of the Bengal Tenancy Act induces his lessee to accept it on the faith of a representation that his own status is such as to validate such a sub-lease, he cannot afterwards be allowed to prove in a suit against his lessee that his status was other than it was in the first instance represented to be. **C** CHANDI CHARAN NATH *v.* SOMLA BIBI, 22 C W. N. 179 254

——— **s. 49**—*Notice to quit by several joint landlords signed by one only, validity of.*

A notice under section 49 of the Bengal Tenancy Act purporting to emanate from three landlords but in fact signed by one of them is a proper notice to quit.

There is no necessity that the notice should be signed by the landlord at all. It is sufficient if the notice is at the instance of the landlord calling upon the under-*raiyat* to quit the land. **C** MAFEDUL SHA FAKIR *v* MAHARUDDIN 49

——— **s. 50 (2)**, *presumption under*—Kabuliyat *stipulating enhanced rent, whether rebuts presumption*

Where in a *kabuliyat* executed in 1840 there was an express stipulation that the tenants would pay enhanced rent according to the Pargana rate:

Held, that the *kabuliyat* might be considered either as a new contract under which the tenants agreed to pay enhanced rent or as a contract containing recitals of the incidents of the tenancy which was

Bengal Tenancy Act—contd.

in existence before. In either view the *kabuliyat* showed that the rent was enhanceable. Therefore, the presumption under section 50 (2) of the Bengal Tenancy Act was rebutted. **C** UPENDRA NATH GHOSE *v.* DWARKANATH BISWAS, 22 C. W. N. 322 **593**

——— **s. 50 (2),** *presumption, under, rebuttal of —Landlord and tenant—Amalgamation of tenures, whether creates new tenancy.*

Where four separate tenures were amalgamated into one by a *kabuliyat* of 1853, which expressly stated that enhanced rent would be paid according to the rate of enhancement in the village, and there was no suggestion that the other incidents of the tenure as mentioned in the *kabuliyat* were the same as those of the four original tenures:

Held, that the *kabuliyat* created a new tenancy in 1853, so that the presumption arising under section 50 (2) of the Bengal Tenancy Act was rebutted. **C** UPENDRA NATH GHOSE *v.* GOPI CHARAN SAHA, 22 C. W. N. 321 **595**

——— **s. 52**—*Landlord and tenant—Holder of temporary tenure, whether can contract himself out of his right to apply for reduction of rent.*

A holder of a temporary tenure under a *kabuliyat*, which provides that diluvion or no diluvion the tenant would remain liable for the full rent payable, is not entitled to claim reduction of rent on the ground of diluvion.

Apart from any question of contract section 52 of the Bengal Tenancy Act is applicable both to tenure-holders and to *raiyats*. But a tenure-holder is at liberty to contract himself out of his right to apply for a reduction of rent under section 52

In the case of a holder of a temporary tenure, section 52 of the Bengal Tenancy Act must be read subject to the terms of the contract between him and his landlord. **C** SECRETARY OF STATE *v.* KAMAL KRISHNA PAL **222**

——— **s. 52**—*Landlord and tenant—Landlord, whether can claim additional rent for excess area within boundaries specified in* pattah.

Where rent is fixed for the whole area within the boundaries specified in a *pattah*, the landlord is not entitled to additional rent on account of excess area merely because the area within the boundaries specified in the *pattah* is considerably more than the area stated therein, although he may claim additional rent for excess lands outside the boundaries, **C** MANJANALI DEBI *v.* KAILASH NATH MITRA **24**

——— **s. 60,** applicability of **129**

——— **s. 66**—*Extension of time, application for, after expiry of period—Court, power of, to allow extension.*

It is open to a Court to grant an extension of the time limited by section 66 of the Bengal Tenancy Act, even where the application for extension is made after the expiry of the period prescribed by the section. **C** SARADA CHARAN BASAK *v.* JURO RAM MANDAL **473**

——— **s. 66**—*Payment of decree by under-*raiyat *of non-occupancy* raiyat, *whether can prevent ejectment.*

Section 66 (2) of the Bengal Tenancy Act clearly contemplates that the payment of the amount decreed against a non-occupancy *raiyat*, in order to be a good payment, must be made by or on behalf of the judgment-debtor.

Where the under-*raiyat* of a non-occupancy *raiyat*, against whom a decree for arrears of rent was obtained by the landlord under section 66 of the Bengal Tenancy Act, paid the decretal amount expressly to protect his own interest and on the allegation that the judgment-debtor was in collusion with the decree-holder landlord:

Held, that the payment, not having been made on behalf of the judgment-debtor, was not a good payment under section 66 (2) of the Bengal Tenancy Act so as to prevent the execution of the decree for ejectment. **C** BROJENDRA NATH MITRA *v.* ARMAN SHEIKH, 27 C. L. J. 478 **977**

——— **ss. 69, 70** **177**

——— **s. 74** **497**

——— **s. 85** **254**

——— **s. 85 (1)** **922**

——— **ss. 105, 109 A**—*Appeal against decision of Settlement Officer—Schedule directed to be prepared by judgment—Limitation, commencement of.*

Where a Settlement Officer, in an order on an application for settlement of fair rents under section 105, Bengal Tenancy Act, arrived at certain findings and laid down certain principles, in accordance with which fair rents were to be ascertained and entered in a schedule directed to be prepared by the order:

Held, that limitation for preferring an appeal against the decision of the Settlement Officer began to run from the date on which the schedule was signed by the Settlement Officer, and not from the date on which the order was made, inasmuch as the schedule settling the rents was clearly a part of the decision and in fact read with the order was the decision. **C** DHARANI KANTA LAHIRI *v.* AMIR SHEIKH **152**

——— **ss. 105A, 109**—*Status of tenant—Decision by Settlement Officer—Suit for declaration, maintainability of.*

Under section 105 A of the Bengal Tenancy Act a Settlement Officer hearing an application for the settlement of a fair rent is authorised to decide whether the tenant belongs to a class different from that to which he is shown in the Record of Rights as belonging. When a Settlement Officer has decided that question, it is not competent to a Civil Court, having regard to the terms of section 109 of the Act, to entertain a suit for a declaration of the status of the tenant. **C** BEPIN KRISHNA KUMAR *v.* HARI DAS GHOSE, 27 C. L. J. 210 **562**

——— **s. 109** **562**

——— **s. 109A** **152**

——— **s. 116** **94**

——— **s. 153**—*Appeal, whether lies—Question of title raised but not decided.*

Under section 153 of the Bengal Tenancy Act, it is not sufficient merely that there should be a controversy on the question of title as between parties having conflicting claims to land but the section requires that some question of title should be decided as between such parties. Therefore, where in a suit for rent the lower Court does not decide the question of title which is raised between parties having conflicting claims thereto,

Bengal Tenancy Act—contd.

no appeal lies under section 153 of the Bengal Tenancy Act. **C** JILLOR RAHMAN *v.* EBRAHIK KHAN **558**

——— **s. 174**—*Sale, order setting aside—Suit for declaration, maintainability of.*

Where a sale in execution of a rent-decree is set aside under section 174 of the Bengal Tenancy Act, the purchaser is entitled to bring a suit for a declaration that the defendant had no right to make the deposit. **Pat** GOLAB CHAND RAY *v.* FEDA HUSSAIN, 3 P. L. W. 264; 3 P. L. J. 122 **532**

——— **Sch. III, Art. 1 (a), ss. 3, 4, 5, 116**—Zirat *land, acquisition of non-occupancy rights in—Ejectment from* zirat *land—Limitation.*

Per *Curiam* (*Chapman* and *Jwala Prasad, JJ.*, dissenting).—The Bengal Tenancy Act applies to a proprietor's private land, and a suit by a landlord to eject a non-occupancy *raiyat* of his private land on the ground of the expiration of his lease is governed by Article 1 (*a*) of Schedule III of the Act.

Per *Chamier, C. J.*—The operation of Article 1 (*a*) of Schedule III of the Bengal Tenancy Act is not excluded by section 116 of the Act in the case of *zirat* land.

Section 116 of the Bengal Tenancy Act prevents the application of Chapter VI to *raiyats* of a proprietor's private land in two cases only, namely, where such land is held under a lease for a term of years and where it is held under a lease from year to year. Except in these two cases Chapter VI of the Act was intended to apply to *raiyats* of a proprietor's private land, and such *raiyats* may be non-occupancy *raiyats* within the meaning of the Act.

Per *Mullick, J.*—There is nothing in the Bengal Tenancy Act to support the view that it is not open to a *zemindar* to create *raiyati* interests in his private lands. On the contrary section 116 of the Act clearly contemplates the acquisition of occupancy rights in such land under certain circumstances and, if of occupancy rights, then why not of non-occupancy rights also?

Per *Chapman, J.*—The classification of tenants in sections 4 and 5 of the Bengal Tenancy Act was not intended to be scientific or precise, and in order to render the Act intelligible these sections must be applied with a reasonable amount of elasticity.

Zirat land is not *raiyati* land although the *zemindar* may lose his rights in it by treating it as if it was *raiyati*. But if he lets it for a term or from year to year, it remains his own and the tenant of it is not a *raiyat*.

Article 1 (*a*) of Schedule III of the Bengal Tenancy Act does not apply to tenants in *zirat* land.

Per *Jwala Prasad, J.*—The Bengal Tenancy Act does not purport to be a complete and exhaustive Code even in respect of the law of landlord and tenant. A person holding *zirat* land under a lease for a term of years is not a *raiyat* and will not be governed by the Bengal Tenancy Act but by the general law. He does not become a non-occupancy *raiyat* after the expiry of the lease and is a trespasser only. Therefore, Article 1 (*a*) of Schedule III of the Bengal Tenancy Act does not apply to persons holding under a lease the proprietor's private lands.

Bengal Tenancy Act—concld.

A Court is required to have regard to custom in determining whether a person is a *raiyat* or not. No custom is more certain than that a tenant in *zirat* is not a *raiyat*. **Pat** JANKI SINGH *v.* JAGANNATH DAS, 3 P. L. J. 1 **94**

Berar Land Revenue Code, s. 78 (2)—Anti-ijara *tenancy—Presumption—Burden of proof.*

It is the tenant who wants to remain on the land in spite of the landlord's wishes to the contrary that has to prove the circumstances which entitle him to do so. He has, therefore, to prove, in the case of an *anti-ijara* tenancy in Berar, that no satisfactory evidence of the commencement of his tenancy and of the period agreed upon between the landlord and tenant for its duration is forthcoming.

If he fails to do so no presumption under section 78 (2) of the Berar Land Revenue Code can be made in his favour. **N** ABDULLAKHAN *v.* ABHIMAN **531**

——— **ss. 78, 79**—*Notice under s. 78, not acted upon for one year, effect of—Fresh notice, whether necessary—Termination of tenancy.*

If a notice has been duly served under section 78 of the Berar Land Revenue Code, then in the absence of waiver the person so served is not entitled to a fresh notice under section 79 merely because more than one year has elapsed since the time when in accordance with the notice the tenant should have vacated the land.

Section 78, sub-sections (4) and (8), are not restricted to the tenancies mentioned in sub-section (2) of that section, but the enhancement contemplated therein can be decreed only if in the judgment of the Court it be just and reasonable.

A notice to quit under section 79 of the Berar Land Revenue Code unconditionally determines the tenancy, but a notice under section 78 (8), if not complied with, is not intended to have that effect inasmuch as the tenant has a right to appeal to the Court for a decision as to whether in its opinion the enhancement is just and reasonable.

A tenant is to be evicted for not paying the enhanced rent only after it has been determined to be just and reasonable by the Court. **N** NARAYAN *v.* SYED BAHADUR **723**

——— **s. 79 (2)**—*Annual tenancy, whether includes tenancy for a year—Notice to quit, whether necessary—Transfer of Property Act* (*IV of* 1882), *s.* 111 *A.*

The expression "annual tenancy" as used in section 79 of the Berar Land Revenue Code is meant to cover a tenancy from year to year only and not a tenancy lasting for a year only. No notice by either party to a contract of tenancy for one year is therefore, necessary to determine the tenancy. **N** KESHAO *v.* MANSHA **212**

——— **Ch. VIII (a), s. 96 (j)**—*Officer in charge of Record of Rights, powers of.*

The officer-in-charge of a Record of Rights is not an officer who is authorised to recognise a Subdivision of a Survey number or to form two recognised Sub-divisions into one Survey number. **N** GADADHAR *v.* CHUNNILAL, 14 N. L. R. 55 **541**

Berar Municipal Law of 1886, ss. 85, 86—*Application for permission to build, no order passed on, effect of—Steps and balcony projecting over street—Encroachment—Notice to remove obstruction, necessity of—Notice to show cause, whether notice to remove.*

Accused applied to the Municipal Committee, Amraoti, for sanction to build a house, but no order was passed on the application within one month by the Committee. The applicant built steps over a roadside drain and a balcony eleven feet high projecting over it without the written permission of the Committee. The latter issued a notice to the former to show cause why the balcony and steps should not be removed and why he should not be prosecuted. The applicant was then prosecuted on a complaint made by the Secretary duly authorised by a resolution of the Committee and was convicted of two offences, one in respect of the steps and the other in respect of the balcony, under rule 10 read with rule 30 of the rules framed under section 116 of the Berar Municipal Law, and fined Rs. 25 on each count. The steps and the balcony were ordered to be removed within eight days, on failure of which he was ordered to pay a continuing daily fine of Re. 1:

Held, that the notice to show cause was not a notice to remove the obstruction as required by section 86 (2) of the Berar Municipal Law.

Section 86, sub-section (2) contemplates a notice issued personally to an individual.

Section 85 of the Berar Municipal Law merely requires a person intending to erect or re-erect any building to give written notice of his intention to the Committee, but the mere fact that such a permission was applied for and no order prohibiting the errection was passed within one month does not place the applicant in the same position as if written permission was accorded to him by the Committee as required by section 86. So far as the encroachments dealt with by section 86 are concerned, they are not in themselves punishable though declared unlawful by that section, but it is the disobedience to the order of the Committee for their removal under section 130 which has been made punishable. **N** RADHAKISAN *v.* MUNICIPAL COMMITTEE, AMRAOTI, 19 CR. L. J. 392 **744**

——— **s. 116**—*Daily fine, when can be imposed—Rules* 10 *and* 30 *framed under s.* 116, *whether* ultra vires.

The rules framed under section 116 of the Berar Municipal Law must be consistent with the Act. The effect of rule 10 framed under section 116 of the Berar Municipal Law is to do away with the notice required by section 138, and the rule is, therefore, *ultra vires*.

The policy of the Berar Municipal Law is not to authorise a daily fine except in cases of contumacy, that is, disobedience of a lawful order. **N** RADHAKISAN *v.* MUNICIPAL COMMITTEE, AMRAOTI, 19 CR. L. J. 392 **744**

——— **ss. 132, 133.**

A balcony eleven feet above the level of a street is not an encroachment within the meaning of section 132 of the Berar Municipal Law.

Section 133 of the Berar Municipal Law makes an encroachment punishable without a notice of removal being issued to the offender. That section does not, however, justify a daily fine but only allows a fine which may extend to Rs. 50. **N** RADHAKISAN *v.* MUNICIPAL COMMITTEE, AMRAOTI, 19 CR. L. J. 392 **744**

——— **s. 138** **744**

——— **s. 151.**

All that section 151 of the Berar Municipal Law lays down is that a Court shall not take cognizance of an offence under the Berar Municipal Law, except on the complaint of the Committee or of some person authorised by the Committee in their behalf. The complaint need not specify the section or rule of the Berar Municipal Law which has been broken. It need only state the facts and it is for the Court to decide under what section or rule an offence has been committed.

When a Statute expressly deals with any matter and lays down certain procedure, it is not competent to a Corporation to repeal any of the provisions of the Act under which power to make rules has been given. **N** RADHAKISAN *v.* MUNICIPAL COMMITTEE, AMRAOTI, 19 CR. L. J. 392 **744**

Bihar & Orissa Excise Act (II B. & O. of 1915), s. 47 (a) **974**

Bombay District Municipal Act (III of 1901), ss. 92, 96—*Re-construction of old building—Failure to give notice—Offence—Scope and object of s.* 96.

The reference to section 92 in section 96, clause (1), of the Bombay District Municipal Act, does not govern the whole of the clause but is limited to the clause describing projecting portions of buildings in respect of which the Municipality are empowered by that section to enforce a removal or set-back, so that notice or permission is requisite in case of all buildings whether on a public road or in a private *mahala*.

Section 96 of the Bombay District Municipal Act does not empower the Municipality to deprive owners of the legitimate use of their land or to refuse permission to build at all, but it does confer on the Municipality a very wide power of regulating buildings. The object of the power is to secure the safety and sanitation of buildings to be newly erected. This power, though an encroachment on private rights, is not inconsistent with the Act. **S** KHUSHALDAS MOOLCHAND *v.* EMPEROR, 11 S. L. R. 90; 19 CR. L. J. 330 **346**

——— **s. 96** **346**

——— **s. 160 (3)**—*Award of compensation by District Court—Power of Court to award* 15 *per cent. on market value—"Procedure," meaning of—Revision—High Court, power of interference of—Civil Procedure Code (Act V of* 1908), *s.* 115.

Under section 160 (3) of the Bombay District Municipal Act, the matter of the compensation is to be determined by the District Court, which decides the question in the exercise of its jurisdiction as a Civil Court. Its proceedings are, therefore, subject to revision by the Judicial Commissioner's Court under section 115 of the Civil Procedure Code.

The word "procedure" in section 160 (3) of the Bombay District Municipal Act is used in its popular and not in its strictly legal sense, and a District Court in awarding compensation under that section has power to award 15 per cent. of the market value in addition to such value. **S** HYDERABAD MUNICIPALITY *v.* MOORIJMAL MUSHTAKRAM, 11 S. L. R. 93 **363**

Bombay District Police Act (IV Bom. of 1890), s. 44, *order under, form of—Technical errors, effect of.*

An order under section 44 of the Bombay District Police Act must relate to certain persons or parties and to an actual or intended occurrence.

Where an order under section 44 of the Bombay District Police Act set out the occurrences which had led to the order, its purpose and the particular occasion to which it was to apply, but its operative part was in the following terms: "No one shall obstruct religious or ceremonial processions passing with music in front of any Masjid within the Municipal limits of the Haliyal town:"

Held, that the errors in the form of the order were so purely of a technical character as not to render the order invalid. **B** ABDUL HAMID RAJABALI *v.* EMPEROR, 20 BOM. L. R. 114; 19 CR. L. J. 366 **590**

Bombay Land Revenue Code (Act V Bom. of 1879), s. 40 **872**

Bombay Survey and Settlement Act (I Bom. of 1865), ss. 37, 38 **872**

Buddhist Law, Burmese—*Succession—Exclusion from inheritance, requisites for.*

Mere non-attendance on a deceased during his or her illness is not sufficient to exclude those who would ordinarily inherit from him or her. The law requires that on the part of the person sought to be excluded, there must be conduct such as constitutes an intention on his part to destroy the natural tie between him and the deceased. **L B** MAUNG NGE *v.* MAUNG ZIN BA **239**

Burden of proof **915**

Burma Civil Courts Regulation (I of 1896), s. 15 **690**

Burma Forest Act (IV of 1902), rr. 22, 98—*License to fell timber, breach of condition of—Licensee, liability of, for acts of servants.*

A licensee or other person permitted to fell timber in accordance with certain conditions under rules framed under the Forest Act is liable to be punished under those rules for the acts of his servants, whether authorised by him or not, and even if the acts are in contravention of his instructions, provided that those servants were acting within the scope of their master's authority and unless the master can show that he acted in good faith and did all that could be reasonably expected of him to prevent the breach of the conditions under which he is permitted to fell the timber. **L B** EMPEROR *v.* U GYAW, 9 L. B. R. 112; 19 CR. L. J. 331 **347**

—— **r. 98** **347**

Burma Municipal Act (III of 1898), ss. 2 (6), 142 (d)—*Lodging-house, what is—Receiving lodgers.*

A lodging-house need not be let in lodgings: it is still a lodging-house if it is occupied to any extent in common by members of more than one family. The persons living in the lodging house are lodgers, whether they pay rent or not and the owner of the lodging-house receives them when he allows them to occupy the building. **U B** AMANATH MISTRY *v.* EMPEROR, 3 U. B. R. (1917) 52; 19 CR. L. J. 370 **674**

—— **s. 142 (d)** **674**

Calcutta Improvement Act (V B. C. of 1911) **331**

Calcutta Improvement Act—concld.

—— **ss. 41 (a), 42 (a), 78, 81**—*Board, whether has power to acquire land for recoupment—"Affected" in s. 42 (a), meaning of—'Recoupment,' 'Betterment,' meaning of.*

By the Full Bench (N. R. Chatterjea, J., dissenting).—Section 42 (*a*) of the Calcutta Improvement Act authorises the Board of Trustees to acquire land compulsorily for purposes of "recoupment," *i.e.*, by selling or otherwise dealing with the land under section 81 or by abandoning the land in consideration of the payment of a sum under section 78 of the Act.

Per *Fletcher, J.*—The word "affected" in section 42 (*a*) of the Calcutta Improvement Act means affected in any way; and the expression "by the execution of the scheme" means through or owing to the execution of the scheme.

Betterment means that persons whose property has clearly been increased in market value by an improvement effected by local authorities should specially contribute to the cost of the improvement.

Recoupment means the acquisition of land by a public body beyond what is necessary for the actual execution of an improvement, so that some part at least of the improved value may be secured by the improving public body in ease of the burden on the rate-payers.

Per *Richardson, J.*—The phrase "land affected by the execution of the improvement scheme" in section 42 *a* of the Calcutta Improvement Act suggests land affected for the better, and though the words may be wide enough to include land prejudicially affected should the Board choose to acquire such land, they specially include and signify land beneficially affected.

The words "by the execution of the scheme", which qualify the word "affected" refer not only to the period of construction but also to the period immediately following, when the improvement scheme is completed and in operation and "a going concern."

Per *Chatterjea, J.*—The words "land required for the scheme" in section 41 (*a*) of the Calcutta Improvement Act mean the land which is actually required for what may be called the engineering or construction works, for instance, in a street scheme the land necessary for laying out the street.

The word "affected" in section 42 (*a*) of the Calcutta Improvement Act has no reference to value. In that section it is used in the sense of acted upon physically or materially.

The Calcutta Improvement Act does not authorise the Board of Trustees to acquire land compulsorily for the purpose of recoupment.

Where there are two possible constructions of certain words in a section of the Calcutta Improvement Act defining the power of the Board of Trustees, if on the one construction the Board would have almost unlimited power of interference with private rights, and in the other they are not clothed with such power, but with a power more convenient and limited, the latter construction should be preferred **C** MANI LALL SINGH *v.* TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA, 22 C. W. N. 1; 27 C. L. J. 1; 45 C. 343 **770**

—— **ss. 78, 81** **770**

Calcutta Municipal Act (III B. C. of 1899), ss. 171, 228 669

——— **ss. 299, 593**—*Notice, service of, on one of several co-owners of premises, validity of.*

The service of a notice under section 299 of the Calcutta Municipal Act upon one of the co-owners of the property in the manner provided in section 593 is effectual against the other co-owners. **C** CORPORATION OF CALCUTTA *v.* HEMANGINI DASSI 413

——— **s. 593** 413

Caste Disabilities Removal Act (XXI of 1850) 299

Cattle, *illegal seizure of—Damages, suit for—Burden of proof.*

In a suit for damages for wrongful seizure of cattle the burden lies on the defendant to prove that the seizure was legal. **N** MADHORAO *v.* ABDUL GAFUR 241

Cattle Trespass Act (I of 1871), s. 22 592

——— **Chap. V, s. 22**—*Suit for damages for illegal seizure, whether barred—Burden of proof.*

In cases where a Statute provides a special remedy for a right or liability already existing, unless the Statute contains words which either expressly or by necessary implication exclude the common law remedy, the person suing has his election to pursue either that or the statutory remedy.

In a suit for damages for illegal seizure of cattle the onus lies on the defendant to prove that the seizure was justifiable in law.

Such a suit is not barred by reason of Chapter V of the Cattle Trespass Act. **N** BALA *v.* VITHU 237

Cause of action 912, 980

Cause of action.

When a cause of action for money is once complete in itself, whether for goods sold, or for money lent or for any other claim, and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may, always as a rule, sue for the original consideration, provided that he has not endorsed, or lost, or parted with, the bill or note, under such circumstances as to make the debtor liable upon it to some third person. But when the original cause of action is the bill or note itself, and does not exist independently of it, then the bill or note is the only contract between the parties, and if for want of proper stamp or some other reason it is not admissible in evidence, the creditor must lose his money. **P** BHAGAT RAM-GANPAT RAI *v.* CHHAJJU RAM, 15 P. W. R. 1918 886

———, *accrual of, after suit—Relief, whether can be granted.*

Courts have power, in certain circumstances, to grant a decree in a case, where the cause of action arose subsequently to the filing of the plaint.

In a suit for money, where the money becomes payable to the plaintiff only after the filing of the suit the Court should pass a decree in favour of the plaintiff and not compel him to institute another suit, for the purpose. **M** SUBBARAYA CHETTY *v.* NACHIAR AMMAL, (1918) M. W. N. 199; 7 L. W 403 863

C. P. Courts Act (II of 1904), s. 15, *scope of—"Value of suit," meaning of.*

Plaintiff sued for the recovery of Rs. 1,651-15-0, but subsequently, on different dates, he gave up his claim to the extent of Rs. 651-2-5 leaving a balance of Rs. 1,000-3-0. Through mistake, however, he prayed only for a decree for Rs. 988-3-7. The first Court dismissed the claim but on appeal to the District Judge the decree was set aside and the suit was remanded for a decision on merits, with the result that a decree was passed in favour of the plaintiff for Rs. 988-3-7 claimed by him:

Held, that the value of the suit was Rs. 988-3-7 and that an appeal lay to the District Judge and not to the Court of the Divisional Judge.

Jurisdiction in the matter of appeals in the Central Provinces is governed by section 15 of the Central Provinces Courts Act, 1904. The words "value of the suit" as used in that section invariably mean value of the relief originally claimed by the plaintiff in the plaint or increased or reduced by voluntary amendment, that is to say, value of such relief as is made the subject-matter of the Court's decision.

Where a plaintiff voluntarily reduces an original claim, it is the reduced claim which represents the value of the suit for the purposes of appeal.

A Court cannot adjudicate itself out of the jurisdiction given to it by law over the suit as instituted. **N** DINDAYAL *v.* DEONATH 287

C. P. Land Revenue Act (XVIII of 1881), ss. 65A (4), 132, 152 - *Gauntia, protected—Succession - Resignation by eldest heir—Surrender of Gauntiaship, validity of - Suit to recover Gauntiaship, whether cognizable by Civil Court.*

The object of section 65 A of the Central Provinces Land Revenue Act is not to the benefit of the *zemindar* but to retain, if possible, certain selected families in the Gauntiaships of their villages, and to protect them against transfers and sub divisions.

Section 65 A, clause (4), of the Central Provinces Land Revenue Act is mandatory in its terms. The right of the eldest male heir to resign or renounce his rights as a Gauntia, with a view to giving up all claim to inherit the estate which has by statutory devolution descended upon him must be exercised at the time when the succession opens, *viz.*, on the death of the last protected Gauntia.

The provisions of section 132 of the Central Provinces Land Revenue Act were drawn up with reference to section 65 A of the Act and were intended to enable the Deputy Commissioner merely to determine claims to protection under that section and to enforce the provisions of that section. It was never intended that the Deputy Commissioner should be empowered to deal with a suit for ejectment or for the recovery of a Gauntiaship. Such a suit is cognizable by the Civil Courts.

Per *Atkinson, J.*—The right of election under section 65A, clause (4) (*b*), must be exercised in respect of the entire estate which devolves on the eldest male heir. If two or more villages form the protected tenure of a Gauntia, even though they may have been declared protected by separate certificates at different times, the eldest male heir must exercise his choice of resignation or adoption in respect of all or none of such villages; there can be no splitting up of the estate or tenure into different parts having distinct entities.

C. P. Land Revenue Act—concld.

Per *Imam, J.*—There is nothing in section 65A of the Central Provinces Land Revenue Act to show that the protection afforded to the tenure of a Gauntia is to extend to a group of tenures. Where a person in whom two Gauntiaships are vested dies, it is open to his eldest heir to resign at the time of his succession in favour of another heir either both the Gauntiaships or one of them. **Pat** LAL NRIPARAJ SINGH *v.* MOHAN GAUNTIA, 3 P. L. J. 229; 4 P. L. W. 256 **817**

——— **ss. 132, 152** **817**

C. P. Laws Act (XX of 1875), s. 5—*'Hindu,' meaning of.*

The term 'Hindu' in section 5 of the Central Provinces Laws Act, 1875, refers to persons who profess some form of the Hindu religion, whatever be the branch, school, sect, off-shoot or denomination to which they may belong, but it does not extend to persons who have never professed any form of the Hindu religion or to those who have been converted from it to some entirely different religion. The word would apply to dissenters and non-conformists but not to apostates. Thus a Jain is a Hindu but a Brahman converted to Buddhism or Islam is not. **N** UJIYARA *v.* TILOCHAN **435**

C. P. Tenancy Act (XI of 1898), s. 2 (3)—*Landlord and tenant—Tenancy of undefined land, whether permissible.*

There can be no tenancy within the meaning of the Central Provinces Tenancy Act of a share of land, if that share is not defined by metes and bounds. **N** SUMERA *v.* PEMCHAND, 14 N. L. R. 62 **845**

—— —— **ss. 35, 36** **317**

——— **s. 46**—*Suit for possession of occupancy tenancy by heir—Civil Court, jurisdiction of, whether barred.*

In a suit for possession of an occupancy holding in the Civil Court on the ground that it devolved on the plaintiff after the death of the former holder, her mother, the defendant resisted the claim on the ground that as the land was gifted to him by a registered deed by the plaintiff's mother the suit was barred by the Central Provinces Tenancy Act:

Held, (1) that as the suit was one for possession of an occupancy tenancy and not a suit to set aside an alienation made by the former tenant in contravention of the provisions of the Tenancy Act, the Civil Court had jurisdiction to entertain the suit;

(2) that irrespective of the provisions of the Central Provinces Tenancy Act the deed of gift regarded as an attempt to alienate anything more than the life-interest of a Hindu widow was invalid. **N** KALWA *v.* BHAWAR SINGH **1001**

——— **ss. 46, 47, 95**—*"Transfer," meaning of—Surrender, whether transfer—Surrender of tenancy in favour of co-sharer landlord*—Lambardar, *whether can apply for possession—Suit for possession by landlord who obtained surrender, whether barred—Jurisdiction.*

The transfer contemplated by section 46 of the Central Provinces Tenancy Act must be either a sale or a gift or a mortgage or a sub-lease, and the words "otherwise transfer" must be limited to transactions of a similar nature. A surrender is in no sense a transfer, much less a transfer within the meaning of section 46.

C. P. Tenancy Act—concld.

The Central Provinces Tenancy Act, while making provision for the recovery of possession of a holding by the heir of a surrendering tenant, makes no provision for such recovery by a co-sharer landlord.

The institution of a suit for ejectment against a purchaser of a holding is not one of the duties which a *lambardar* can be held to have to perform as the representative of the proprietary body. He has no authority to represent the co-sharers for the purpose of ejectment before a Revenue Officer.

Plaintiffs Nos. 1 to 8 were co-sharer landlords with defendant who was also the *lambardar*. Certain tenants surrendered the lands in suit to plaintiffs Nos. 1 to 8, and the latter leased them to plaintiffs Nos. 9 to 12. Defendant then applied to the Revenue Officer under sections 46 and 47 of the Central Provinces Tenancy Act to be put in possession as landlord of the disputed lands, and his application was allowed. Plaintiffs then brought a suit in a Civil Court for declaration and possession:

Held, (1) that the surrender was not a transfer within the meaning of section 46 of the Central Provinces Tenancy Act and that the defendant had, therefore, no right to make an application under sections 46 and 47 of the Act;

(2) that section 95 of the Central Provinces Tenancy Act was no bar to the suit. **Pat** TRILOCHAN PANDA *v.* DINABANDHU PANDA, 3 P. L. J. 88 **317**

——— **s. 95** **317**

Chota Nagpur Tenancy Act (VI of 1908), s. 139 (5)—*Wrongful dispossession of tenant—Suit to recover possession in Civil Court, whether maintainable—Jurisdiction.*

Where a tenant has been wrongfully dispossessed of his holding, he may bring a suit for possession of the land in the Civil Courts. Section 139 (5) of the Chota Nagpur Tenancy Act is no bar to such a suit. The word 'application' in the section does not include suits. **Pat** NARAIN SINGH *v.* BABA, 4 P. L. W. 189; (1918) PAT. 131 **262**

Civil Procedure Code (Act XIV of 1882), s. 17, Expl. III **863**

——— **s. 244** **855**

—— **ss. 323, 325** **15**

Civil Procedure Code (Act V of 1908), s. 9 **659**

——— **s. 11**—*Finding in Civil Court as to landlord's right, whether* res judicata *in suit for rent in Revenue Court.*

A mere finding by a Civil Court as to the existance of any right in a landlord will not operate as *res judicata* in a subsequent suit in a Revenue Court having exclusive jurisdiction over such a suit. But where the right is embodied in the decree of a competent Court in the former suit, such decree is *res judicata* between the parties as regards the rights established thereby. **M** RAMASAMI SERVAIGARAN *v.* ATHIVARAHA CHARIAR, 23 M. L. T. 183; 7 L. W. 471; (1918) M. W. N. 340 **663**

——— **s. 11**—*Matter expressly excluded from decision, whether* res judicata.

In deciding the validity or otherwise of the defence of *res judicata*, the Court is concerned with

what was actually decided and not with what ought to have been decided in the previous suit.

Plaintiffs let the ground floor of their house to defendants from 1st January 1909. In the summer of 1911, a dispute arose between the parties with regard to the term of the tenancy and the extent of the property leased and the plaintiffs brought a suit for ejectment of the defendants from the house as well as two plots of land which, according to the plaintiffs, did not form part of the property leased. The defendants thereupon instituted a counter-suit for the specific performance of an agreement to lease the property for a period of 3 years. The litigation dragged on till the defendants vacated the premises on the 7th March 1912 and informed the Court accordingly, which consequently declined to adjudicate upon the various issues arising between the parties and simply granted the plaintiffs a decree for possession of the property, expressly stating that the said issues might be determined in the suit for damages which was to be instituted by the plaintiffs The present suit was then brought for damages for use and occupation on the allegations that the defendants were monthly tenants, that their tenancy was determined at the end of June 1911 by a notice to quit served on them in April 1911 and that thereafter they were in wrongful possession of the demised premises. It appeared that the parties had written to each other on the 15th and 22nd January 1909 with regard to the matter of the lease and it was contended that these letters amounted to a lease for a term exceeding one year and not having been registered were inadmissible in evidence:

Held, (1) that inasmuch as the Court dealing with the former suit expressly refused to adjudicate upon any of the matters covered by the issues in the subsequent suit, the plaintiffs could not avail themselves of the doctrine of *res judicata* and the Court was competent to determine the issues on the merits between the parties;

(2) that the contract between the parties was entered into orally and the letters subsequently exchanged between the parties were merely memoranda of a *fait accompli* and could not, therefore, be excluded from evidence on the ground of want of registration;

(3) that the tenancy was for three years from 1st February 1909 to 31st January 1912 and the plaintiffs had no right to eject the defendants from the premises before the expiry of that period;

(4) that the defendants were liable to pay damages for use and occupation for the period subsequent to 31st January 1912. **P** MADAN MOHAN LAL *v.* FIRM OF MESSRS. B. BOROOAH & COMPANY, 11 P. L. R. 1918; 71 P. W. R. 1918 **859**

—— **ss. 11, 47**—*Mortgage—Redemption, suit for, decided on merits—Second suit for redemption, whether maintainable*—Res judicata.

In a suit for redemption of a mortgage a decree was passed under the Dekkhan Agriculturists' Relief Act directing delivery of possession of the mortgaged property to the mortgagor and ordering the latter to pay off the mortgage debt by instalments Neither party executed the decree and possession of the property remained with the mortgagee. The mortgagor then mortgaged the property to the present plaintiff, who brought a suit to enforce the mortgage against the mortgagor and the prior mortgagee:

Held, (1) that the suit was practically one for redemption of the first mortgage and could be maintained only if it could be shown that the mortgagor could have maintained a second suit for redemption;

(2) that the first suit having been heard and decided on the merits in respect of the same matter, a second suit for redemption was not maintainable having regard to the provisions of section 11 of the Civil Procedure Code;

(3) that if the suit was to be treated as based on the previous decree, it was barred by section 47 of the Civil Procedure Code. **B** BAPUJI RAMCHANDRA KULKARNI *v.* GUJA MHADU DHANGAR, 20 BOM. L. R. 164 **908**

—— **s. 11, O. XXXIV, rr. 1, 2, 3, 10**—*Mortgage—Redemption suit—Preliminary decree, payment under—Mesne profits, suit for, after date of payment, maintainability of—Remedy of plaintiff*—Res judicata.

A suit lies for mesne profits after date of payment under a preliminary decree in a suit for redemption of mortgage, the mortgagor's remedy not being confined to a claim for adjustment of accounts at the time of the passing of the final decree. **M** VAIRAPPA THEVAN *v.* SUBBIAH THEVAN, 23 M. L. T. 158; 7 L. W. 269; (1918) M. W. N. 207 **251**

—— **s. 11, O. II, r. 2**—*Previous suit for possession and interest—Suit dismissed as not maintainable—Second suit for interest, whether barred—Punjab Redemption of Mortgages Act (II of 1913).*

Defendant mortgaged some land to the plaintiffs for a certain sum, a part of which was to carry interest. On an application to the Collector under Punjab Act II of 1913, the mortgagor was allowed to redeem the land on payment of the principal only. A suit was then brought by the mortgagees for possession of the mortgaged property and for a declaration of their charge together with interest, which was dismissed on the ground that no civil suit to disturb possession given under Act II of 1913 could lie and that the plaintiffs were not entitled to interest. In a subsequent suit brought by the plaintiffs for interest:

Held, that the finding of the Court in the former suit with regard to interest being superfluous, the present suit for interest was neither *res judicata* under section 11 nor barred under Order II, rule 2, of the Civil Procedure Code. **P** RAMJI SHAH *v.* GHULAM, 22 P. W. R. 1918 **983**

—— **s. 11**—Res judicata—*Decree against person impleaded as legal representative of deceased defendant, whether binding on persons claiming through deceased.*

A suit was brought for specific performance of a contract to sell certain property against the vendor and on his death pending the suit, his widow, daughter-in-law and mother were impleaded as legal representatives. The daughter-in-law did not appear or contest the suit, which was decreed by ordering the widow as legal representative to execute a conveyance. The other defendants being exonerated, the suit was dismissed as against them. In a subsequent suit for mesne profits of the property

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which remained in the possession of the daughter-in-law after the date of the first suit, she contended that she was in possession as legatee under a Will of the vendor and that as the first suit was dismissed as against her she was not liable:

Held, (1) that having been a party to the first suit she should have raised her contentions in that suit;

(2) that the decree passed in that suit against the widow as legal representative of the vendor was binding on all who claimed through him. **M** PISUPATI VENKATA RANGAYYA *v.* GANDAVARAPU NARASAMMA, 23 M. L. T. 208; (1918) M. W. N. 195; 8 L. W. 19 **852**

——— **s. 11**—Res judicata—*Rent suit—Plaintiff's title negatived in previous suit—Subsequent suit, whether maintainable—Bengal Tenancy Act (VIII B. C. of 1885), s. 60, applicability of.*

Plaintiff sued defendants for rent of certain lands as usufructuary mortgagee thereof. The defendants pleaded that the plaintiff was not entitled to sue for rent inasmuch as his name had not been registered as mortgagee. The question of his title as mortgagee was also put in issue and was decided against him. He subsequently brought another suit for rent for the same period after registration of his name:

Held, (1) that the subsequent suit was barred by *res judicata*;

(2) that section 60 of the Bengal Tenancy Act had no application to the case, inasmuch as the defendants denied the mortgage in favour of the plaintiff altogether. **Pat** SHEO CHARAN DHOBI *v.* BANSI SINGH **129**

——— **s. 11**—Res judicata—*Suit by widow against daughter-in-law for share of estate—Previous suit by collaterals compromised by widow, effect of.*

In a suit by a Hindu widow against her daughter-in-law for possession of a moiety of the estate alleged to have been left by the former's husband or in the alternative for maintenance, it appeared that the collaterals of the plaintiff's deceased son the husband of the defendant) had sometime previously sued for possession of the entire estate on the allegation that the defendant having become unchaste had forfeited her widow's estate. The present plaintiff, who was impleaded as a defendant in that suit, resisted the claim and eventually effected a compromise with the plaintiffs, according to which she agreed to relinquish her rights in their favour in lieu of certain property to be given to her as absolute owner in the event of the collaterals' suit succeeding. In the event of their defeat, she was to receive the property on the death of the defendant:

Held, that this compromise could not and did not affect the rights of the two widows *inter se*, and that so far as the plaintiff's claim against her daughter-in-law was concerned, there had been neither an adjudication nor any agreement which could be set up as a bar to the suit, and that, therefore, the rule of *res judicata* had no applicability to the case. **P** BHOLI BAI *v.* CHIMNI BAI, 45 P. W. R. 1918; 23 P. L. R. 1918 **92**

s. 11, Expl. iv—Res judicata *against* pro forma *defendant.*

Where one of several persons interested in a property brings a suit in respect of it, and the other persons interested therein being unwilling to join themselves as plaintiffs in the suit are made *pro forma* defendants, they cannot, upon the failure of the plaintiff, harass the defendant upon the same cause of action. **Pat** BISHESHWAR DAYAL SAHU *v.* BANSROPAN SAHU **546**

——— **s. 11, Expl. IV**—*Res judicata*, partial **368**

——— **s. 11, Expl. V, O. II, r. 2, O. XX, r. 12**—Res judicata—*Suit for possession and mesne profits—Subsequent suit for mesne profits from date of institution of suit up to delivery of possession, maintainability of.*

Plaintiff brought a suit for possession and claimed a certain sum for mesne profits. There was a further claim for mesne profits during the pendency of the suit and after decree. The suit resulted in a decree for possession and for a portion of the sum claimed for mesne profits. The Court did not purport to deal with the question of mesne profits during the pendency of the suit and after decree. Plaintiff then brought a suit for mesne profits from the date of the institution of the previous suit up to the date of delivery of possession:

Held, that the suit was maintainable and was not barred either by Explanation V to section 11 or by rule 2 of Order II of the Civil Procedure Code. **A** MOHAMMED ISHAQ KHAN *v* MOHAMMED RUSTUM ALI KHAN, 16 A. L. J. 182 **88**

——— **ss. 11, Expl. VI, 91**—*Injury to plaintiff in exercise of public right—Damages, suit for—Finding as to nature of right*—Res judicata

A private individual is not competent to obtain a declaration that a right is a public one, but he is entitled to sue for damages for injuries sustained by him in the exercise of his privileges connected with a public right.

Where the Court gives a finding in such a suit that the right is a public right, it becomes *res judicata* in a subsequent litigation by virtue of Explanation VI of section 11, Civil Procedure Code. **M** KHAJI SAYYID YUSUF SAHIB *v.* EDIGA NARASIMHAPPA, (19 8) M. W. N. 175 **367**

——— **s. 20** **659**

——— **ss. 20, 21**—*"Cause of action," meaning of—Suit on policy of insurance—Place of suing—Death of assured, whether part of cause of action.*

One *R* sent proposal forms for two policies of life insurance from some place in the District of Chittagong to the head office of the defendant company at Calcutta, and the policies were made out in that office and thence despatched to the assured *R R.* subsequently died in the District of Noakhali. Thereafter *R's* son brought a suit in the Munsif's Court at Feni in the District of Noakhali upon the policies issued to *R.* by the defendant company. Objection was taken at the trial that the Court at Feni had no jurisdiction, but it was overruled and the suit was tried on the merits:

Held, that although the objection as to jurisdiction was taken at the earliest possible opportunity and before the issues were settled, yet having regard to the provisions of section 21 of the Civil Procedure Code and to the fact that evidence had been taken at length in the Feni Court, this was not a case in which the High Court should

interfere in the exercise of its revisional jurisdiction as no attempt was made to show that the company had been prejudiced in any way by the case being tried at Feni or that the disposal of the suit had been prejudicially affected on the merits.

Per *Richardson, J.* (*Beachcroft, J.*, not expressing any opinion).—The death of the assured being a part of the plaintiff's cause of action and the death having taken place within the Feni jurisdiction, a part of the cause of action arose there and the Feni Court had jurisdiction to try the case.

The expression 'cause of action' means the whole cause of action, or every fact which must be either admitted or proved before the plaintiff can succeed.

It is not justifiable to interpret the language of section 20, clause (c of the Code of 1908 now in force by reading into it a repealed explanation, *viz.* explanation III of section 17 of the repealed Civil Procedure Code of 1882. **C** BENGAL PROVIDENT AND INSURANCE CO. *v.* KAMINI KUMAR CHOUDHURY, 22 C W. N. 517 **694**

——— **S. 20 (c)**—*Civil Procedure Code (Act XIV 1882), s. 17, Expl. III, —Jurisdiction—Cause of action —Contract, execution of, within jurisdiction, effect of.*

Explanation III to section 17 of the Civil Procedure Code of 1882 has not been re-enacted in the Code of 908, but owing to the addition of the words "wholly or in part" in section 20 (c) of the latter Code no change has been made in the law.

Where a contract on the basis of which a suit is brought was entered into within the jurisdiction of a certain Court, that Court has jurisdiction to try the suit notwithstanding that the place where the contract was to be performed and the place where the breach alleged in the plaint occurred are both outside such jurisdiction.

The making of the contract is part of the cause of action within the meaning of section 20 (c) of the Civil Procedure Code. **P** SITA RAM *v.* RAM CHANDRA, 26 P. R. 1918; 51 P. W. R. 1918 **863**

——— **S. 20 (c)**—*Suit on contract—Cause of action—Place of suing—Jurisdiction.*

Where in a suit on a contract it appears that the place where the contract was made, is not within the jurisdiction of the Court, the Court still has jurisdiction if the place where the contract was to be performed, or where in its performance the money to which the suit relates was expressly or impliedly payable, is within the jurisdiction of the Court. **U B** MEGHRAJ RAMNIRANJANDAS *v.* THAKURDAS, 3 U. B. R. (1917) 38 **609**

—— **S. 24**—*Courts of Small Causes, what are—Small Cause suit transferred from Court of Sub-Judge to Court of Munsif—Munsif's Court, whether Court of Small Causes—Jurisdiction*

A Court of Small Causes under section 24 (4) of the Code of Civil Procedure includes Courts vested with Small Cause Court jurisdiction as well as the special Courts constituted under the Provincial Small Causes Courts Act.

A suit of the value of Rs. 140 cognizable by a Court of Small Causes was transferred by the District Judge from the Court of a Subordinate Judge vested with Small Cause powers not exceeding Rs. 500 to the Court of a Munsif with Small Cause powers up to Rs. 100 only:

Held, that the Court of the Munsif to which the suit was transferred must be deemed to be a Court of Small Causes under section 24 (4) of the Code of Civil Procedure so as to permit the trial of the suit by that Court. **C** MADHU SUDAN GOPE *v.* BEHARI LALL GOPE, 27 C. L. J. 461 **881**

——— **S. 24**—*Upper Burma Civil Courts Regulation I of 1896, s. 15—Costs—Appeal as to costs, when maintainable—Order of transfer and costs—Appeal, whether lies.*

An appeal does not lie on the question of costs where there has been no appealable decree.

An order passed under the provisions of section 24 of the Code of Civil Procedure, read with section 15 of the Upper Burma Civil Courts Regulation, is not a decree and is not appealable. No appeal, therefore, lies from an order as to costs forming part of such order. **U B** MA TU *v.* KUMAR GANGADHAR BAGLA, 3 U. B. R. (1917) 61 **690**

——— **S. 35**—*Costs—Appellate Court, power of, to interfere with costs awarded by Trial Court—Appeal on question of costs, maintainability of.*

Under section 35, Civil Procedure Code, the costs of, and incident to, all suits are in the discretion of the Court and where the primary Court has exercised its discretion in dealing with the costs, it is an unusual course for the Appellate Court to interfere with that discretion of the primary Court.

Where costs are in the discretion of the Judge, the Court of Appeal will assume that the Judge exercised his discretion unless it is satisfied that he has not exercised it. The Appellate Court will not interfere with an exercise of the discretion of the primary Court unless it has proceeded on a manifestly wrong ground

It was never intended by the Legislature that the award of costs by a Court should form the subject of an appeal, unless some question of principle is involved on which that Court failed to exercise its discretion. **C** SARADENDU MUKERJEE *v.* CHARU CHANDRA DUTTA, 22 C. W. N. 372 **870**

——— **S. 47** **164, 908**

——— **S. 47, O. XXI, r. 63**—*Claim allowed —Suit, subsequent, by judgment-debtor against claimant decreed—Sale by judgment-debtor—Re-attachment of property — Claim by judgment-debtor's vendee, dismissal of—Suit to establish claim, maintainability of.*

A claim preferred to property attached in execution of the respondent's decree having been allowed, the judgment-debtor sued the claimant to set aside the settlement which was the basis of the claim and obtained a decree for possession. He then sold the property to the appellant. The respondent having re-attached the property, appellant put in a claim and, having failed in it, he filed a separate suit for possession:

Held, (1) that the first attachment was not revived as the result of the judgment-debtor's suit;

(2) that the appellant's suit was not barred by section 47, Civil Procedure Code. **M** CHAMPAYIL KOPPAN *v.* KOLASSERI KELAPPAN NAMBIYAR **864**

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——— **s. 47**—*Execution—Decree-holder ordered to furnish security—Order accepting security offered, whether appealable—Security accepted without enquiry into sufficiency—Court, duty of.*

An order by which security proffered by the decree-holder for getting delivery of possession of the property forming the subject-matter of the decree is accepted and delivery of possession is directed to be made to the decree-holder is appealable, inasmuch as the order directing delivery of possession is a final order and not an interlocutory or intermediate one.

In an appeal by a judgment-debtor to the High Court it was ordered that on the decree-holder furnishing security in immoveable property, he should be at liberty to proceed with the execution. In accordance with the order the decree-holder proffered securities to which the judgment-debtor took various objections, but the executing Court without entering into the question of the sufficiency of the securities offered accepted the securities and ordered delivery of possession in execution of the decree:

Held, that the executing Court was wrong in accepting the securities without holding any enquiry into their sufficiency and that the case must go back to the executing Court for making the necessary enquiries. **C** RUDRA NARAYAN JANA *v.* NABA KUMAR DAS, 22 C. W. N. 657 **156**

—— **s. 47, O. XXI, r. 95**—*Execution—Decree-holder purchasing at auction, position of—Suit for possession, maintainability of.*

When a decree-holder by his own action combines the position of decree-holder and auction-purchaser by purchasing at the auction sale with the permission of the Court, he does not lose his character of a party to the suit, and proceedings in execution are not terminated until he obtains possession of the property, inasmuch as Order XXI, rule 95, of the Civil Procedure Code provides for delivery of possession being enforced in execution of the decree.

Section 47 of the Civil Procedure Code is a bar to a suit for possession by a decree-holder auction-purchaser. **N** LACHUSA MOTILAL *v.* MAHERALI RAHIMALI **563**

—— **s. 47, O. XXI, r. 92**—*Execution—Sale—Property purchased by decree-holder—Re-transfer, oral, validity of—Possession, suit for, maintainability of—Estoppel, title by.*

Defendant, a decree-holder, purchased certain immoveable property belonging to his judgment-debtor in execution of a money-decree. The sale was confirmed, but the defendant afterwards agreed to accept the decretal amount and to re-convey the property to the judgment-debtor. No document was, however, executed and the judgment-debtor sold the property to the plaintiff. The latter then sued for possession of the property:

Held, (1) that the defendant having on confirmation of the sale become absolute owner of the property under Order XXI, rule 92 of the Civil Procedure Code, a re-transfer of the property to the judgment-debtor could only be effected by a registered deed;

(2) that the plaintiff having purchased the property from the judgment-debtor during the pendency of the execution proceedings the purchase was void;

(3) that the plaintiff being the representative of the judgment-debtor, a separate suit for possession was barred by section 47 of the Civil Procedure Code;

(4) that the Court in which the suit was brought not being the Court which passed the decree or in which the decree was executed, the suit could not be treated as an application under section 47 of the Code.

A decree-holder, who is an auction-purchaser, remains a party to the suit for the purposes of section 47 of the Code of Civil Procedure. **N** DEOBA *v.* LAXMAN **978**

——— **s. 47, O. XXI, r. 95**—*Execution—Sale—Suit by auction-purchaser decree-holder for possession, maintainability of.*

A decree-holder who purchases at a sale held in execution of his decree property belonging to his judgment-debtor is in the same position as would be any other purchaser at an auction sale held in execution of a decree. If after confirmation of the sale in his favour such an auction-purchaser fails to obtain from the judgment-debtor possession of the property purchased, he may claim possession not only by an application under Order XXI, rule 95 of the Civil Procedure Code, but also by suit. Section 47 of the Code is not a bar to such a suit and does not apply to such an application. The subject-matter of such a suit does not relate to the "execution, discharge or satisfaction of the decree" within the meaning of section 47.

The summary remedy provided for by rule 95 of Order XXI of the Code is concurrent with a remedy by separate suit, and either the one or the other can be availed of by the aggrieved party as the circumstances of a particular case may require. It does not follow that because the summary remedy provided for by rule 95 of Order XXI can be given to the decree-holder purchaser by the executing Court, if he fails to avail himself of that remedy or seeks it, but is unsuccessful, he is precluded from seeking the alternative remedy by regular suit which is open to other auction-purchasers, simply because he happened at one time to be the holder of a decree against the opposite party. **P** CHOTHA RAM *v.* KARMON BAI, 8 P. R 1918 **169**

——— **s. 48**, *applicability of—Limitation Act (IX of 1908), Sch. I, Art. 181—Execution, stay of—Revival of antecedent application—Limitation.*

Section 48 of the Civil Procedure Code applies only to a fresh application for leave to issue execution. It has no application whatsoever to the case of a revival of an antecedent application for execution which has been in suspense by reason of some bar or which has been stayed pending the determination of subsequent litigation. The limitation applicable to such a case is that provided by Article 181 of the Limitation Act, *i. e.*, three years from the time when the bar is removed. **Pat** SAKINA BIBI *v.* GANESH PRASAD, 3 P. L. J. 103; 5 P. L. W. 21 **560**

——— **s. 48, O. XX, r. 11**—"*Subsequent order*," *meaning of—Scope of s. 48.*

"A subsequent order directing payment of money", in section 48 (*b*) of the Civil Procedure Code, means a subsequent order made by the Court which made the decree and acting as that Court, and not an order of a Court executing a decree. In all probability the section contemplates orders made under Order XX, rule 11, of the Code.

An order of an executing Court granting time to the judgment-debtor is not a "subsequent order directing payment of money" within the meaning of section 48 of the Civil Procedure Code and does not operate to extend the period of limitation for the execution of the decree.

Section 48 of the Civil Procedure Code does not in a strict sense provide a period of limitation It is an enactment which forbids an order for execution upon a decree which is more than twelve years old **A** JURAWAN *v.* MAHABIR DUBE, 16 A L. J. 71; 40 A. 198 **24**

——— ss. 63, 73, O. XXI, r. 57—*Execution—Attachment—Discontinuance of execution case at instance of claimant, effect of—Attachment of property by two Courts—Sale by Court of inferior grade—Procedure—Rateable distribution.*

Where an execution case is discontinued, not by reason of default on the part of the decree-holder, but at the instance of an unsuccessful claimant who has instituted a suit to contest the validity of the order in the claim case, the attachment effected at the instance of the decree-holder continues to be in force.

Where the same property is attached in execution of two decrees, one passed by a Court of superior grade and the other by a Court of inferior grade, the sale should be held by the Court of superior grade. Where, however, the Court of inferior grade has actually held the sale in ignorance of the fact that proceedings in execution have already been taken in the Court of superior grade and that the property brought to sale was subject to a legally subsisting attachment effected in the latter Court, the proper procedure is to move the District Judge to transfer the proceeds realised by the sale held by the Court of inferior grade to the Court of superior grade. If this procedure is adopted, full effect is given to the intention of the Legislature. The Court of superior grade in essence adopts the sale held by the Court of inferior grade as if it were a sale held by itself and the sale-proceeds are then rateably distributed in accordance with the provisions of the Code. **C** NILKANTHA RAI *v.* GOSTA BEHARI, 27 C. L. J. 145 **249**

——— s. 73 **249**

——— s. 91 **367**

——— s. 92—*Suit by alleged* gaddinashin *of* takia *to eject trespasser—Trespasser found to be manager of* waqf *—Sanction of Collector, whether necessary—Alienations by trustee, validity of—Trustee alleging himself to be owner, effect of.*

In a suit by the plaintiff for possession and management of *waqf* property, on the allegations that he was the *gaddinashin* of the Takia, that the property in dispute was the trust property attached to that institution, that the defendant being a mere trespasser had no sort of right to remain in possession of that property and that the alienations made by her of the *waqf* property were invalid, it appeared that the property was *waqf* property and that the defendant was not a trespasser but the trustee and manager thereof:

Held, (1) that upon that finding it was clear that a prayer for defendant's removal would convert the suit into one described in section 92 of the Civil Procedure Code and that there being no consent in writing of the Collector as required by the said section, the prayer for her removal could not be adjudicated upon.

(2) that no issue having been framed by the lower Court as to the necessity for the alienations of the *waqf* property made by the defendant, they could not be set aside until the alienees had been afforded an opportunity, and had failed, to establish the circumstances which would justify the transactions and render them binding upon the persons interested in the institution.

It was urged that no person other than the duly authorised trustee could alienate the property of a religious trust by sale or mortgage and that as the defendant was never appointed a trustee, the alienations made by her were not binding upon the persons interested in the institution:

Held, that this matter as well as the matter relating to the necessity for the transactions could properly be decided in a suit framed for the purpose of contesting alienations made by a *de jure* or *de facto* trustee and that as the plaint did not assign to the defendant the position of a trustee, but described her as a mere stranger to the institution, the lower Court was not called upon to decide these points and the Chief Court was not willing to pronounce any opinion thereon.

Where the father of the defendant was recorded in the revenue papers as the trustee of a shrine and remained in possession in that capacity up to his death, after which the property was held by or on behalf of the defendant:

Held, that the mere fact that after repeatedly describing herself as trustee, the defendant began to claim a higher status, did not alter her real position.

Where property belongs to a religious institution, the person in charge thereof cannot divest himself of his fiduciary position by merely asserting his title thereto. **P** MUHAMMAD ABDUL KADIR *v.* HUSSAIN BIBI, 11 P. W. R. 1918 **879**

——— s. 94 **56**

——— s. 100, O. XLI, r. 1—*Appeal, second—Two decrees in Appellate Court in one case—Appeal, single, whether lies—Court-fee payable.*

Where two appellate decrees are passed in one judgment in two cross-appeals arising out of the same case and the appellant in second appeal wants to challenge both of them, he must file two appeals. **Pat** RAM NARAIN LAL *v.* HARI KISHEN PRASAD NARAIN, 3 P L. J 96 **418**

——— ss. 100 (a), 103—*Madars High Court Appellate Side Rules, r. 2—Custom or usage, evidence as to, whether question of fact—Appeal, second—High Court, power of, to review evidence of custom—Genuineness of documents, finding on—Full Bench, reference to, of whole case, legality of*

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credibility of witnesses, are findings of fact and the High Court cannot, in second appeal, review the evidence on these matters and interfere with such findings.

Per *Wallis, C. J.*—The words 'usage having the force of law' in section 100, Civil Procedure Code, are little more than words of amplification and do not give the Court any larger powers of interference with findings as to custom in so far as they are findings of fact, than with any other findings of fact.

Per *Sadasiva Aiyar and Phillips, JJ.*—It is competent to a Divisional Bench of the High Court to refer to a Full Bench, not merely a question of law but the whole matter of an appeal.

In dealing with second appeals the High Court is bound by the lower Appellate Court's opinion on the reliability of evidence but the value to be attached to the evidence (provided it is not mere opinion evidence) supposing it is accepted as true, and the relevancy of evidence, are questions to be considered by the High Court also. If notwithstanding uncontradicted instances ranging over a long period and recognised judicially in several cases, the lower Appellate Court finds against the existence of a proper custom on the ground that in its opinion the instances are insufficient in number, the High Court is entitled to hold that on the facts found by the lower Appellate Court, the custom is legally established **M** KUMARAPPA REDDI *v.* MANAVALA GOUNDAN, 23 M L T. 44 34 M. L. J. 104; 7 L. W. 243; 41 M. 374; (1918) M. W. N. 350 **699**

—— **s. 103** **699**

—— **ss. 107, 151, O. XLI, r. 33**—*Appellate Court, power of, to vary decree—Estoppel.*

In a suit to which a puisne mortgagee was a party the prior encumbrancer prayed for and obtained a decree against the sale-proceeds of a revenue sale. The puisne mortgagee brought two suits, one for a declaration that the recorded proprietor was the *benamidar* of the purchaser at the sale and that consequently the latter acquired the property subject to encumbrances, and the second to enforce his mortgage against the property. The Court of first instance held that the purchaser was the real owner of the property and decreed both suits in favour of the puisne mortgagee. Against these two decrees the purchaser appealed and the puisne mortgagee appealed against the decree in favour of the prior mortgagee. The High Court heard all the appeals together, and affirming the finding of the Court below dismissed the purchaser's appeals and gave the prior mortgagee a decree against the property in lieu of that against the sale-proceeds:

Held, (1) that inasmuch as on hearing the puisne mortgagee's appeal the High Court had before it all the facts which showed all the circumstances relating to the sale, the Court had abundant power under sections 101 and 151, and Order XLI, rule 33, of the Code of Civil Procedure to vary, as it did, the decree in the prior mortgagee's suit;

(2) that the fact that the puisne mortgagee did not attack the sale in the prior mortgagee's suit did not operate as an estoppel against the puisne mortgagee so as to prevent him from attacking the sale in his own suits and obtaining consequential relief. **P C** TARINI CHARA SARKAR *v.* BISHUN CHAND, 23

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M. L. T. 147; 7 L W. 315; 27 C L. J. 303; 34 M. L. J. 36; 4 P L W. 249; 16 A L. J 271; 22 C. W. N. 505; (1918) M. W. N. 295; 20 BOM L. R 553 **304**

—— **ss. 109, 110, 111, 112, O. XLIV, r. 1**—*Appeal to His Majesty in Council—Leave to appeal in forma pauperis—Jurisdiction—High Court, power of, to grant leave.*

The High Court has no jurisdiction to grant an application for leave to appeal to His Majesty in Council *in forma pauperis.*

Order XLIV of the Civil Procedure Code does not apply to appeals to His Majesty in Council. Rule 1 of the Order contemplates an Appellate Court perusing the judgment of a subordinate Court, and not the Court whose judgment is appealed from perusing its own judgment; the very fact that Order XLIV requires an investigation into the merits of the appeal before allowing the application introduces an element inconsistent with the principle underlying sections 109 and 110 of the Code **Pat** RAMKISHEN LAL *v.* MANNA KUMRI, 3 P. L. J. 179 **731**

—— **s. 110**—*Leave to appeal to Privy Council—Subject-matter of suit, value of—Property directly or indirectly involved—Interest on arrears, whether can be added.*

Plaintiff brought a suit to recover arrears of pension from September 1911 to July 1912 together with interest thereon and valued his suit at Rs. 5,445. His suit was dismissed by the first Court but was decreed by the High Court. The defendant applied for leave to appeal to the Privy Council:

Held, (1) that the subject-matter of the suit was not above Rs. 10,000, nor did the decree involve a claim to or question respecting property of the value of Rs 10,000;

(2) that in determining the value of the subject-matter of the suit the interest payable until realisation of the decree could not be added to the amount claimed, nor could the arrears of pension accrued due since the decree be taken into consideration;

(3) that no question respecting future payment of the pension was involved in the decree;

(4) that the value of the properties to be attached in execution of the decree could not be said to have even an indirect connection with the decree. **Pat** KESHO PRASAD SINGH *v* SHIVA SARAN LAL, 4 P L W. 240; 3 P. L. J 317 **475**

—— **s. 115, O. I, r. 10 (2), O. XXXI, r. 1**—*Government of India Act, s 5 (5 & 6 Geo. V, C. 61), s. 107—Addition of parties Suit by administrator—Beneficiary, whether can be added as a co-plaintiff—Revision—High Court, whether can interfere with order refusing to add co-plaintiff*

P. as administratrix to the estate of her deceased husband instituted a suit against *X J.* claiming to be a son adopted by her to her deceased husband, on coming of age, applied to be made a co-plaintiff with *P.* on the ground that *P.* was not prosecuting the suit with due diligence In another suit pending between *P.* and *J. P.* admitted the factum of *J.'s* adoption by her but pleaded that she had no authority from her husband to adopt The Trial Court rejected *J's* application to be added as a party to the suit:

Held, that although *J.'s* title might not be finally adjudicated in the suit, *J.* having made out a *prima facie* case was entitled to be made a party;

(2) that in the matter of addition or substitution of parties the High Court had power to interfere under section 115 of the Civil Procedure Code or section 107 of the Government of India Act **C** JUGAL KRISHNA MULLICK *v.* PHUL KUMARI DASSI **564**

— — — ss. 115, 151, O. XXI, r. 58 — *Mortgage decree, execution of—Attachment, whether necessary—O. XXI, r. 58, objection under, whether can be taken—Court, inherent power of, when to be exercised—Revision—High Court, power of interference of.*

An objection having been taken under Order XXI, rule 58, of the Civil Procedure Code to the, attachment of property sold in execution of a mortgage decree, the Court, holding that Order XXI, rule 58, was inapplicable entertained the application under section 151 of the Civil Procedure Code to save the objector the trouble of bringing a regular suit:

Held, that the Court had no jurisdiction to entertain an application or to pass an order upon it and that the Court having entertained the application the High Court had power to interfere under section 115 of the Civil Procedure Code. **P** RATAN LAL *v.* BALA PARSHAD, 23 P. W. R. 1918; 58 P. R. 1918 **986**

s. 115—Revision—High Court, power of interference of **363**

— — s. 115 — *Revision—High Court, whether can interfere with order allowing withdrawal.*

The High Court has power to interfere in revision with an order of a lower Court allowing the plaintiff to withdraw his suit with permission to bring a fresh suit. **Pat** BISHESWAR AHIR *v* BRIJRA MISSER, 4 P L. W. 233 **406**

— s. 115 (c) — *Revision—Power of superintendence of High Court when to be exercised—High Courts Act*, 1861 (24 & 25 *Vict., C.* 104, s. 15.

Per *Sanderson, C J., and Walmsley, J.*—The High Court cannot, by exercising its powers of superintendence under section 15 of the High Courts Act, 1861, interfere with the decision of a subordinate Court from which no appeal or revision under section 115, Civil Procedure Code, lies to the High Court.

Where a District Judge reversed in appeal an order of a Munsif setting aside a sale under Order XXI, rule 92, Civil Procedure Code, on erroneously holding that the property sold was a ½rd share in a *patni* whereas it was the undisputed ⅔rd share that was sold, and that the auction-purchaser was a 'new comer' whereas in fact he was a co-sharer in the property, and without coming to any definite conclusion as to the publication of the sale proclamation:

Held, per *Curiam* (*Teunon, J.* dissenting).—That the decision of the District Judge was not subject to revision under section 115, clause (c), Civil Procedure Code, as the mistakes upon which he based his judgment, though grave mistakes of fact, were in regard to questions which he had jurisdiction to decide.

Per *Teunon, J.* (*contra*).—As the property sold was clearly specified in the sale proclamation as the judgment-debtor's ⅔rd share in the *patni* and as there was no dispute between the parties as to that share, the decision of the District Judge, based as it was on the imaginary finding that the property sold was a ½rd share, was open to revision by the High Court under section 115 (*c*), Civil Procedure Code, as it was the duty of the District Judge to decide *secundum allegata et probata*; although if the parties had been in dispute as to the judgment-debtor's interest in the *patni*, and if, however erroneously, the District Judge had decided that his interest was not ⅔rds but ½rd, that would have been merely an erroneous decision on a question of fact with which the High Court acting under section 115, Civil Procedure Code, could not interfere **C** KUMAR CHANDRA KISHORE ROY *v.* BASAT ALI, 27 C. L. J. 418; 22 C. W. N. 627 **763**

— — ss. 132, 133—*Hindu lady of high family appearing in public, whether can be compelled to appear in witness-box.*

An old Hindu lady belonging to a high family, who has abandoned entirely the protection of the *purdah* and who has no intention of resuming it, ought not to be compelled, having regard to her social position and the feelings of her class, to appear in the witness-box but should get the privilege of being examined on commission, the cost of such commission being costs in the cause.

Section 132, Civil Procedure Code is wide enough to cover the case of such a lady. **C** ELIAS JOSEPH SOLOMON *v.* JYOTSNA GHOSHAL, 22 C. W. N 147 **157**

— — s. 144 — *Application for restitution, nature of—Limitation Act (IX of 1908), Sch. I, Art.* 182.

An application for restitution under section 144 of the Civil Procedure Code, is an application for execution of a decree within the meaning of Article 182, Schedule I of the Limitation Act. **P** RAM SINGH *v.* SHAM PARSHAD, 36 P. W. R. 1918; 15 P. L. R. 1918 **301**

— — s. 149—*Deficient Court-fee—Extension of time to make up deficiency—Discretion of Court.*

Where insufficient Court-fee has been paid on a memorandum of appeal, the Court will not in its discretion under section 149 of the Civil Procedure Code allow the deficiency to be made up on the day of the hearing unless it is satisfied that some grounds exist for the exercise of its discretion. Of these grounds the principal one is that a *bona fide* mistake was made. **C** SAIDUNNESSA *v.* TEJENDRA CHANDRA DHAR **398**

— s. 151 **304, 986**

— s. 152—*Clerical mistakes and slips in decree or order, correction of, during pendency of appeal—Court, power of, to amend—Jurisdiction.*

Clerical errors or slips in a decree or order can be corrected by the Court which passed it, although an appeal against the same is pending in a superior Court. The proper Court to correct them is the Court in which the errors were made. **M** MUTHU BHATTER *v.* MARITHUNJAYA BHATTAR, 7 L. W. 8 **248**

— O. I, r. 3—*Misjoinder of parties—Suit for possession by heir against several alienees, whether competent—Separate trial of issues affecting different defendants.*

A suit for possession on the ground of inheritance can proceed against a number of different alienees. The question is purely one of convenience.

B. the last male owner, died leaving a widow who gifted her late husband's property to her daughters *N.* and *S.* Both these made certain alienations and then gifted their properties to their respective husbands. *S.* was, on her death, succeeded by her

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daughter's daughter *M*. On the death of *N*. her sons sued for possession of the whole of the property alienated by *N*. and *S*. and that held by *M*, alleging that they were the heirs of *B* the last male owner and that all alienations were unauthorized. They impleaded all the various alienees—the mortgagees and vendees from *S*. and *N*. jointly and severally—as defendants:

Held, that there was no misjoinder of parties and that the suit could proceed against all the defendants jointly and that any varieties of defences which arose could easily be cured by the successive trial of the issues separately affecting different defendants. **P** LAL CHAND *v.* MANOHRI, 64 P. W. R. 1918; 59 P. R. 1918 **549**

——— **O. I, r. 10 (2)** **564**

——— **O. I, r. 10 (2)**—*Addition of parties—Heirs of original tenant, whether can be added as parties defendants in rent suit brought against one of them.*

In a suit for recovery of arrears of rent instituted against one of the heirs of the original tenant whose name was recorded in the landlord's *sherista*, the remaining heirs of the tenant were on their application added as parties to the suit:

Held, that although the added defendants were not strictly necessary parties to the adjudication of the question arising between the plaintiff and the original defendant, yet they were not improperly added as parties to the suit. **C** GURU PROSANNA LAHIRI *v.* SAMIRUDDIN SARKAR **465**

——— **O. II, r. 2** **88, 983**

——— **O. VI, r. 14**—*Plaint signed by prisoner in contravention of Jail Regulations, validity of.*

A plaint signed or a suit authorised by a man in jail is just as good as any other suit or plaint, although the plaintiff in signing the plaint or authorising the suit contravenes some of the provisions of the Jail Manual. **A** BISHESHAR NATH *v* EMPEROR, 16 A. L. J. 64; 40 A. 147 **28**

——— **O. VII, r. 7**—*Pleadings—Relief, lesser than that asked for, whether can be granted.*

A plaintiff is always entitled to a lesser relief of the same kind as he has asked for. **N** GHOOTI *v.* SITKU **557**

——— **O. VII, rr. 14, 18**—*Document not filed with plaint nor within time fixed by Court, admissibility of.*

The plaintiff brought a suit for enhancement of rent on the basis of a *kabuliyat* which was not filed with the plaint as required by Order VII, rule 14, Civil Procedure Code, but was filed in Court after the time within which parties were directed by the Court to file their documents, and was, therefore, not received in evidence at the hearing of the suit:

Held, that as there was no doubt that the document was in existence at the date of the institution of the suit, and also having regard to the proceedings which had taken place in the suit, the rejection of the document by the Courts below was not a proper or judicial exercise of the discretion conferred by Order VII, rule 18. **C** JOGENDRA KUMAR GHOSE *v.* ANANDA CHANDRA MOZUMDAR **21**

——— **O. VII, r. 18** **21**

——— **O. VIII, r. 6** **428**

——— **O. IX, r. 5** **693**

——— **O. XII, r. 6** **145**

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——— **O. XII, r. 6**—*Portion of claim admitted, effect of Judgment on admission—Appeal—Discretion exercised by Court, when open to correction in appeal.*

A Court has jurisdiction under Order XII, rule 6, Civil Procedure Code, to enter judgment for the plaintiff in respect of a portion of the claim admitted by the defendant, with liberty to the plaintiff, to proceed with the suit in the ordinary way as to remainder of the claim.

Per *Mookerjee, J.*—A judgment on admission by the defendant under Order XII, rule 6, Civil Procedure Code, is not a matter of right, it is in the discretion of the Court, so that if a case involves questions which cannot be conveniently disposed of on a motion under the rule, the Court may, in the exercise of its discretion, refuse the motion. The discretion is judicial and an erroneous exercise thereof may be open to correction by a Court of Appeal which, however, on well-established principles, will be slow to interfere, unless either of the parties has been manifestly and unfairly prejudiced.

Order XII, rule 6, Civil Procedure Code, cannot be restricted in its operation to cases where the plaintiff accepts the admission of the defendant in its entirety or where the claim is severable into distinct portions and the defendant admits his liability in respect of one such fragment of the claim. **C** PREMSUK DAS ASSARAM *v.* UDAIRAM-GUNGABUX, 22 C. W. N 204; 45 C. 138 **233**

——— **O. XX, r. 11** **24**

——— **O. XX, r. 12** **88**

——— **O. XXI, r. 11** **220**

——— **O. XXI, rr. 13, 17 (2)**—*Execution, application for—Supplementary list of properties, whether allowable after registration of application—Fresh application, whether can be treated as continuation of previous application.*

An application for execution, which was on the face of it in accordance with law, was subsequently, on objection taken by the judgment-debtor, discovered to be defective, inasmuch as against the properties specified in the list furnished under Order XXI, rule 13, of the Civil Procedure Code proceedings could not be taken. The decree-holder then applied to the Court requesting it to accept a further and supplementary list of the properties and praying that execution should proceed by attachment and sale of those properties:

Held, that even after the admission and registration of the original application for execution it was open to the decree-holder to ask the Court to proceed against the properties specified in his supplementary list, which should be taken as part of the original application under the provisions of Order XXI, rule 17 (2), Civil Procedure Code, or if a fresh application were at all necessary that application should be treated as one made in continuation of the application first presented so that no question of limitation could arise in the case. **C** GNANENDRA KUMAR RAI CHOWDHURY *v.* SHAYAMA SUNDER JEN, 27 C. L. J. 398; 22 C. W. N. 540 **553**

——— **O. XXI, rr. 15, 19 (b)**—*Execution in case of cross-claims under the same decree.*

Plaintiff, a co-sharer landlord, brought a suit for

rent impleading several persons as defendants to the suit, of whom defendants Nos. 1 to 14 held a dual position being tenants and co-sharer landlords, Nos. 15 to 21 were purely tenants and Nos. 22 to 41 were co-sharer landlords. All the co-sharer landlords were made *pro forma* defendants A decree was made for Rs. 76 and odd in favour of the plaintiff and for Rs. 380 and odd in favour of the co-sharer landlords, the *pro forma* defendants. The *pro forma* defendants Nos 34 to 38, who were also tenants defendants Nos 1 to 5, applied for execution of the decree against the defendants Nos. 7 to 21 for Rs. 285 and odd, which was the whole balance of the decree passed in favour of the *pro forma* defendants, Rs 95 and odd having been realized in a previous execution proceeding:

Held, that such an execution was maintainable, but the Court under the provisions of Order XXI, rule 19 (*b*), of the Civil Procedure Code, should first ascertain what amounts were due from each party to the other and thereafter allow execution to proceed for the difference, making such order as it deemed necessary for protecting the interests of the persons who had not joined in the application for execution. **C** RAM LAL MANDAL *v.* ASUTOSH MANDAL **445**

——— **O. XXI, r. 17 (2)** **220, 553**

——— **O. XXI, r. 19 (b)** **445**

——— **O. XXI, r. 32**—*Order to furnish accounts, whether injunction - Failure to obey order, consequences of.*

A preliminary decree in a suit for accounts directing the defendant to furnish and render accounts is not an "injunction" within the meaning of rule 32 of Order XXI of the Code of Civil Procedure and the failure of the defendant to furnish accounts does not entitle the Court to take proceedings under that section. **Pat** ARJUN SUIE *v.* EMPEROR, 3 P. L. J. 106; 19 CR. L. J. 385 **737**

——— **O. XXI, r. 38** *Execution—Warrant of arrest, whether can be executed outside jurisdiction of execution Court—Jurisdiction*

The jurisdiction to issue a warrant for the arrest of a judgment-debtor in execution of a decree is territorial, that is to say, a warrant of arrest issued by an executing Court must be executed, if at all, within the limits of the jurisdiction of that Court, but the fact that the judgment-debtor, at the time of the application, does not reside within the jurisdiction is not necessarily a sufficient reason for refusing to issue a warrant. In such a case, however, a time must be fixed for the return of the warrant. **Pat** KRISHNA PRASAD *v.* BIDYA NANDA, 3 P. L. J. 95 **296**

——— **O. XXI, rr. 43, 54, 55**—*Attachment of propety, order for, after hearing judgment-debtor's objections - Application, subsequent, for raising attachment, maintainability of.*

Where an order for attachment of the judgment-debtor's property is passed after hearing his objections, the order is conclusive and debars the judgment-debtor from raising other objections in the same proceedings. **M** MALLIDI DORAYYA *v.* SATTI VEERAYYA, (1918) M. W. N. 143 **4**

——— **O. XXI, rr. 54, 55** **4**

——— **O. XXI, rr. 54, 90**—*Execution—Attachment—Sale proclamation, irregular—Under-valuation, effect of—Application to set aside sale—Conspicuous part of property, what is.*

Where an under-valuation of the property to be sold made in the sale-proclamation is obviously a gross misrepresentation, the sale will be set aside.

Where a right of fishing which extended over 138 villages and the annual income realised from which was over Rs. 1,000 was described in the sale proclamation merely by a *tauzi* number and a name, the value of the estate being given at Rs. 2,500, and it was sold for that sum:

Held, that the sale proclamation was materially irregular both in the description of the property and in the valuation put upon it and that for that reason alone the sale should be set aside.

Where the property to be sold consists of a right of fishing over a length of stream extending over several miles, it is not possible to say that any particular spot on the stream is a conspicuous part of the property within the meaning of rule 54 of Order XXI of the Code of Civil Procedure. In such circumstances the principle of the rule must be applied and a copy of the order must be conspicuously displayed at various portions of the estate In addition the sale should be advertised either in the local newspapers or in the Gazette **Pat** CHATTARPATT SINGH *v.* SURENDRA NATH SINGH, (1918) PAT. 23 **412**

——— **O. XXI, rr. 56, 57.**

Whether the dismissal of an execution petition has the effect of removing the attachment depends upon the facts of each case. **M** CHIVIKULA VENK TASUBIAH *v.* GOLLAPUDI VENKATESWARULU, (1917) M. W. N. 816 **566**

——— **O. XXI, r. 57** **249**

——— **O. XXI, r. 58** **265**

——— **O. XXI, r. 58.**

Where property is directed to be sold under a mortgage decree, no objection under Order XXI, rule 58, of the Civil Procedure Code, can be entertained to the attachment of such property, the reason being that the property directed to be sold under a decree of that kind does not require to be attached by way of execution and the mere fact that there has been an unnecessary attachment does not make the rule applicable

Order XXI, rule 58, Civil Procedure Code, applies only to attachments in execution of a decree and not to attachments made before decree. **P** RATAN LAL *v.* BALA PARSHAD, 23 P. W. R. 1918; 58 P. R. 1918 **986**

——— **O. XXI, rr. 58, 59, 60**—*Claim proceedings—Order allowing claim conditionally, validity of—Revision.*

A Court has no jurisdiction to make an order allowing a claim preferred under Order XXI, rule 58, Civil Procedure Code, to a property attached in execution of a decree, conditional on the claimant paying a certain sum to the decree-holder, on the ground that in the conveyance by which the claimant purchased the property there was an undertaking on his part to pay that sum to the decree-holder as part of the consideration. If such a claimant is in possession of the property on his own account under title of a conveyance executed in his favour by the judgment-debtor, his claim should be allowed and allowed unconditio-

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ally. C KAMALA KANTA SEN v. DURGA KUMAR SEN 1007

—— **O. XXI, r. 58**—*Limitation Act (IX of 1908), Sch I, Art 11, scope of—Objection, dismissal of, without investigation—Suit to establish right, limitation for—Non-production of evidence, effect of—Inquiry into objection, materials for.*

An objection under Order XXI, rule 58, of the Civil Procedure Code, if dismissed without investigation, takes the case of the objector out of the operation of the one year's rule of limitation prescribed by Article 11, Schedule I, of the Limitation Act for the establishment of his right by a suit

The only order under Order XXI, rule 58, upon which the character of finality is impressed, is an order made upon enquiry It does not follow, however, that merely because the claimant does not advance evidence or is absent, there are no materials before the Court to enable it to inquire into the matter.

Where, therefore, plaintiff made an objection under Order XXI, rule 58, the correctness of which was disputed by the opposite party, and no evidence having been produced to make out the truth of the claim, the Court dismissed the objection and the plaintiff brought a suit to establish his right more than a year after the date of the order:

Held, that though the plaintiff produced no evidence in support of his objection, it did not follow that there was no material on the record to enable the Judge to dispose of the objections, which could not, therefore, be said to have been decided without investigation and that as the plaintiff failed to bring a suit to establish his right within one year from the date of the order, his claim was barred under Article 11, Schedule I of the Limitation Act. A GOKUL v. MOHRI BIBI, 16 A. L. J. 716 1005

—— **O. XXI, r. 63** 265, 551, 864

—— **O. XXI, r. 63**—*Objection dismissed without evidence being recorded, whether bars declaratory suit—Limitation Act (IX of 1908), Sch. I, Art. 11.*

Plaintiff filed an objection to the attachment of a share in a village in respect of which he held two registered mortgages. On the date fixed for evidence the scribe of one of the mortgage-deeds was the only witness present for the objector, who, however, did not examine him. An adjournment was refused and the case was closed with the result that the objection was dismissed. Plaintiff instituted a suit for a declaration more than one year after the dismissal of the objection It was urged that the suit was barred under Article 11 of the Limitation Act:

Held, that as there was really no investigation under the objection the case did not fall within the one year period laid down by Article 11 of the Limitation Act and that the suit was, therefore, within time N NANHU v. MALLOO 528

— **O. XXI, r. 66**—*Notice, provision for, whether mandatory Failure to give notice, effect of.*

The provisions for notice under Order XXI, rule 66, of the Civil Procedure Code, are directory and not mandatory: they have not been enacted for the benefit of the judgment-debtor but with a view to ascertain the exact rights which should be set forth in the proclamation for sale. N KRISHNAJI v. BALIRAM 252

— — **O. XXI, r. 90** 412, 885

— — — **O. XXI, rr. 91, 92, 93**—*Execution—Sale—Property sold twice over—Suit by second purchaser to recover purchase-money, maintainability of.*

Where the property of a judgment-debtor has once been sold by Court-auction, he has no interest in the property subsequent to the sale and a purchaser at a second sale of the same property, therefore, acquires no interest by his purchase and is entitled to maintain a suit for the refund of the purchase-money paid by him against all the creditors of the judgment-debtor to whom payments have been made out of that money. A GIRDHAR DAS v SIDHESHWARI PRASAD NARAIN SINGH, 16 A. L. J. 236 697

—— **O. XXI, r. 92** 978

—— **O. XXI, r. 95** 169, 563

—— **O. XXI, r. 96**—*Symbolical possession and paper delivery, distinction between.*

Symbolical possession is given only in cases where the party in actual possession is entitled to remain in such possession as in cases of delivery under Order XXI, rule 95, Civil Procedure Code, and should not be confounded with cases where a party is entitled to actual possession but obtains only what is called a paper delivery *i e.*, where he gets no possession at all M GOVINDASAMI PILLAI v. PETHAPERUMAL CHETTY 839

—— **O. XXII, rr. 3, 5**—*Representatives of deceased party, conflicting claims by, decision on—Duty of Court.*

When a question arises as to who are the representatives of a deceased party to a suit or proceeding, it is obligatory on the Court to decide it. M SUBRAMANIA IYER v. MUTHU VAITHILINGA, 1918) M. W. N. 198 987

— — **O. XXII, r. 4**—*Death of respondent—Application for bringing legal representative on record not made within limitation—Appellant living at great distance from respondent—Sufficient cause.*

One of the respondents in an appeal died on the 7th April 1915. An application to bring his legal representative on the record was not made till the 3rd December. It appeared from the affidavit of the appellant that the deceased lived in Multan City while the appellant himself lived in a village in Muzaffargarh District and that, therefore, he did not know of the death of the respondent till shortly before he made the application:

Held, that the appellant had sufficient cause for not making the application within the prescribed period of limitation. P ALLAH YAR v. THAKAR DAS, 46 P. W. R. 1918; 24 P. L R 1918 9

—— **O. XXII. r, 5** 987

— — **O. XXII, r. 6, O. XXIII, r. 1**—*Death of defendant before judgment—Judgment, whether can be pronounced—Withdrawal of suit, whether can be allowed*

The provisions of Order XXII, rule 6, of the Civil Procedure Code, though they cover the case where a judgment is delivered in ignorance of the fact that a party has died between the conclusion of the hearing and the delivery of judgment, also provide for the delivery of judgment where the

Court is aware of such death, and they make it clear that the death of a party is not sufficient cause for refusing to deliver judgment or allowing the withdrawal of a suit which has been completed in every respect except for such delivery of judgment. **U B** MA KIN NYUN *v.* MA TIN, 3 U. B. R. (1917) 46 **620**

——— O. XXIII, r. 1.

The provisions of Order XXIII, rule 1, of the Civil Procedure Code should not be arbitrarily applied. **U B** MA KIN NYUN *v.* MA TIN, 3 U. B. R. (1917) 46 **620**

——— O. XXIII, r. 1—*Withdrawal of suit with liberty to bring fresh suit—Formal defect.*

Where the defendant sets up a plea that there is a formal defect in the plaint, the Court has jurisdiction to pass an order under Order XXIII, rule 1, of the Civil Procedure Code. **Pat** BISHESWAR AHIR *v.* BRIJRA MISSER, 4 P. L. W. 233 **406**

O. XXIII, r. 1—*Withdrawal of suit with liberty to file fresh suit, petition for—Order, construction of—Leave granted by implication.*

Where, on a petition praying for withdrawal of a suit with liberty to bring a fresh suit, the Court simply endorsed the word 'permitted':

Held, that the order should be construed as having impliedly granted leave to file a fresh suit. **M** KEELANGOTI NARAYANA TANTRI *v.* NAGAPPA, 34 M. L. J. 515 **889**

——— O. XXIII, r. 1—*Withdrawal of suit with permission to bring fresh suit on payment of costs, effect of—Second suit, maintainability of, without payment of costs—Order of withdrawal, form of.*

Where a plaintiff is allowed to withdraw a suit with permission to bring a fresh suit, the payment of the costs of the first suit being made a condition precedent to the institution of a fresh suit, and a second suit is instituted without payment of such costs, the suit is maintainable provided the costs are paid before the suit comes on for trial.

In such cases until the costs are paid the permission is not operative and, therefore, there is no withdrawal with liberty to bring a fresh suit, the result being that until there is such a withdrawal the former suit remains pending and is under section 10 of the Civil Procedure Code a bar to the trial of the second suit.

The order allowing withdrawal of the suit in such cases should limit the time within which costs should be paid and should go on to direct that on failure to pay costs within that time, the original suit shall stand dismissed with costs. **Pat** KULDIP SINGH *v.* KULDIP CHOUDHURI, 3 P. L. J. 63; 4 P L W 134 **79**

——— O. XXIII, r. 3 **145**

——— O. XXIII, r. 3, O. XXXII, rr. 6, 7—*Adjustment of decree—Agreement to adjust by minor, enforceability of—Minor, suit against—Compromise by guardian without leave of Court, validity of.*

Under Order XXXII, rule 7 (2), of the Civil Procedure Code an agreement or compromise entered into by the guardian of a minor without leave of the Court is voidable against all parties other than the minor.

Order XXIII, rule 3, of the Civil Procedure Code which relates to a compromise of a suit is inapplicable to execution proceedings.

Plaintiff obtained a decree for possession of a field and for mesne profits against a minor defendant. He subsequently agreed to sell the field to the minor judgment-debtor at a certain price, but the transfer was not completed:

Held, (1) that this did not amount to an adjustment of the decree but was only an agreement to adjust;

(2) that there being nothing to show that the decree-holder gave up his rights under the decree upon the mere execution of the agreement, the contract was an executory one and was not capable of being specifically enforced by the minor for want of mutuality **N** SAKHARAM *v.* BHIVRABAI **164**

——— O. XXX, r. 1 *Suit by firm—Name of firm—Misdescription*

In India it is a common practice for a firm to be known by the name of father and son, even after both are dead and the business is carried on by the son's son.

Where a firm continues to be known by its old name, but the name of the actual head of the firm is sometimes added to the old name, the omission of such addition from the name of the firm in a suit by the firm does not amount to a misdescription. **P** CHELA RAM-SANT RAM *v.* KISHAN CHAND, 3 P. W. R. 1918; 155 P. L. R. 19 7 **283**

——— O. XXX, r. 4 **911**

——— O. XXX, r. 9—*Party, whether can be both plaintiff and defendant.*

The rule of procedure observed by the common law Courts in England that the same individual, even in different capacities, cannot be both a plaintiff and a defendant is not applicable to India as Order XXX, rule 9, really contemplates suits between the same individuals in different capacities. **M** VELLAYAPPA MOOTHAN *v.* KRISHNA MOOTHAN, 34 M. L. J. 32 4 .8

— O. XXXI, r. 1 **564**

——— O. XXXII, rr. 6, 7 **164**

——— O. XXXIII, rr. 1, 5 (b)—*Application for permission to sue as pauper by married woman—Husband's means, whether can be taken into consideration.*

Where a married woman applies for permission to sue as a pauper, the real point in issue is whether she herself is a pauper within the meaning of rule 1 of Order XXXIII of the Civil Procedure Code, and the fact that her husband has property is not sufficient proof that the applicant herself has property from which Court-fees in the case can be paid. **Pat** SHARFUNNESSA *v.* NAZMI KHANUM, 3 P. L. J 178 **723**

— O. XXXIII, r. 5 **723**

——— O. XXXIV, rr. 1, 2, 3, 10 **251**

——— O. XXXVIII, rr. 1 to 6—*Attachment before judgment—Procedure—General allegation against defendant, whether sufficient*

When a party seeks to obtain an order of attachment before judgment, he must by definite evidence satisfy the Court that there is reasonable cause for believing that the judgment-debtor is about to dispose of the whole or part of his property with a view to defeating his creditors It is not sufficient to make only general allegations. **Pat** KHOKA MARWARI *v.* RAMCHANDRA MARWARI **240**

Civil Procedure Code—1908—contd.

——— O. XXXVIII, rr. 9, 11—*Attachment before judgment, whether ceases on dismissal of suit —Appeal, whether revives order of attachment.*

An attachment before judgment comes to an end when the suit is dismissed.

In order to avoid all possible doubt and difficulty, the Court should when dismissing a suit make an order under Order XXXVIII, rule 9, Civil Procedure Code, withdrawing the attachment before judgment. But even if an order directing withdrawal of attachment is not made, on the dismissal of the suit, the attachment before judgment ceases to exist, and it does not revive when an appeal is lodged.

In a suit brought by the plaintiff the property of the defendant was attached before judgment. The Trial Court dismissed the suit without making any order as to the withdrawal of the attachment. On appeal, the suit was decreed In the interval the property attached was transferred by a private sale. The decree-holder then applied for the execution of his decree by the sale of the property without applying for its re-attachment:

Held, that as the property had ceased to be under attachment after the dismissal of the suit by the Trial Court, the Court had no jurisdiction to direct it to be sold without being first attached. **C** ABDUL RAHAMAN *v.* AMIR SHARIF **229**

——— O. XXXVIII, r. 11 **229**

——— O. XXXIX, r. 2—*Injunction—Person not party to suit, whether can be summoned*

A Court has no jurisdiction to issue an injunction against a person not a party to the suit, or to summon before it any person not a party to the injunction. **Pat** MALHIUDDIN AHMAD *v.* ATHAR HOSSAIN **496**

——— O. XXXIX, r. 2, *scope of Injunction, disobedience of—Prohibitory orders, enforcement of.*

Orders passed under rule 2 of Order XXXIX, Civil Procedure Code, are not orders enforcing the injunction, but are really orders punishing a party for past disobedience.

Clause 3 of rule 2 of Order XXXIX applies to injunctions prohibiting the doing of or restraining from doing certain acts.

Clause 3 is independent of and is not controlled by the provisions of rule 4 of the Order.

Order XXXIX must be read with section 94 and the provision for punishment for disobedience applies to cases falling under either. **M** VIDYAPURNA THIRTHASWAMI *v.* VICAR OF SURATKAL CHURCH, 7 L. W. 328 **56**

——— O. XLI, r. 1 **418**

——— O. XLI, rr. 4, 33—*Appellate Court, power of, to vary decree in favour of persons who do not appeal.*

Except under Order XLI, rule 4, Civil Procedure Code, an Appellate Court cannot vary a decree of a lower Court as regards its adjudication on the rights and liabilities of the parties who have not joined in the appeal and who are not parties to the litigation in the Appellate Court

Order XLI, rule 33, Civil Procedure Code, does not apply to a person who is not a party to the appeal. **C** HARIDAS DEY *v* KAILASH CHANDRA BOSE **480**

Civil Procedure Code—1908—contd.

O. XLI, r. 4—*Mortgage suit—Appeal by one of several defendants—Appellate decree, effect of.*

In a case in which one only of several defendants appeals, the result of the appeal will enure to the benefit of the other defendants only if the interests of the other defendants are inseparable from the interests of the defendant-appellant.

A decree in a mortgage suit made several properties liable for the satisfaction of the mortgage debt. One of the defendants appealed and was released from liability under the mortgage, on the ground that by a revenue sale the property claimed by him had passed to him free of all incumbrances:

Held, that the result of the appeal was to free only the property in which the defendant-appellant had an interest, leaving untouched the decree of the original Court in so far as the interests of the other defendants were concerned. **Pat** MAHENDRA KOER *v.* SAT NARAIN LAL, 3 P. L. J. 166 **762**

——— O. XLI, r. 10—*Application for security for costs, when to be made.*

Applications for security for costs must be made promptly, not only on the ground that the respondent should apply for security for costs before he incurs them but also on the ground that it is unreasonable that security should not be applied for till the appellant has incurred costs of the appeal.

Where, therefore, an appeal was preferred on the 17th July 1913 and was admitted on 11th October 1913 and the application for security for costs was not made till the 29th March 1917, when the appellant had incurred all the costs of printing the paper-book and engaging Counsel and the appeal had even been fixed for hearing for no fewer than four times and had been actually heard on the 3rd January 1917, when the Court decided that the appeal in *forma pauperis* could not be entertained and directed the appellant to pay the Court-fee leviable on the memorandum of appeal, which order was also complied with on the 26th February 1917, more than a month before the application was made:

Held, that the application was a belated one and could not be entertained. **P** DALIP KOER *v.* JAGIR SINGH, 41 P. W. R. 1918; 20 P L R 1918 **23**

— O. XLI, rr. 23, 25, O. XLIII, r. 1 (u)—*Appeal—Pleadings and proof, variance between—Appellate Court, whether can raise new point —Remand for taking evidence and decision on new point—Appeal, whether lies.*

In a suit brought by the plaintiff to establish her right of way over certain lands belonging to the defendant, the claim was based either on prescription under section 26 of the Limitation Act or on necessity. The Trial Court dismissed the suit on the ground that the plaintiff had failed to prove her case. On appeal the Subordinate Judge, although he concurred with the Trial Court in holding that on the evidence on the record the plaintiff had failed to prove that she was entitled to a right of way either on the basis of prescription or on the basis of necessity, went on to discuss the question whether plaintiff had a right founded either on custom or grant or some right to use the way as a village road or as a public road, and remanded the case to the Court of first instance to be re-heard not only on the evidence

already on the record but on such further evidence as the parties might desire to adduce:

Held, (1) that the order of remand must be set aside and the suit remitted to the Court of Appeal in order that the appeal to that Court might be finally disposed of with reference to the pleadings and the proof;

(2) that although this was not a case in which it was, strictly speaking, open to the Court of Appeal to make an order under rule 23 of Order XLI, Civil Procedure Code, yet as the order appeared to be in form and substance an order under that rule and not under rule 25, an appeal lay against it. **C** BASEEMATI DEBI *v.* TARIT BASANI DASSI **416**

——— **O. XLI, r. 25** **416**

——— **O. XLI, r. 27 (b)**—*Appellate Court, power of, to admit additional evidence.*

Order XLI, rule 27 (*b*), of the Civil Procedure Code does not mean that in order to enable the Appellate Court to pronounce judgment in favour of a particular party additional evidence should be admitted in appeal; it means only that where it is impossible to pronounce judgment at all on the evidence the Court may call for a document.

Where the plaintiff on whom the onus lay failed to discharge it owing to the non-production of a document which it was in his power to produce, but for the production of which he took no steps:

Held, that the provisions of Order XLI, rule 27 (*b*), of the Civil Procedure Code could not be used in his favour and that he could not be allowed to produce the document in appeal. **Pat** KALIKA DUTT MANDAR *v.* TULSI MANDAR, 3 P. L. W. 385 **670**

——— **O. XLI, r. 33** **304, 480**

——— **O. XLI, r. 33,** *scope of.*

Order XLI, rule 33, of the Civil Procedure Code gives to an Appellate Court power to pass any decree and make any order which ought to have been passed or made, the object of the rule being manifestly to enable the Court to do complete justice between the parties to the appeal; but the provision is not intended to enable a defendant to obtain for a plaintiff, not a party to the appeal, a relief which the latter never asked for. **N** RAO VINAYAK *v.* LAXMAN, 14 N. L. R. 56 **51**

——— **O. XLIII, r. 1 (m), O. XII, r. 6, O. XXIII, r. 3**—*Appeal from order rejecting petition asking for judgment and decree on defendants' admission, maintainability of.*

Orders rejecting separate petitions filed by the plaintiff and the defendants, by which the plaintiff prays for judgment and decree against the defendants and the defendants state that they consent to a decree being made against them, are not appealable under the Civil Procedure Code, unless such petitions are presented and dealt with in the Court on the footing that they taken together amount to a lawful agreement or compromise within the meaning of rule 3 of Order XXIII, Civil Procedure Code. **C** PRASANNA DEB RAIKAT *v.* DARPA NARAIN SINGH **145**

——— **O. XLIII, r. 1 (u)** **416**

——— **O. XLIV, r. 1** **731**

——— **O. XLVII, r. 1**—*Review—Mistake of law, whether ground for review—Any other sufficient reason.*

A mere mistake of law is not in itself a sufficient mistake or error apparent on the face of the record so as to form a ground for review of judgment.

Where the mistake arises from the conduct of the applicant for review, the mistake cannot even be pleaded as "any other sufficient reason" within the meaning of Order XLVII, rule 1, Civil Procedure Code.

The defendants in a partition suit preferred an appeal against the preliminary decree and the plaintiff preferred cross-objections to the same. The appeal was dismissed and the cross-objections were allowed. The defendants then applied for a review on the ground that their appeal was incompetent under section 97, so that the cross-objections of the plaintiff should not have been allowed:

Held, that the discretion of the Court to grant a review should not be exercised in this case inasmuch as owing to the applicants' own negligence, their appeal was argued and the cross-objections were allowed. **C** HAZRA SARDAR *v.* KUNJA BEHARI NAG CHOUDHURY **161**

——— **O. XLVII, r. 5**—*Review, jurisdiction of one of two Judges constituting Division Bench of High Court to hear application for.*

Want of objection by or consent of the parties to the exercise of jurisdiction by a Court will not give a jurisdiction to the Court which it does not possess under the law.

During the absence on leave of one of two Judges of a High Court constituting a Division Bench, the other Judge has no jurisdiction to hear an application for review of its decree, unless the former Judge has ceased to be a member of the Court or is precluded by absence or other cause, for a period of six months next after the application, from considering the decree to which the application refers. **C** JAGAT CHANDRA ACHARJI *v.* SYAMA CHARAN BHATTACHARJEE, 22 C. W. N. 550 **999**

——— **Sch. II, para. 1**—*Arbitration—Court acting as arbitrator—Award, finality of—Appeal, whether lies.*

The general principle is that an award is final and cannot be questioned except upon such grounds, as corruption or an illegality apparent upon the face of the award, as are set out in the Second Schedule to the Code of Civil Procedure, and there is no reason for departing from the principle where the Court itself has been appointed and has accepted the office of arbitrator.

Where the Court itself is appointed to act as an arbitrator, no separate award need be passed inviting the parties to put in objections before passing a decree: such an award in itself is a decree.

Where the parties to a suit agreed that after the Judge had examined the documentary evidence and inspected the ground he should give his decision without any witnesses being called, and that they would abide by his decision:

Held, that the decision was in the nature of an award and that no appeal lay against it. **U B** MAUNG KALA *v.* MAUNG MEIK, 3 U. B R. (1917) 36 **622**

——— ——— **para. 17**—*Application to file agreement for reference—Death of some arbitrators before application—Agreement, whether can be filed.*

Civil Procedure Code—1908—concld.

An agreement to refer to arbitration becomes *ipso facto* inoperative by the death of an arbitrator before the agreement is made a rule of the Court.

Where, therefore, five arbitrators were named in an agreement to refer to arbitration and two of them had died before an application was made for the filing of the agreement in Court:

Held, that the agreement became incapable of performance and could not be filed in Court. **P** MOHAN LAL *v.* DAMODAR DAS **866**

Commissioner for local investigation, *remuneration of, whether can be disallowed by District Judge.*

The District Judge has no power to disallow a portion of the remuneration claimed by a Commissioner for local investigation in connection with a suit pending in the Court of the Subordinate Judge. The matter is one which must be dealt with by the Subordinate Judge in whose Court the suit is pending. **C** PANCHANAN SEN *v.* MADHU SUDAN MALLIK **496**

Commitment to Sessions, *considerations governing—Government resolution, whether binding on Magistrate.*

When a Magistrate comes to consider whether he shall or shall not commit a case to the Court of Session, he has to consider the gravity of the offence, the punishment with which in his opinion it ought to be met and the section under which he charges the accused person. He may consider any special difficulties in the case, or that it is a matter of some peculiar public importance, and other matters, such as the wishes of the parties. But a Magistrate must not determine this important matter, whether he is to commit the case or to try it himself, solely by the wish of the parties and the terms of a Government resolution. No resolution whatever that the Executive Government has issued can properly control or determine the discretion of a Magistrate in such a matter; for the Government have no authority whatever to interfere with this discretion, which is imposed on the Magistrate by the law and must be exercised by him. **B** EMPEROR *v.* BHIMAJI VENKAJI NADGIR, 20 BOM. L. R. 89; 19 CR. L. J. 342; 42 B. 172 **454**

Common land—Shamilat abadi—*Co-sharers, rights of—Co-sharer building on* shamilat *—Injunction, suit for—Damage.*

The mere circumstance of a building being erected on common land without the consent of the co-sharers, and even despite their protest, is not sufficient in itself to entitle the aggrieved co-sharers to claim the demolition of the building so erected, unless it can be shown that the erection of the building has caused such material and substantial injury as cannot be remedied on a partition of the joint land. **P** MAJJU *v.* TEJA SINGH, 29 P. R. 1918 **844**

Companies Act (VII of 1913), s. 246, r. 53, forms Nos. 34, 35—*Liquidation—Call, order for—Procedure—Notice, form of.*

Every application by the liquidators of a Company to the Court to make a call upon the contributories must be made by a petition, and notice in form No. 34 must be served four clear days before the date of the hearing on each contributory, unless the Judge directs that personal service be dispensed with and advertisement in form No. 35 be substituted therefor. Where the latter course is adopted, the contributories must be given sufficient time to appear and show cause against the order being made. **P** GIRJA NANDAN SINGH *v.* NATIONAL INSURANCE AND BANKING CO, LTD, 1 P. R. 1918 **139**

Company—*Liquidation—Deposit receipt in name of several joint holders—Liquidator, whether bound to pay dividend to some holders.*

Where a fixed deposit receipt issued by a Bank which has since gone into liquidation is in the name of several persons and is not payable to "either or survivor", the liquidator is not bound to pay the dividend on the receipt to any one or more of the joint holders of the receipt without obtaining a discharge from all the holders. **P** GOKAL CHAND *v.* OFFICIAL LIQUIDATORS, DOABA BANK, LIMITED, 28 P. R. 1918; 47 P. W. R. 1918 **848**

Compensation, assessment of, mode of **923**

Confession *of co-accused, whether corroboration —Material corroboration, what amounts to.*

The confession of a co-accused does not rank as corroboration of the statement of the approver. **P** GURDIT SINGH *v.* EMPEROR, 9 P. W. R. 1918 CR.; 19 CR. L. J. 439 **967**

———, *retracted, use of, against person making it and against co-accused—Corroboration.*

Where it is a question of using a confession against a co-accused and the Court is not prepared to accept the confession *per se* as sufficient, the corroboration ought to be of the kind that not only confirms the general story of the crime but also unmistakably connects the co-accused with the crime. **P** EMPEROR *v.* JAWAI, 19 W. R. 1918 CR.; 19 CR. L. J. 275 **179**

Construction of document 227, 523

Construction of document.

Where the language in which a deed is written is not the language of a trained draftsman or a skilled conveyancer but the draft is prepared by an amateur or a layman, all that is necessary to interpret such a deed is to give the plain meaning to the words used, neglecting grammatical errors and remembering the limitations and deficiencies of the draftsman. **O** GANGA BAKHSH SINGH *v.* GOKUL PRASAD, 4 O. L. J. 744 **645**

———, *principles of.*

In determining the nature of a transaction the document evidencing it should be considered as a whole and the intention of the parties should be gathered not from isolated sentences but from the whole of the instrument. **P** GOPI RAM *v.* RAM DHAN, 10 P. W. R. 1918; 157 P. L. R. 1917 **228**

Contempt of Court—*High Court, power of, to punish summarily for contempt—Unjust criticism of Court's act while Court is not sitting, whether contempt—Printer and publisher of newspaper, liability of, for contempt—Punishment for contempt, mitigation of—Apology.*

If the printer of a newspaper publishes a letter with the name of an author attached to it, he must bear the responsibility if he is unable, when required, to prove that it was published with the authority of the person by whom it purports to have been signed.

When letters amounting to contempt of Court

Contempt of Court—concld.

are published in a newspaper, the Court has its election to punish both the author and publisher of the newspaper or either of them.

If a printer prints anything that is libellous, it is no excuse to say that he had no knowledge of the contents of the paper and was entirely ignorant of its being libellous.

When contempt of a Court of Record is committed, there are two modes of proceeding open to it, one by a Rule calling upon the person charged with contempt to show cause why he should not be adjudged guilty of contempt of Court, the other by attachment under which that person might be arrested and brought into Court for a similar purpose.

The charge of contempt may be made by the Court itself upon its own knowledge of facts which, if sworn to by any one to the best of his belief, would have made a *prima facie* case of contempt of Court.

To charge a Judge with presumptuous tyranny for the mode in which he is proceeding in a matter pending before him or to publish anything respecting that matter, whilst it is under consideration, with a view to induce the Judge to alter his course is a grave contempt of Court.

It is a high and serious offence to cast unjust and defamatory imputations on a Judge. Judges are subject to be criticised but they must be protected from unfounded defamation.

In cases of contempt of Court by means of misrepresentation or wilful concealment of the true state of facts, a proper apology may mitigate but it cannot wholly excuse or justify the contempt or form a ground for a total exemption from punishment. **C** *In the matter of* WILLIAM TAYLER, 26 C. L. J. 345: 19 Cr L. J. 402 **930**

Contract Act (IX of 1872), s. 2 (d)—*'Consideration,' what is.*

The consideration required to support a promise may consist of any damage or any suspension or forbearance of his right or any possibility of a loss occasioned to the plaintiff by the promise of another, though no actual benefit accrues to the promisee. **M** PERUMAL MUDALIAR *v.* SENDANATHA MUDALIAR, (1918) M. W. N. 173 **479**

——— **s. 16**—*Undue influence, tests of—Gift, deed of, cancellation of, before registration, effect of—Non-delivery of document to donee, effect of.*

A deed of gift which is repudiated by the donor before registration, though presented by him to be registered, is inoperative and confers no rights on the donee.

Non-delivery of the document to the donee renders it unenforceable.

Presentation of a document for registration is not equivalent to its registration.

Per *Abdur Rahim, J.*—A deed cannot be treated as void for undue influence merely because it is unreasonable or its terms are prejudicial to the donor or his kinsmen. If the deed is true and a well-understood and voluntary act of the donor, no legal objection can be taken to it merely on the ground that it is such as would not be expected from a man of ordinary prudence.

Undue influence is not a matter always capable of direct proof, and must depend, in its very nature, on the conclusions to be drawn from the entire circumstances in which the transaction had its origin.

Per *Oldfield, J.*—The proof of undue influence may be either direct, though that cannot be insisted on, or indirect with reference to the opportunities for and disposition to the exercise of influence on the one side and the result of its exercise, as indicated by the merits of the transaction, the acceptance of false representations and the entertainment of false beliefs on the other. **M** AMBA *v.* SHRINIVASA KAMATHI, 7 L. W. 339 **483**

Contract Act—contd.

——— **s. 23**—*Public policy—Promise not to bid at excise auction, validity of.*

An agreement to abstain from bidding at an excise auction is not void under section 23 of the Contract Act as being against public policy. **N** MAHADEO *v.* KEWALRAM **223**

—— — **s. 25.**

The provisions of section 25 of the Contract Act do not apply to such a case, for though the mortgage might be treated as having consideration, it is not enough to charge the *tarwad* with liability, which must be shown to have been benefited by the transaction. **M** MANKOOTTIL CHATHUKUTTI NAIR *v.* KOMAPPAN NAIR, (1918) M. W. N. 144 **572**

——— **ss. 30, 65**—*Wagering contract—Suit for recovery of deposit made as security for performance of contract, maintainability of—Void contracts, money paid under, when recoverable.*

A suit lies for recovery of money deposited by a party to a wagering contract as security for the performance of his part of the contract. The direct prohibition contained in section 30 of the Contract Act does not cover such a claim.

The words 'entrusted to any person to abide the result of a game, etc.,' in section 30 refer only to moneys deposited with stakeholders.

The general principle is that a plaintiff whose hands have not been tainted by corruption and who has not committed any act which fixes him with having been a party to a fraud is entitled to get back the money which he left with another. **M** SRIKAKOLAPUR VENKATARAJU *v.* GUDIVADA RAMANUJAM, 23 M L. T. 84; (1918) M. W. N. 230; 7 L. W. 518; 34 M. L. J. 561 **319**

——— **s. 30**—*Wagering contract, what is—Common intention to wager, necessity of—Speculation, whether amounts to wagering*—Pakka adatias, *position of.*

Speculation does not necessarily involve a contract by way of wager: to constitute such a contract a common intention to wager is essential. The mere fact that one party to a contract for sale of goods does not intend to deliver, even if known to the other party, does not vitiate the contract, unless there is a bargain or understanding between the parties that delivery is not to be called for.

Pakki adat dealings are well established as a legitimate mode of conducting commercial business in the Bombay market, and the acts of a *pakka adatia* as such are not unlawful.

Defendant instructed plaintiffs, a firm of *pakka adatias*, to sell for him three several lots of linseed amounting in all to 4,000 tons for September delivery. The market went against the defendant, and the plaintiffs discharged their obligations to their buyers

Contract Act—contd.

by delivering 300 tons of linseed, and by making cross-contracts and paying differences as to the balance. They then sued the defendant for indemnity:

Held, that the fact that the defendant was a speculator who never intended to give delivery and that the plaintiffs did not expect him to deliver did not convert the contract into a wager. **P C** BHAGWANDAS PARASRAM *v.* BURJORJI RUTTONJI BOMANJI, 23 M. L. T. 203; 34 M. L. J. 305; 4 P. L. W. 229; 16 A. L. J. 241; 27 C. L. J. 358; (1918) M. W. N. 315; 22 C. W. N. 625; 20 BOM. L. R. 561; 7 L. W. 577 **284**

——— **s. 38** **627**

——— **s. 43** **466**

——— **s. 43**—*Joint promisors, liability of—'Joint liability' and 'joint and several liability,' distinction between.*

Section 43 of the Contract Act enables a promisee to sue one or more of several joint promisors to enforce the joint liability.

When a contract is made with several persons as tenants, they are jointly and severally liable for rent. But when the contract is made with a single person, after his death the liability of his heirs is a joint liability. **C** KRISHNA DAS ROY *v.* KALI TARA CHOWDURANI, 22 C. W. N. 289 **80**

——— **s. 65** **319**

——— **ss. 69, 70**—*Calcutta Municipal Act (III B. C. of 1899, ss. 171, 228—Consolidated rate, payment of, by owner of premises—Owner, whether can recover half share from occupier.*

In view of the provisions of section 228 of the Calcutta Municipal Act, which make the consolidated rate a first charge upon the building or land in respect of which it is payable, the owner of such building or land is a person interested in the payment of the rate within the meaning of section 69 of the Contract Act, and having paid the share of the occupier he is entitled to recover it from the latter under section 69 or 70 of the Contract Act. **C** BHUDAR MAL-RAM CHANDRA MARWARI *v.* SEW NARAYAN **669**

——— **s. 74**—*Penalty—Time granted to mortgagor on condition of paying higher rate of interest.*

Where a mortgage-decree provided for the payment of interest at a certain rate, but in execution the Court granted the judgment-debtor time to pay off the decretal amount on condition that he paid interest at a higher rate:

Held (*semble*), that the increase in the rate of interest was in the nature of a penalty. **Pat** BENODE BEHARI BOSE *v.* HIRA SINGH, (1918) PAT. 76 **726**

——— **ss. 134, 137**—*Principal and surety—Suit dismissed as against principal—Surety, whether discharged.*

Plaintiff sued a principal debtor and the surety for the price of goods sold. Service of summons could not be effected upon the principal debtor and the plaintiff applied that he should be dismissed from the suit. The suit proceeded against the surety alone and the plaintiff obtained a decree:

Held, that the legal consequence of the act of the plaintiff was to discharge the principal debtor within the meaning of section 134 of the Contract Act, so that he had no further right of suit against the surety. **U B** MAUNG PO U *v.* MAUNG KYAW, 3 U. B. R. (1917) 62 **693**

——— **s. 137** **693**

Contract Act—concld.

——— **s. 172**—*Chattels, whether can be hypothecated without transfer of possession.*

The method provided by section 172 of the Contract Act for the hypothecation of loose chattels is not the only method for creating security thereon. They may be hypothecated without transferring their possession. In such cases the only question that arises is whether there was an intention to create a security and if there was an intention to create a security, equity gives effect to it. **C** HARIPADA SADHUKHAN *v* ANATH NATH DEY, 22 C. W. N. 758 **211**

——— **s. 226.**

The ordinary law of agency stated in section 226 of the Contract Act is applicable to negotiable instruments. **M** CHELLA BALAYYA *v.* KANUPARTHI SUBBAYYA, 40 M. 1171 **813**

——— **ss. 239, 242**—*Partnership—Agent sharing profits and losses, whether partner.*

A *gomashta* sharing in the profits as well as in the losses of a business is a partner in the business. **P** CHELA RAM-SANT RAM *v.* KISHAN CHAND, 3 P. W. R. 1918; 155 P. L. R. 1917 **283**

——— **s. 242** **283**

——— **s. 253 (10)** **849**

——— **s. 263** **466**

Contract *by guardian, whether binding on minor—Specific performance—Mutuality.*

It is not within the competence of the guardian of a minor to bind the minor or his estate by a contract for purchase of immoveable property and specific performance of such a contract cannot be decreed even at the instance of the minor for want of mutuality. **N** SAKHARAM *v.* BHIVRABAI **164**

Co-operative Societies Act (II of 1912), s. 42—*Liquidator, order of payment made by—Declaration, suit for, whether maintainable—Jurisdiction.*

A Civil Court cannot, in view of section 42 (6) of the Co-operative Societies Act, entertain a suit for a declaration that an order of the liquidator passed under section 42 (2) of the Act is *ultra vires* and without jurisdiction and cannot be executed **O** BENI MADHO SINGH *v.* LIQUIDATOR, DEWARA BANK, 4 O. L. J. 583 **353**

Co-owners, *rights of—Adverse possession by co-owner, requisites of—Partition, suit for, by co-owner out of possession, form of—Court-fee payable.*

The possession of one co-owner is *prima facie* the possession of the other co-owners and in order to make the possession of one co-owner adverse to the other co-owners there must be an actual ouster of the latter. Where one co-owner has been in uninterrupted possession for a large number of years, the Court may presume that there has been an ouster of the other co-owners without any express evidence of the fact of such ouster.

In a partition suit ordinarily it is not very material as to whether the plaintiff is or is not actually in possession of his share. But in this country in the Mofussil Courts it is important, because a person who sues for partition and is out of possession must ask, first of all, to be restored to possession of his share and pay additional *ad valorem* fee upon his plaint, whereas in a case where the plaintiff is in possession

Co-owners—concld.

he simply sues for partition and separation of his share on a plaint bearing a stamp of Rs. 10 only. **C** AHAMUDDIN TAMIJUDDIN *v.* AMIRUDDIN **216**

Co-sharers, *rights of—Co-sharer in exclusive possession—Suit for possession by other co-sharer, maintainability of.*

A co-sharer in joint lands can maintain a suit in ejectment against his other co-sharer, claiming joint possession with him where the latter is not only in exclusive possession of the lands but asserts in his written statement exclusive possession in denial of the title of the plaintiff. **C** SASHISHEKKARESWAR REY *v.* HEMANGINI DEBI **689**

Costs **690, 870**

———, *award of.*

Where the pleadings of both parties leave the Court in the dark as to the nature of the real contest between them, the proper course to follow is not to allow costs to any of them. **P** MUHAMMAD ABDUL KADIR *v.* HUSSAIN BIBI, 11 P. W. R. 1918 **879**

Councils Act, 1861 (24 and 25 Vict. C. 67), s. 22 - *High Courts Act,* 1861 (24 *and* 25 *Vict. C.* 104), *s.* 9—*Defence of India (Criminal Law Amendment) Act (IV of* 1915), *s.* 4—*Governor-General, power of, to create Courts—Jurisdiction—High Court, power of, to declare an Act* ultra vires.

Section 22 of the Indian Councils Act, 1861, read with section 9 of the Indian High Courts Act, 1861, is in terms amply wide to give the Governor-General of India in Council power to create new tribunals such as those contemplated in section 4 of the Defence of India (Criminal Law Amendment) Act, 1915.

If an enactment of the Indian Legislature is outside the scope of the powers conferred upon the Governor-General in Council by Act of Parliament, the High Court has power in a proper proceeding to declare such an enactment *ultra vires* and of no force and effect, with all the consequences that may result therefrom.

Per *Chapman, J.*—A Court cannot be constituted otherwise than in the name of the Sovereign, and before it can be held that the Indian Legislature can create a Court it must be clear beyond doubt that the power to create a Court has been properly delegated.

The power conferred on the Governor-General in Council by section 22 of the Councils Act of 1861 included the power to make laws and regulations for all persons and all Courts of justice whatever and for all places and things whatever. This delegation of plenary power was designed for the benefit of public interests of the greatest magnitude and whatever may fairly be regarded as incidental to or consequential to the main purpose ought not, unless judicially prohibited, to be held by judicial construction to be *ultra vires.* **Pat** PARMESHWAR AHIR *v.* EMPEROR, 4 P. L. W. 157; (1918) PAT. 97; 19 CR. L. J. 281 **185**

Court, *duty of, to correct error in decree where no question of doubt.*

It is the Court's duty to see that all errors in the decree are amended when there is no question of doubt. **A** BASANTI *v.* KUNJ BIHARI LAL, 16 A. L. J, 262 **998**

Court-fee **890**

———*Suit to set aside decree—Plaintiff entitled only to portion of property affected by decree—Court-fee payable.*

Plaintiff brought a suit to set aside a compromise decree obtained on the basis of a mortgage. He was entitled to a portion only of the property affected by the compromise decree:

Held, that Court-fee was payable on the value of the share of the plaintiff, and not on the value of the whole of the property affected by the decree. **Pat** BANKEY BEHARI *v.* RAM BAHADUR, 4 P. L. W. 281; (1918) PAT. 223 **891**

Court Fees Act (VII of 1870), s. 7 (i) (vi)—*Pre-emption suit—Suit decreed in respect of part of property and dismissed as to remainder—Appeal—Court-fee payable.*

Plaintiff sought to pre-empt five villages on payment of Rs. 2,500, alleging that the sum of Rs. 41,000 entered in the sale-deed was the ostensible amount of consideration. The suit was dismissed in respect of three villages and decreed in respect of the remaining two on payment of Rs. 21,000. The plaintiff appealed:

Held, (1) that the appeal being divisible into two parts and the sole question which arose in the part relating to the two villages being a question of consideration, the appellant must pay an *ad valorem* Court-fee on the amount by which he was seeking to reduce the amount made payable by the lower Court;

(2) that as regards the rest of the claim as the right to pre-empt was in dispute, the Court-fee in respect thereto must be calculated according to section 7 (*vi*) of the Court Fees Act. **A** ABINASH CHANDRA *v.* SHEKHAR CHAND, 16 A. L. J. 174 **666**

——— **s. 7 (iv) (c)**—*Suit for declaratory decree and injunction—Court-fee payable.*

The plaint in a case in which the plaintiff not only asks for a declaration of rights but also prays for perpetual injunction restraining the defendant from putting in execution a particular decree is chargeable with *ad valorem* Court-fee under section 7 (*iv*) (*c*) of the Court Fees Act. **C** SAIDUNNESSA *v.* TEJENDRA CHANDRA DHAR. **398**

——— **ss. 12, 17, Sch. I, Art. 1**—*Mortgage suit—Appeal or cross-objection—Costs, appeal in respect of—Court-fee payable—Taxing Judge, power of—Procedure.*

In the case of appeals or cross-objections in suits for redemption or foreclosure in all cases whether a decree for interest has been made in them or not, in which the Court-fee declared by the Court to be due at the date of the decree can be ascertained by reference to the judgment and the decree, it is that amount at which the appeal or cross-objection should be valued and future interest should not be taken into account—*i.e.*, in all original appeals the Court-fee should be levied on the sum due at the date of the original decree and in all second appeals it should be levied on the sum due at the date of the decree of the lower Appellate Court.

When an appeal against costs is distinct and separate from the other parts of the appeal, Court-fee must be paid *ad valorem* on the costs decreed

When it is the appellant who failed to pay sufficient Court-fees in the Court below, his appeal will not be heard till the deficiency has been made good,

Court Fees Act—concld.

Where it was the respondent who was in default, no decree shall be executed in his favour until the deficiency has been made good.

The decision of the Taxing Officer in the matter of Court-fees is final. The Court-fee fixed by him must be paid. **Pat** ROWLINS *v.* LACHMI NARAIN JHA, 3 P. L. J. 443 **50**

——— **s. 17** **50**

——— **s. 17,** *applicability of—Alternative reliefs—Court-fees payable.*

Section 17 of the Court Fees Act applies to cases in which two different reliefs may be applied simultaneously to the wrong done to the plaintiff; it does not apply to cases where alternative reliefs are asked for. Where alternative reliefs are sought Court-fee must be paid on the relief which appears to be of the higher value. **Pat** MUKHLAL GIR *v.* RAMDHEYAN RAI **143**

——— **Sch. I, Art. I** **50**

——— **Sch. II, Arts. 5, 17 (iii)**—*Agra Tenancy Act (II of 1901), s. 95—Suit for declaration of occupancy rights—Court-fee payable.*

A suit for a declaration of occupancy rights under section 95 of the U. P. Tenancy Act falls under Article 5, Schedule II, of the Court Fees Act and the plaint in such a suit should bear a Court fee of eight annas.

Article 17 (iii) of Schedule II of the Act has no applicability to such a suit. **A** RATAN SINGH *v.* KHEM KARAN, 16 A. L. J. 167 **608**

——— **Art. 17 (iii)** **608**

Criminal Procedure Code (Act V of 1898), s. 14—*"Any local area", meaning of—Special Magistrate, powers of—Punjab Government Notification No. 99, dated 23rd February 1883.*

The words "any local area" in section 14 of the Code of Criminal Procedure can be extended to cover, if necessary, all the territories administered by the Local Government issuing the notification, and are not restricted in their meaning to a local area within a specified District or Sessions Division.

The Punjab Government Notification No. 99, dated 23rd February 1883, applies equally to a Special Magistrate of the first class appointed under section 14 of the Criminal Procedure Code. **P** HIRA LAL *v.* EMPEROR, 4 P. W. R. 1918 CR.; 19 CR. L. J. 310 **326**

——— **ss. 16, 350**—*Difference of opinion between even number of Magistrates—Procedure—Rules framed by Bengal Government under s. 16, Criminal Procedure Code, r. 6—Trial, de novo—Jurisdiction.*

Rule 6 of the Rules framed by the Bengal Government under section 16, Criminal Procedure Code, provides that in case of a difference of opinion between an even number of Honorary Magistrates the case shall be referred back to the District Magistrate or Sub-Divisional Officer, as the case may be.

Where a case is thus referred back under this rule to the Sub-Divisional Officer, the provisions of sections 350, Criminal Procedure Code, apply to the case, so that the Magistrate does not act without jurisdiction if in the absence of any demand for a *de novo* trial on the part of the accused he hears arguments and passes judgment without holding a *de novo* trial. **C** CHAND TARAFDAR *v.* SHAMSHER FAKIR, 19 CR. L. J. 312 **328**

Criminal Procedure Code—contd.

——— **ss. 90, 514**—*Penal Code (Act XLV of 1860), s. 498—Warrant issued for woman enticed away—Reasons not recorded, effect of—Bond executed by surety, whether can be forfeited on woman's failure to appear.*

In a case under section 498 of the Penal Code the trying Magistrate is competent to issue a warrant instead of issuing a summons for the attendance of the woman alleged to have been enticed away, but in order to comply with the provisions of section 90 of the Criminal Procedure Code it is necessary to record reasons for issuing the warrant in the first instance and if the Magistrate fails to do so, the warrant must be regarded as wholly illegal and the bond given by the surety for the woman's attendance has no legal force and cannot be forfeited if the woman does not appear. **P** BELA SINGH *v.* EMPEROR, 7 P. W. R. 1918 CR.; 19 CR. L. J. 443 **971**

——— **s. 106**—*Security on conviction—Appellate Court, when can order security—Conviction by Second or Third Class Magistrate.*

One of the essentials for justifying an Appellate Court in requiring security under section 106 of the Code of Criminal Procedure is that the accused must have been tried and convicted by a Court of the description mentioned in the first paragraph of the section, *i.e.*, a Magistrate not inferior to a Magistrate of the First Class, and an appellate Court is, therefore, not competent to require security while hearing an appeal from a conviction by a Second or Third Class Magistrate. **P** LAL KHAN *v.* EMPEROR, 5 P. R. 1918 CR.; 19 CR. L. J. 326 **352**

——— **s. 107**—*Breach of peace apprehended in sub-division—Accused living in Sudder Division—Procedure—Irregularity—Overt acts—Apprehension of breach of peace.*

In a case under section 107, Criminal Procedure Code, the breach of the peace apprehended being in a sub-division and the accused residing in the Sudder Division, the District Magistrate was moved for the commencement of the proceedings, but he, instead of drawing up the proceedings and sending them to the Sub-Divisional Magistrate for trial, merely said that he "sanctioned the proceedings" and sent the case to the Sub-Divisional Magistrate:

Held, that although the District Magistrate did not express his intention strictly in accordance with law, the irregularity in expression did not deprive the trying Magistrate of jurisdiction in the case and could not affect the merits of the trial in any way.

Held, also, that though there were no actual overt acts on the part of the accused during the six months preceding the commencement of the proceedings, still the proceedings were not bad as there was a likelihood that the accused might commit a breach of the peace or disturb the public tranquillity or do some wrongful act which might occasion a breach of the peace. **C** OHIDUDDIN CHOUDHURY *v.* EMPEROR, 19 CR. L. J. 266 **122**

——— **s. 107**—*Conviction for rioting—District Magistrate, power of, in appeal, to order security for good behaviour—Surety, whether particular person can be ordered to be—Jurisdiction.*

A District Magistrate has no jurisdiction, in an appeal from a conviction under section 147 of the

Criminal Procedure Code—contd.

Penal Code, to order an accused person to give security to be of good behaviour although he may order security to keep the peace, nor is his order directing a particular individual to be one of the sureties a valid order. **A** MAHABIR *v.* EMPEROR, 16 A. L. J. 280; 19 CR. L. J. 439 **967**

——— **ss. 107, 145,** *distinction between—Security to keep public peace—Possession of immoveable property, dispute as to—Procedure.*

Proceedings under section 107 of the Criminal Procedure Code are only intended for the security of the public peace, not for the purpose of enabling one of the two contending parties to help themselves in recovering possession of immoveable property after having their adversaries' hands tied down by an order under this section. Where the dispute relates to the possession of immoveable property the proper course is to institute proceedings under section 145, and not under section 107. **P** JALAL *v* EMPEROR, 144 P. L. R. 1917; 19 CR. L J. 446 **974**

——— **ss. 107, 144**—*Order under s.* 144 *restraining party from entering upon land, renewal of, validity of—Breach of peace, apprehension of—Procedure, proper.*

Where a party who has once been restrained under section 144 of the Code of Criminal Procedure from entering upon certain land insists upon such entry and there is an apprehension of a breach of the peace, the proper course is to take proceedings under section 107 of the Code and not to issue a fresh order under section 144. **Pat** RASHBEHARI SINGH *v* JAGNARAIN RAI, 3 P. L J. 130; 19 CR. L. J. 365 **589**

——— **ss. 107, 125**—*Petition under s.* 125—*Right of petitioner to be heard—Applicability of s.* 107—*Breach of peace, apprehension of.*

A District Magistrate dealing with an application under section 125 of the Code of Criminal Procedure is exercising neither appellate nor revisional jurisdiction and it is not incumbent upon him to hear the Mukhtear of the petitioner before disposing of the application.

Where acts committed by an accused person are of such a nature that the continuity of these acts or the commission of similar acts by the accused is apprehended to be tending to a breach of the peace, section 107 of the Code of Criminal Procedure is applicable notwithstanding that the acts already committed by the accused constitute specific offences under the Penal Code. **Pat** KHETRABASI SAHU *v.* EMPEROR, 19 CR. L. J. 246 **38**

——— **ss. 107, 144, 145**—*Proceedings, simultaneous, whether proper—Dispute as to possession of land—Proceedings, proper.*

It is inconvenient that proceedings under section 107, Criminal Procedure Code, and also under section 144 or 145 should be going on at the same time.

Where on the application of the petitioners for the assistance of the Magistrate in the matter of possession of a piece of land, an injunction was issued under section 144, Criminal Procedure Code, and the petitioners were called on under section 107:

Held, (1) that the procedure was bad, as in effect it debarred the petitioners from giving evidence of possession;

Criminal Procedure Code—contd.

(2) that if on the expiry of the injunction under section 144 there was any apprehension of a breach of the peace, the more appropriate procedure would be to take proceedings under section 145, Criminal Procedure Code, rather than under section 107. **C** ABINASH CHANDRA MANDAL *v.* LOKENATH GANI, 19 CR. L. J. 367 **591**

——— **ss. 107, 145**—*Proceeding under s.* 107 *converted into one under s.* 145—*Procedure—Evidence, recording of.*

Where a proceeding is started under section 107 of the Criminal Procedure Code and evidence is taken under that section, but the Magistrate subsequently converts the proceeding into one under section 145 of the Code, he must call for the written statements of the parties and record evidence under the latter section. If he omits to do so, any order passed by him under section 145 of the Code would be illegal. **Pat** SAHDEB *v.* JUMON JOLAHA, 4 P. L. W. 195; 19 CR L. J. 320 **336**

——— **s. 107**—*Security, when to be demanded—Wrongful act—Breach of peace—Proof.*

Accused, owners of a certain piece of land, intended to open a market upon it for the sale of cattle near a place where there already was an old cattle market. The Magistrate, apprehending that that circumstance would very likely cause a breach of the peace, made an order against the accused under section 107, Criminal Procedure Code:

Held, that as the Magistrate was only informed that the accused intended to hold a market on their land without being at the same time informed that they intended to commit a breach of the peace by doing any wrongful act, the order of the Magistrate was illegal. **A** MAHU *v.* EMPEROR, 16 A. L. J. 279; 19 CR. L. J. 437 **965**

——— **s. 110** **125**

——— **s. 110**—*Security for good behaviour, order for—Approved sureties—Sureties residing in another Police district and helping accused in defence, whether ground for refusing to accept.*

Where an order to furnish security under section 110, Criminal Procedure Code, simply requires the sureties to be 'approved sureties', the mere fact that the sureties do not reside in the same Police district and have evidenced their friendship by helping the accused in his defence will not suffice in law to justify a refusal to accept the sureties. **A** GOBARDHAN *v.* EMPEROR, 16 A. L. J. 263; 19 CR. L. J. 441 **969**

——— **ss. 110 (f), 117**—*Security for good behaviour—Proof—General repute—Evidence.*

Where it is alleged against a person, even in a proceeding under section 110 of the Code of Criminal Procedure, that he on a certain occasion committed a particular offence, that fact must be proved by relevant evidence. It is not at all the same thing as proving by evidence of general repute that a man is a habitual offender.

The fact that a person is so desperate and dangerous as to render his being at large without security hazardous to the community is not one which can, under section 117 of the Code of Criminal Procedure, be proved by evidence of general repute. **A** INDAR *v.* EMPEROR, 16 A. L. J. 205; 19 CR. L. J. 351 **463**

Criminal Procedure Code—contd.

——— s. 112 345
——— s. 117 463
——— s. 118 345
——— s. 125 38
——— s. 144 591

——— **s. 144.**

Section 144 of the Criminal Procedure Code should not be used as a permanent expedient. The Legislature did not intend that a man may be restrained once under section 144, and that then if he states his intention of again doing the same thing a further order under the same section may be made against him. **Pat** RASHBEHARI SINGH *v.* JAGNARAIN RAI, 3 P. L. J. 130; 19 CR L. J. 365 **589**

——— **Ch. XII, s. 435 (3)**—*Proceedings under s. 145—Revision—High Court, power of interference of.*

Orders passed under Chapter XII of the Code of Criminal Procedure are not subject to revision, being expressly excluded from the operation of section 435 of the Code by clause (3) of that section. But in order to make the provisions of section 435, clause (3), applicable, that is to say, to deprive the High Court of the power of interference in revision, the proceedings must be proceedings under Chapter XII of that Code in fact, and not only in name. **U B** NGA HPAY *v.* NGA AUNG BAW, 3 U. B R. (1917) 35; 19 CR L. J. 381 **685**

——— **s. 145 336, 591 673, 974**

——— **145, 146**—*Attachment of land—Decree of Civil Court, effect of—Punjab Land Revenue Act (XVII of 1887), s. 36, applicability of—Revision—Chief Court, interference by.*

In proceedings under Chapter XII of the Criminal Procedure Code where the Magistrate attaches property, the attachment should continue only until a competent Court has determined the rights of the parties thereto, and the mere fact that an appeal from such determination is pending before a higher Court is no reason for the Magistrate continuing to keep the property in attachment.

Obiter dictum.—Section 36 of the Punjab Land Revenue Act is not properly applicable to cases in which property has been attached by a Magistrate under section 146 of the Criminal Procedure Code.

Where after the attachment of certain property by a Magistrate under section 146 of the Criminal Procedure Code, one of the parties is put in possession of it by a Revenue Officer acting under section 36 of the Punjab Land Revenue Act, the Chief Court, as a Criminal Court, cannot interfere with the Revenue Officer's order. **P** EMPEROR *v.* ABDUL AZIZ, 46 P. W. R. 1917 CR.; 19 CR. L. J. 261 **117**

——— **ss. 145, 146**—*Possession, enquiry into—Attachment of property under s. 146—Cancellation of order before adjudication by Civil Court, legality of.*

An order for attachment passed under section 146 (1), Criminal Procedure Code, must be kept in force till the adjudication of the rights of the parties by a competent Civil Court.

A Magistrate has no jurisdiction to cancel the attachment as a result of further enquiry and adjudication by him as to the right to possession. **M** GURVANNA GOWD *v.* GOVINDAPPA, 19 CR. L. J. 443 **971**

——— **s. 145,** *proceedings under—Arbitration—Award accepted by both parties—Revision—Objection to award, validity of.*

Where after drawing up proceedings under section 145 of the Criminal Procedure Code the matter is, with the consent of the parties, referred to arbitration and the award is filed and accepted by both parties, it is not open to either of them to object to the award in revision. **Pat** HALDHAR SINGH *v.* BULAKI SINGH, 4 P. L W. 104; 3 P. L. J. 249; 19 CR. L. J. 266 **122**

——— **s. 145,** *proceedings under—Receiver, appointment of, validity of.*

Under section 145 of the Code of Criminal Procedure a Magistrate has in cases of emergency the power to attach the subject in dispute, but he has no power at that stage to appoint a Receiver.

Where a Magistrate takes proceedings under section 145 of the Criminal Procedure Code the object of the law is that he shall confirm the party in actual possession He is not competent to dispossess such a party by appointing a Receiver and the order of attachment which the law empowers him to make has no greater force than any Civil Court attachment the effect of which is generally to restrain alienations.

A Receiver can be appointed only where the Magistrate is unable to decide which of the parties is in possession and has a right to remain in possession, and considers it necessary that the property should vest in some person appointed by the Court under section 146 of the Code of Criminal Procedure. **Pat** MEWA LAL *v.* EMPEROR, (1917) PAT. 363; 3 P. L. J. 147; 19 CR. L. J. 249; 4 P. L. W. 359 **41**

——— **ss. 145, 435 (3)**—*Proceedings under s. 145—Revision—High Court, power of interference of—Previous trial, whether bar to proceedings.*

An order passed under the provisions of section 145 and proceedings under Chapter XII of the Code of Criminal Procedure is not subject to revision in view of the terms of section 435 (3) of the Code. But that section does not deprive the High Court of jurisdiction unless the proceedings are in fact, and not merely in name, proceedings under Chapter XII of the Code.

Proceedings under section 145 do not constitute a trial and are not in the nature of a trial. They are in the nature of Police proceedings in order to prevent the commission of offences, and the fact that there have been criminal charges brought by one or other of the parties against each other, so far from being a bar to action under Chapter XII, constitutes evidence which may possibly prove the danger of disputes which it is desired to prevent.

Where it was found that one of the parties to a proceeding under section 145 of the Code of Criminal Procedure had already been prosecuted and acquitted under section 447 of the Penal Code:

Held, that this was no bar to the proceedings. **U B** NGA CHIT *v.* NGA YA, 3 U. B. R. (1917) 33; 19 CR. L. J. 389 **741**

Criminal Procedure Code—contd.

—— - **s. 145 (1)**—*Preliminary order, condition precedent of—Jurisdiction.*

The condition precedent authorizing a Magistrate to issue an order under section 145 (1), Criminal Procedure Code, is that he should be satisfied that a dispute likely to cause a breach of the peace exists.

The fact that the complaint shows that the complainant was out of possession of the property in dispute for over two months does not vitiate the proceedings under section 145, Criminal Procedure Code **N** SHESHAROO NAGORAO PATIL *v.* EMPEROR, 19 CR. L. J. 414 **972**

—— —— **ss. 143 (3), 143 (3)**—*Proceedings under s. 145 started in presence of parties—Notice, whether necessary—Costs, order as to - Delay in making order, effect of.*

During the course of proceedings under section 144 of the Code of Criminal Procedure, the Magistrate intimated to the parties his intention to draw up proceedings under section 145 of the Code. On the following day he drew up proceedings under the latter section in the presence of the parties, who thereafter filed their written statements and adduced evidence in support of their respective cases:

Held, that the Magistrate was not guilty of any irregularity in proceeding with the case as he did and that the proceedings were not vitiated by want of formal notice to the parties.

An order for costs under section 148 (3) of the Criminal Procedure Code, made ten days after an order under section 145 (6) of the Code, is not illegal by reason of the delay in passing it. **Pat** CHADHARI AHIR *v.* RAJA RAM SINGH, 4 P. L. W. 274; 19 CR. L. J. 393 **743**

——— **s. 143 (3)** **743**

——— **s. 164** **321**

—— — **s. 181 (4)**—*Enticing away married woman—Detention for purpose of illicit intercourse—Detention, offence of, where to be enquired into—Jurisdiction.*

A complaint under section 498 of the Penal Code for detaining a woman for the purpose of illicit intercourse can be enquired into only in the District where such detention occurs, as section 181 (4) of the Code of Criminal Procedure refers only to cases of kidnapping and abduction, offences dealt with in sections 359 to 369 of the Penal Code, but does not apply to offences under Chapter XX of the Code. **P** JASWANT SINGH *v.* EMPEROR, 8 P. W. R. 1918 CR; 19 CR. L. J 438 **965**

——— **s. 195**—*"Court," meaning of—Tribunal constituted under Calcutta Improvement Act, 1911, whether Court Sanction to prosecute.*

The word "Court" in section 195, Criminal Procedure Code, has a wider meaning than a Court of Justice as defined in the Penal Code. It may include a Tribunal empowered to deal with a particular matter and authorised to receive evidence bearing on that matter in order to enable it to arrive at a determination.

The Tribunal constituted under the Calcutta Improvement Act of 1911 is a "Court" within the meaning of section 195, Criminal Procedure Code. Therefore, a person who has given false evidence before the Tribunal cannot be prosecuted for perjury without its sanction **C** NANDO LAL GANGULI *v.* KHETRA MOHAN GHOSE, 27 C. L. J. 463; 19 CR. L. J. 315 **331**

Criminal Procedure Code—contd.

——— **s. 195** *Sanction to prosecute—Appeal, temporary dismissal of, legality of—Procedure.*

Accused preferred a charge under section 406 of the Penal Code against one *B* which was dismissed. *B* then applied for sanction to prosecute accused for perjury, but that application was rejected. In the meantime accused brought a civil suit to recover the sum of money in respect of which he had preferred the charge in the Criminal Court. That suit was pending, when *B* appealed to the District Magistrate against the order refusing sanction to prosecute. The latter dismissed the appeal till the decision of the civil suit, but after its determination granted the sanction:

Held, (1) that the order of the District Magistrate granting sanction was illegal, inasmuch as the Magistrate became *functus officio* when he passed his order dismissing the appeal, there being no such thing known to law as a temporary dismissal of an appeal;

(2) that the proper procedure for the District Magistrate would have been to have postponed the decision of the appeal till the decision of the civil suit. **A** LACHHMI NARAIN *v.* BINDRABAN, 16 A. L. J. 210 9 CR. L. J 358 **582**

——— **s. 195** *Sanction to prosecute—Trying Magistrate, whether can question legality of sanction.*

A Magistrate trying an accused person for an offence for which sanction is required under section 195 of the Criminal Procedure Code, has no right to go behind the order of sanction and to question its propriety or legality. If he thinks that the sanction is bad for any reason he cannot refuse to recognise it all that he can do is to stay proceedings in order to allow the accused to get the sanction revoked by some Court to which the Court granting the sanction is subordinate. **P** EMPEROR *v* THAMMAN, 8 P. R. 1918 CR.; 17 P. W. R. 1918 CR.; 19 CR L. J. 399 **751**

——— **s. 195**—*Sanction, when can be said to be "given"—Duration of sanction—Period of six months, commencement of.*

A sanction granted under section 195 of the Criminal Procedure Code is "given" by the Court which first grants it, and not by the Court which subsequently refuses to revoke it. Hence the period of six months mentioned in section 195, clause (6), for which the sanction is to remain in force, must be computed from the day on which it is "given" by the Court which first grants it, and not from the date of the refusal of a superior Court to revoke it **A** TILAK RAM *v.* DALIP SINGH, 16 A. L. J. 223; 19 CR. L. J. 387 **739**

—— — **s. 195 (1) (b)**—*Offence committed before First Class Magistrate—Sanction to prosecute, application for - Magistrate transferred—Court, proper.*

An offence of abetment of perjury was committed during an enquiry into a murder case before a First Class Magistrate. An application for the grant of sanction to prosecute the accused was made to the Magistrate, but before the application could be disposed of the Magistrate was transferred and was succeeded by a Second Class Magistrate who had not the power to commit to the Court of Session. Before giving over charge the First Class Magistrate sent the papers to the District Magistrate, who granted the sanction required:

Criminal Procedure Code—contd.

Held, that the District Magistrate had jurisdiction to dispose of the application, inasmuch as he was the successor of the First Class Magistrate to the extent that he had power to commit to the Court of Session, and was "such Court" referred to in section 195 (1) (*b*) of the Criminal Procedure Code. **B** RAMRAO N. BELLARY, *In re*, 20 BOM L. R. 117; 19 CR. L. J. 332; 42 B. 190 **348**

——— **s. 195 (6)**—*Sanction to prosecute confirmed on appeal—Revision summarily rejected by High Court—Period of six months, commencement of.*

The period of six months, during which a sanction to prosecute remains in force under clause (6) of section 195 of the Code of Criminal Procedure, begins to run either from the time the original sanction was given or from the date of some subsequent order made by a competent Court which confirms the giving of the sanction or itself specifically gives a sanction. An order of the High Court summarily rejecting an application in revision does not approve or confirm the order of the Court below and therefore does not furnish a starting point for the period of six months to run from. **B** PARVATRAO MAHASKOJIRAO, *In re*, 20 BOM. L. R. 108; 19 CR. L. J. 353 **577**

——— **s. 195 (6), (7)**—*Sanction for prosecution—Bengal Tenancy Act (VIII of 1885), ss. 69, 70, Collector acting under, whether Court subordinate to District Court.*

A Collector acting under sections 69 and 70 of the Bengal Tenancy Act is a Court within the meaning of section 195, Criminal Procedure Code.

Proceedings under sections 69 and 70 of the Bengal Tenancy Act are of a civil nature and the Collector's Court trying such proceedings must be deemed to be subordinate for the purpose of section 195, Criminal Procedure Code, to the principal Court of original civil jurisdiction in the District, *i. e.*, the Court of the District Judge.

Per *Chitty, J.* (*Richardson, J*, hesitating).—The principal Court of original jurisdiction within the meaning of section 195, clause 7, does not necessarily refer to a Court of any particular class. It is a Civil or Criminal or Revenue Court as the case may be.

Per *Richardson, J.*—The words "where no appeal lies" in clause 7, section 195, Criminal Procedure Code, are wide enough to include both a particular case or class of cases in which no appeal lies as well a Court from which no appeal lies in any case, *e. g.*, a Small Cause Court.

Per *Chitty, J*—Although these words in clause 7, section 195, Criminal Procedure Code, are capable of such a wide meaning, yet the Legislature referred to Courts whose decisions are made final by law, *e. g.*, Small Cause Courts **C** CHANDI CHARAN GIRI *v.* GADADHAR PRODHAN, 22 C. W. N. 165; 27 C. L. J. 816; 45 C. 336; 19 CR. L. J. 273 **177**

——— **s. 195 (6), (7)**—*Sanction to prosecute granted by Subordinate Judge—Appeal, forum of.*

A District Court is the authority to which the Court of a Subordinate Judge is subordinate within the meaning of sub-section (6) of section 195 of the Criminal Procedure Code.

That section only refers to Courts and makes no distinction between appellate and original jurisdiction.

An appeal lies, therefore, from orders passed by Subordinate Judges under section 195 of the Criminal Procedure Code, whether in the exercise of original or appellate jurisdiction, to the District Court and not to the High Court. **M** RAPAKA VIYYANNA *v.* PARAKALA BAJAMMA, 19 CR. L. J. 264 **120**

——— **s. 197**—*Offence committed by* vatandar patil—*Sanction to prosecute, necessity of—Proceedings started before sanction, validity of.*

Where a Magistrate took cognizance of an offence committed by a *vatandar patil*, without the previous sanction required by section 197 of the Code of Criminal Procedure, and proceeded to record the whole of the evidence without being aware that any such sanction existed:

Held, that the whole of the proceedings were without jurisdiction and must be regarded as totally invalid. **B** EMPEROR *v.* BHIMAJI VENKAJI NADGIR, 20 BOM. L. R. 89; 19 CR. L. J. 34; 42 B 172 **454**

——— **s. 199**—*Penal Code (Act XLV of 1860), s 498—Accused charged with theft, whether can be convicted under s. 498.*

The provision in section 199 of the Code of Criminal Procedure, that no Court shall take cognizance of an offence under section 498 of the Indian Penal Code except upon a complaint made by the husband of the woman, refers to a complaint by the husband of an offence under section 498, not to any complaint made by the husband.

Where the complainant charged the accused with theft and neither in the complaint nor in his statement did he allege facts that constituted an offence under section 498 of the Penal Code, nor did he ever ask that the accused should be dealt with under that section:

Held, that having regard to the provisions of section 199 of the Code of Criminal Procedure the accused could not be convicted of an offence under section 498 of the Penal Code, there being no complaint against him by the husband that he had committed such an offence. **P** RODA SINGH *v.* EMPEROR, 2 P. R. 1918 CR. 19 CR. L. J 300 **204**

——— **ss. 202, 203**—*Postponement of process—Procedure.*

If a Magistrate takes it upon himself to postpone the issue of process for compelling the attendance of the person complained against for any purpose at all, he is required either to enquire into the case himself or to direct a local investigation. The fact that a local investigation has already been made does not affect the proceedings necessary under section 202 of the Criminal Procedure Code when once process has been postponed.

If an irregularity in procedure has not resulted in a miscarriage of justice, the High Court will not make an order which can result only in harassment to the parties and waste of public time. In a case in which a perfunctory enquiry has been made by the Police and the report considered in a perfunctory fashion by the Magistrate, the High Court will interfere and insist upon the provisions of section 202 being strictly enforced. But where the enquiry has been carefully made and carefully considered, the Court will exercise its discretion and refuse to re-open the matter. **Pat** SHEONANDAN MAHTON *v.* EMPEROR, 4 P. L. W. 114; 19 CR. L. J. 263 **119**

Criminal Procedure Code—contd.

——— **s. 203**—*Complaint, dismissal of.*

A Sessions Judge ordered further inquiry in a case dismissed by a Magistrate under section 203 of the Criminal Procedure Code, pointing out that the complainant had other evidence to produce to show that the cattle in the possession of the accused were his and suggested that a Police Officer should be deputed to search for the missing cattle. The Magistrate again dismissed the case under section 203, Criminal Procedure Code, upon the investigation and report of the Police:

Held, (1) that the Sessions Judge did not direct an investigation by the Police but simply pointed out that a Police Officer might be deputed to search for the cattle;

(2) that the complainant was entitled to produce evidence, oral and documentary, before the Magistrate, and the latter had no right to dismiss the complaint under section 203 when the order of the Sessions Judge clearly contemplated a trial of the case. **P** THAKAR SINGH *v.* KIRPAL SINGH, 10 P. W. R. 1918 CR.; 19 CR. L. J. 436 **964**

——— **207**—*Commitment to Court of Session—"Ought to be tried by such Court," scope of.*

The Criminal Procedure Code does not require that all cases of assault ending in death should be committed to the Court of Session. The expression "ought to be tried by such Court" in section 207 of the Code is limited to cases which the Magistrate is not competent to try or cases in which he is unable to inflict an adequate punishment. **S** IMPERATOR *v.* ISMAIL, 11 S. L. R. 79; 19 CR. L. J. 319 **335**

——— **s. 208 (2)**—*Cross-examination, whether can be postponed till all witnesses have been examined—Procedure.*

The proper time for cross-examination of a witness is immediately after the examination-in-chief, and an order by a Magistrate allowing an accused, without any special reason, to postpone cross-examining the prosecution witnesses until they have been all examined-in-chief is a proceeding not contemplated by the Code of Criminal Procedure.

An accused has no right under section 208 (2) of the Criminal Procedure Code to postpone his cross-examination of the witnesses for the prosecution until they have been all examined-in-chief, but the Magistrate has power to recall witnesses for further cross-examination if the circumstances of the case call for it. **L B** TAMRI *v.* EMPEROR, 9 L. B. R 109; 19 CR. L. J 327 **343**

——— **ss. 209, 210** **454**

——— **s. 233** **973**

——— **ss. 234, 235**—*Distinct offences committed within 12 months—Joint trial, how far permissible.*

Where an accused person commits more than three offences of the same kind within 12 months by distinct, separate and wholly unconnected acts, he may be tried in batches of three at each trial under separate charges.

Where the motive or object which actuates an accused in the commission of several distinct offences of the same kind is the same, the offences do not necessarily constitute one and the same transaction within the meaning of section 235 of the Criminal Procedure Code. **Pat** SITAL PRASAD *v* EMPEROR, 4 P. L. W. 105; 19 CR. L. J. 255 **47**

Criminal Procedure Code—contd.

——— **s. 235**—*General Clauses Act (X of 1897), s. 26—Opium Act (I of 1878), s. 9 (c), (f)—Bihar and Orissa Excise Act (II B. & O. of 1915), s. 47 (a)—Illegal possession and sale of opium—Joint trial under two Acts, validity of—Separate sentences, validity of.*

Separate sentences were passed on the accused under section 47 (*a*) of the Bihar and Orissa Excise Act and sections 9 (*c*) and 9 (*f*) of the Opium Act in the same trial in respect of two sales of opium to the same person and for possession of the residue of the opium left after the sales:

Held, (1) that the whole series of acts for which the accused was punished made one transaction within the meaning of section 235 of the Code of Criminal Procedure and the joint trial of the offences, therefore, was not illegal;

(2) that the conviction for possession was not in respect of the same article as that sold but for the residue, and that, therefore, separate sentences for the possession and the sale did not contravene the provisions of section 26 of the General Clauses Act. **Pat** BALI SAHU *v.* EMPEROR, 19 CR. L. J. 446; 3 P. L. J. 433 **974**

——— **s. 250**—*Compensation, order for, when to be made.*

A Magistrate in acquitting the accused called upon the complainant to show cause why an order for compensation should not be made against him. On the same day and on the next page he recorded the statement of the complainant and then made an order against him to pay compensation:

Held, that this was sufficient copmliancewith the provisions of section 250 of the Criminal Procedure Code. **P** EMPEROR *v.* SAUDAGAR RAM, 31 P. R. 1917 CR.; 19 CR. L. J. 444 **972**

——— **ss. 284, 285**—*Trial with aid of only one official assessor, legality of.*

The trial of an accused person was fixed for a certain date when only one duly qualified assessor was present in Court and capable of acting as such, whereupon the Judge ordered another person who happened to be present in Court but who was not on the official list of assessors, to act as an assessor:

Held, (1) that having regard to the provisions of section 284 of the Code of Criminal Procedure the trial was illegal;

(2) that section 285 of the Code was inapplicable to the case, inasmuch as the trial started with only one duly qualified assessor and was altogether abortive and contrary to law. **Pat** BALAK SINGH *v.* EMPEROR, 3 P. L. J. 141; 19 CR. L. J. 363; 5 P. L. W. 16 **587**

——— **ss. 298, 299, 164**—*Trial by Jury—Functions of Judge and Jury—Misdirection—Expressions assuming guilt of accused, propriety of.*

In a trial by Jury the Sessions Judge admitted as evidence confessional statements of the accused made to the Police which were not strictly within the limits laid down by section 27 of the Evidence Act, and also allowed the Committing Magistrate to depose to statements made by the accused in the course of a proceeding undertaken by him for verifying the confession—statements which were at no time recorded by the Magistrate in accordance with the provisions of section 164, Criminal Procedure Code:

Criminal Procedure Code—contd.

Held, that the trial was vitiated by misdirections so that the conviction of the accused and the sentence passed upon him must be set aside and the case re tried by the Sessions Court.

Per *Teunon, J.*—In a trial by Jury the Judge's treatment of a confession, though onesided to some extent, may not by itself be a sufficient misdirection to the Jury to necessitate a re-trial.

The Judge's instruction to the Jury to take into consideration against an accused statements of co-accused as their "confessions or confessional statements or confessions of a sort", when as a matter of fact those statements were not self-incriminating, amounts to a misdirection.

It is a misdirection for a Judge to leave it to the Jury to decide whether certain statements or confessions made by the accused and how much thereof are admissible in evidence. It is for the Judge to admit or exclude evidence in accordance with the law on the subject and for the Jury to weigh and value the evidence admitted.

A Judge in his charge to the Jury should avoid, as far as may be, the use of expressions which assume the guilt of the accused and must not indulge in the use of slang or colloquial phrases.

Verification proceedings undertaken by a Magistrate in the presence of the accused, with a view to testing the truth of his confession and to obtain evidence either corroborating the confession or indicating its falsity, are not wholly illegal: but the verifying Magistrate cannot be permitted to depose to statements said to have been made to him by the accused in the course of the verification proceedings, where such statements are not recorded by him in the manner provided by section 164, Criminal Procedure Code. **C** AMIRUDDIN *v.* EMPEROR, 22 C. W. N. 213, 27 C. L. J. 148; 19 CR. L. J. 505 **321**

——— **s. 299** **321**

——— **s. 342** —*Accused, duty of Court to question, after examination of prosecution witnesses*

The term "shall" in section 342 of the Code of Criminal Procedure makes the duty imposed on the Court to question the accused generally on the case, after the witnesses for the prosecution have been examined and before he is called for the defence, mandatory and not discretionary and having regard to the object of the examination specified in the section, namely, that it is intended to enable the accused to explain any circumstances in the evidence against him, the omission by a Court to perform this duty must be presumed to seriously prejudice the accused **P** GHULLA *v.* EMPEROR, 1 P. R. 9 8 CR; 19 CR L. J. 280 **184**

——— **s. 344**—*Adjournment of case—Costs, order for, validity of.*

The Criminal Procedure Code does not make special provision for costs in the course of a criminal trial and if section 344 of the Code is to be regarded as justifying an order as to costs, it can only be where the circumstances are exceptional and where for some reason or another the ordinary every day method of conducting criminal cases must be departed from. **S** ABDUL RAHMAN, *In re*, 20 BOM. L. R. 24; 19 CR L. J. 3 6 **342**

——— **s. 345**—*Composition of offence, effect of—Complainant, whether can retract—Composition before complaint, enforceability of—'Accused' in s. 345 (6), meaning of—Incomplete agreement, effect of.*

Criminal Procedure Code—contd.

Section 345 of the Criminal Procedure Code deals only with the *lawful* compounding of offences. The principles which apply to the offence also apply to the exception.

The section is not limited to acts done in Court or to cases in which the parties continue to be of the same mind until the case comes on for further hearing before the Court. Once a composition has been effected, the matter is at an end and the person injured cannot effectively resile from the agreement. If he chooses to do so, it is for the Court to enquire into the accused's allegation that the offence was compounded out of Court and to direct an acquittal under the section if it so finds.

A composition made before the filing of a complaint in Court is covered by the provisions of section 345, the offence being complete when the acts constituting it have been committed apart from whether any complaint or charge has been laid before the Court or not

The word 'accused' in paragraph 6 of the section only describes the character of the person accused of the offence at the time of the trial when the question of the effect of the composition is under consideration.

To operate as an acquittal the compounding must have been completed and any incomplete agreement would not amount to an acquittal within the meaning of the law. **M** KUMARASAMI CHETTY *v* KUPPUSAMI CHETTY, 34 M. L. J. 217; 7 L. W. 274; 23 M L. T 240; 19 CR. L. J 359 **583**

——— **s. 350** **328**

——— **ss. 350, 537**—*Applicability of s. 350—Transfer of case—Transfer of Magistrate—Judgment pronounced on evidence recorded by another Magistrate—Irregularity—Revision.*

Section 350 of the Criminal Procedure Code applies as much to cases in which a Magistrate ceases to exercise jurisdiction by reason of the transfer of the case to another Court, as to cases in which the Magistrate ceases to exercise jurisdiction by reason of his own death or transfer to another post In other words, the section covers cases of transfer as well as those cases in which the Court remains the same but the person of the presiding officer is changed

A complaint filed against the accused was referred for trial to a Second Class Magistrate, who recorded the whole of the prosecution evidence and a portion of the evidence for defence The accused then applied to the District Magistrate for transfer on the express undertaking that in the event of transfer he would be satisfied if the Court, to which the transfer was made, pronounced judgment after recording the evidence of the remaining defence witnesses The District Magistrate transferred the case to a First Class Magistrate, with the direction to proceed with the trial from the stage which it had reached in the Court of the Second Class Magistrate The accused did not claim that the evidence should be recorded *de novo* and the First Class Magistrate passed sentence upon him after recording the rest of the defence evidence:

Held, (1) that inasmuch as the accused did not demand that any of the witnesses should be re-summoned and re-heard, proviso *a* to clause (1) of section 350 of the Criminal Procedure Code did not apply

and could not be relied upon in support of an application for revision:

(2) per *Walsh, J.*) that even if the Magistrate commited an irregularity it was curable by section 537 in the absence of circumstances showing a failure of justice. **A** RAM DAS *v.* EMPEROR, 16 A. L J. 217; 19 CR. L J 378 **682**

——— **s. 350**—*Transfer of Magistrate—Trial de novo—Procedure.*

The right of claiming a trial *de novo* on the transfer of a Magistrate is given to an accused person in order that he may have the very great benefit of the Trying Magistrate having the witnesses examined and cross-examined in his presence, so that he may see and note their demeanour and manner of giving evidence. When the right is claimed the Magistrate must re-commence the trial.

In a criminal trial the Magistrate was transferred after the prosecution evidence was heard and a charge framed. The accused claimed a trial *de novo* before the succeeding Magistrate. Thereupon the witnesses were re-summoned, their statements were read over to them and they were further cross-examined. No fresh charge was framed nor was the accused examined by the Magistrate:

Held, that the provisions of section 350 of the Criminal Procedure Code were not complied with and that a new trial must be ordered **L B** HNIN YIN *v* THAN PE, 9 L. B. R. 92; 19 CR. L. J. 321; 11 BUR L. T. 58 **337**

——— **s. 369**—*Trial for theft—Conviction and sentence—Subsequent sentence on account of previous conviction, validity of.*

Accused was tried, convicted and sentenced under section 379 of the Penal Code. There was also a charge against the accused under section 75 of the Code read with section 379, which was not proceeded with until after the sentence in respect of the offence under section 379 had been passed:

Held, that the trial came to an end when sentence was pronounced in respect of the offence under section 379 and that having regard to the provisions of section 369 of the Criminal Procedure Code the Judge had no power to proceed with the trial of the charge under section 75 of the Penal Code and sentence the accused to enhanced punishment. **B** MAKI PARSU *v.* EMPEROR, 20 BOM L. R 87; 19 CR. L. J. 279; 42 B 202 **183**

——— **s. 403**—*Acquittal on charge under s. 465 of the Penal Code, whether prevents subsequent trial for offence under s 467.*

A person tried and acquitted on a charge under section 465, Indian Penal Code, may on the same facts be committed to the Court of Session for trial for an offence under section 467 on the allegation of the prosecution that the document said to have been forged is a valuable security. Such a case clearly falls within the purview of section 403, clause 4, Criminal Procedure Code **C** ABDUL HAKIM KHAN *v.* EMPEROR, 19 CR. L. J. 388 **740**

——— **s. 408**—*Appeal from sentence passed by Assistant Sessions Judge—Forum of appeal—Trial Judge officiating as Sessions Judge—Procedure.*

An appeal from a conviction and sentence by an Assistant Sessions Judge, where the sentence is less than four years' rigorous imprisonment, lies to the Sessions Court, and the fact that by the time the appeal is ready the Assistant Sessions Judge who tried the case has been promoted to officiate as Sessions Judge does not give the High Court any jurisdiction to try the appeal. In such a case it is open to the Officiating Sessions Judge, on receipt of the appeal, to either send the case to the High Court for disposal or to admit the appeal and postpone it till the return of the Sessions Judge. **Pat** GARIB LALL *v.* EMPEROR, 3 P. L J. 192; 19 CR. L. J. 442; 5 P. L. W. 24 **970**

——— **s. 417**—*Appeal against acquittal—Appellate Court, interference by, when justified.*

Where the findings of fact of a Trial Court are in favour of the accused's innocence, a Court of Appeal will not in an appeal against the order of acquittal interfere with the verdict unless the indications of mistake in the judgment of the lower Court are obvious or the evidence as to the accused's guilt is too strong to be rejected. It is immaterial that the Appellate Court might have arrived at a different conclusion had it been trying the accused as a Court of original jurisdiction.

A confessing prisoner should not be condemned upon a retracted confession unless it is corroborated in material particulars. **P** EMPEROR *v.* JAWAI, 19 P. W. R. 918 CR; 19 CR. L. J. 275 **179**

——— **s. 421**—*Appeal, summary dismissal of—Judgment, writing of, necessity of—Revision.*

Section 421 of the Criminal Procedure Code empowers an Appellate Court to dismiss an appeal summarily without writing a judgment or giving reasons, but it is within the power of the High Court in revision to say after having regard to the facts of each particular case whether or not the Appellate Court has exercised a proper discretion in acting under that section If the High Court finds that the case is one which should not have been dealt with summarily, the High Court will send the case back ordering the Appellate Court to hear it on its merits and pass a judgment **L B** NGA BA MYIT *v.* EMPEROR, 19 L R L J. 316 **332**

——— **s. 421**—*Appeal, summary dismissal of, without giving reason, legality of—Procedure.*

In dismissing appeals under section 421 of the Code of Criminal Procedure some reason should be given and without such reason the summary dismissal would involve either a remand of the appeal to be admitted and heard or an examination of the evidence by the High Court. **Pat** RAM KANT PANDIT *v.* EMPEROR, 4 P. L. W. 212; 19 CR. L. J. 304 **208**

——— **ss. 435, 439**—*Revision against acquittal—Appellate Court, duty of—Evidence, discussion of—Criminal trespass Civil dispute.*

It is not a good reason for an Appellate Court to set aside a conviction for criminal trespass and acquit the accused without discussing the evidence or coming to any conclusion thereon, on the mere ground that the case is of a civil nature especially where the first Court has tried out the matter and has come to the conclusion that the accused is guilty of the offence charged. **C** HARAI CHANDRA NAMA *v.* OSMANALI, 27 C L. J. 224; 19 CR. L. J. 321 **337**

——— **s. 435 (3)** **673, 685, 741**

——— **s. 437** *Discharge of accused Further inquiry, order for, without notice—Discretion—Practice,*

Criminal Procedure Code—contd.

Nothing in section 437 of the Criminal Procedure Code requires previous notice to any accused person who has been discharged before further inquiry into his case is ordered by a competent authority, that is to say, by the High Court, the Sessions Judge or the District Magistrate. Nevertheless as a matter of judicial discretion it is advisable that previous notice should issue when the matter for consideration is the setting aside of an order of discharge passed in favour of an accused person who has actually been before a Court to answer the facts alleged against him.

The fact of a person's being in the position of an accused with another during an inquiry which resulted in the order of discharge, should not at all prevent his being summoned as a witness in the further inquiry ordered. **A** ABDUL LATIF KHAN *v.* EMPEROR, 16 A. L. J. 298; 19 CR. L. J. 401 **929**

——— **s. 437**—*Further enquiry—Notice to accused, whether necessary—Procedure.*

A District Magistrate is not bound in law to issue any notice on the accused before ordering a further enquiry under section 437 of the Criminal Procedure Code, but the exercise of discretion in favour of issuing a notice is considered to be the right and proper action to take. **Pat** RAMBAHAL RAI *v.* EMPEROR, 4 P. L. W. 220; 19 CR. L. J. 399 **751**

——— **s. 439** **337**

——— **ss. 496, 498, 112, 118**—*Security for good behaviour, proceedings for—Bail, excessive—Fair trial.*

When a man is arrested who is not accused of a non-bailable offence, no needless impediments should be placed in the way of his being admitted to bail. The intention of the law is that in such cases the man is ordinarily to be at liberty and it is only if he is unable to furnish such moderate security, if any is required of him, as is suitable for the purpose of securing his appearance before a Court pending enquiry, that he should remain in detention.

An order was made against the accused under section 112 of the Code of Criminal Procedure and he was then told that he would be admitted to bail only if he furnished his own recognisance for Rs. 10,000 and a surety for the same amount, these being the particular sums which were also stated in the order under section 112. The result was that owing to his inability to furnish such heavy security the accused remained in custody during the greater part of the enquiry. Finally an order was made against him under section 118 of the Code of Criminal Procedure:

Held, that the order requiring security for bail in such large sums was oppressive and that the accused had not, therefore, had a fair trial and that the order under section 118 must consequently be set aside. **B** MIR HASHAMALI MIR KASAMALI *v.* EMPEROR, 20 BOM. L. R. 121; 19 CR. L. J. 329 **345**

——— **s. 498** **345**

——— **s. 503** **741**

——— **s. 514** **971**

——— **s. 517**—*Gambling, conviction for—Money tied in gamblers' cloth, whether used for 'commission of offence'—Confiscation, legality of—'Used for gaming', meaning of—Discretion of Court—Jurisdiction—'Make such order as it thinks fit' in s. 517 of Act V of 1898, meaning of.*

Criminal Procedure Code—concld.

Section 517, clause 1, Criminal Procedure Code, authorises the confiscation only of property which has been used for the commission of an offence.

The words 'may make such order as it thinks fit' in the section do not confer on a Court absolute power of disposition over property which is produced before it but regarding which no offence has been committed and which has not been used for the commission of an offence.

Per *Phillips, J*—The powers under section 517, Criminal Procedure Code, are very large and the Magistrate's discretion under it is wide, but such discretion must be exercised judicially and, if so exercised, the High Court should not interfere with it in revision.

If there are circumstances from which an inference can be drawn that money has been used for gaming, a Magistrate can order its forfeiture and it is not necessary that he should hold an enquiry for that purpose. **M** APPAJI IYER *v.* EMPEROR, 34 M. L. J. 253; 7 L. W. 528; 19 CR. L. J. 501 **205**

——— **s. 537** **682**

Criminal trial—*Alternative defences.*

There is nothing in law to prevent a man on his trial on a charge of culpable homicide from setting up an alternative defence, *e.g., first*, that he was not present at the occurrence referred to by the prosecution witnesses and that they were giving false evidence against him; *secondly*, that even if he had failed to persuade the Court of this fact, he could show from the statements of the prosecution witnesses themselves that if he had caused the death of any person in the manner and under the precise circumstances deposed to by them, he was acting in the lawful exercise of a right of private defence. **A** YUSUF HUSAIN *v.* EMPEROR, 16 A. L. J. 169; 19 CR. L. J. 371 **675**

——— *Procedure—Accused, right of, to make defence—Irregularity.*

A Magistrate exercises his jurisdiction with material irregularity if he holds a trial at a place where the accused is totally incapable of making a proper defence. **Pat** MEWA LAL *v.* EMPEROR, (1917) PAT. 363; 3 P. L. J. 147; 19 CR. L. J. 249; 4 P. L. W. 359 **41**

——— *Prosecution, duty of.*

It is not sufficient in the case of the trial of an accused in a criminal cause for the Crown merely to establish a *prima facie* case of guilt. They must establish, so far as they can, by every reasonable means in their power, evidence to support the facts proving conclusively the guilt of the accused. **Pat** LUCHMI SINGH *v.* EMPEROR, (1918) PAT. 36; 19 CR. L. J. 344 **456**

Custom—Burden of proof, whether question of law or of custom **162**

——— *Daughter, whether agnate-Execution-Father's estate, whether liable in hands of daughter.*

A daughter is not an agnate of her father and she derives her title not from the common ancestor but from her father. She has no right, superior to that of her father; she represents him; and his estate in her hands is liable for his debts. **P** KISHEN SINGH *v.* RAHMAT BIBI, 12 P. R. 1918 **561**

———, *evidence of, how to be dealt with by Courts.*

Custom—contd.

In dealing with evidence of custom, Courts should examine the evidence covering the whole period of the custom. It may be that the earlier evidence is not sufficient to establish the custom: it may be that it is sufficient but that later evidence establishes a discontinuance—all these aspects must be considered.

Where abandonment of a customary due is pleaded it is for the tenant to prove it and mere non-receipt of the due will afford very weak evidence of such abandonment. **M** KUMARAPPA REDDI *v.* MANAVALA GOUNDAN, 23 M. L. T. 44; 34 M. L. J. 104; 7 L. W. 243; 41 M. 574; (1918) M. W. N. 350 **699**

———, reasonable—Burden of proof **663**

———**Alienation** — *Male proprietor, powers of—Exchange, whether transfer.*

An exchange is a transfer of property and its validity must be determined in the same way as that of any other transfer.

A male proprietor cannot be reduced to the level of a widow, and the canon by which a transaction effected by him should be judged is whether it is a fair and *bona fide* one, such as may be regarded as an act of good management.

An exchange effected by a male proprietor would be binding upon his reversioners, if it is beneficial to the persons interested in the estate. **P** NAZIR *v.* AMAR CHAND, 9 P. W. R. 1918; 156 P. L. R. 1917 **224**

——— ——— ———*Necessity—Expenses of defence of head of family, whether legal necessity.*

Money raised on ancestral land for the purposes of the defence of the head of the family on a criminal charge must be considered as having been raised for a valid legal necessity. **P** NARAIN SINGH *v.* KHAZAN SINGH, 22 P. R. 1918 **814**

——— ———*Proprietary rights acquired by occupancy tenants, effect of.*

Where the sons of a Government tenant who acquired occupancy rights in the lands granted to him acquire the full proprietary rights therein, the occupancy rights merge in the proprietary rights and determine absolutely, and the persons who have acquired the proprietary rights are entitled to alienate the lands with or without necessity. **P** LAL *v.* GAUHAR, 5 P. R. 1918 **129**

———**Marriage**—*Evidence—Long cohabitation—Man and wife, treatment as—Presumption.*

When a man and a woman have long cohabited and have been treated by their acquaintances, and have treated each other, as man and wife, such long co-habitation plus such treatment is sufficient among Jats to establish a marriage and the legitimacy of the offspring.

Where, however, the parties have not treated each other as man and wife but as master and concubine, the same legal results do not flow from cohabitation even of long date. **P** PARTAP SINGH *v.* PARTAPI, 146 P. L. R. 1917 **893**

———**Succession** — *Ancestral property—Daughter, whether excludes another daughter's daughter*—Onus—*Sayads of Jullundur District.*

Among Sayads of the Jullundur District a daughter's daughter succeeds to her mother's share of ancestral property in preference to another daughter.

The onus of proving that a sister excludes her sister's daughter in succession to ancestral property held by the latter's mother is on the person alleging it. **P** AZIM BIBI *v.* UMTAN BIBI, 21 P. W. R. 1918 **979**

Custom—concld.

———**Succession**—*Self-acquired property—Daughters* versus *collaterals—Gariwal* Jats *of Ludhiana District.*

Among Gariwal Jats of the Ludhiana District there is a special custom, contrary to general custom, whereby daughters are excluded from succession to self-acquired property by collaterals. **P** HAZARA SINGH *v.* BISHEN SINGH, 72 P. W. R. 1918 **853**

Defence of India (Criminal Law Amendment) Act (IV of 1915), s. 4 **185**

District Magistrate, *direction by, to Magistrate to pass particular order in case pending before him, validity of.*

A District Magistrate acts wrongly in giving a direction to a Magistrate subordinate to him that he should pass a particular order with respect to a case which is pending before him in his judicial capacity. **P** THAKAR SINGH *v.* KIRPAL SINGH, 10 P. W. R. 1918 CR; 19 CR. L. J. 436 **964**

Easements Act (V of 1882), s. 17—*Water discharged over surplus weir of tank—Easement, right of, acquisition of.*

Section 17 of the Easements Act implies that a right of easement in connection with the use of water of artificial channels or of water derived from artificial tanks or pools can be acquired by prescription.

A person can acquire a right of easement with respect to water which is discharged over the surplus weir of a tank and which flows therefrom in a defined channel, if he has been using and enjoying the water for a sufficient length of time and as a matter of right as laid down in section 17 of the Easements Act. **M** BODDULURU NAGAYYA *v.* BACHU CHENCHURAMAYYA, 33 M. L. J. 674; (1917) M. W. N. 863 **625**

——— **s. 22**—*Dominant and servient tenements—Upper owner draining rain or other water on to adjoining land—Easement—Natural, customary and prescriptive right—Injunction not to obstruct exercise of easement, form of.*

An owner of land may have a customary or prescriptive right to drain water coming to his land by the falling of rain or drained from upper fields or brought by himself for purposes of irrigation on to adjoining land.

Per *Sadasiva Aiyar, J.*—An owner of land may have a *natural* right not only to drain rain water falling on his land on to neighbouring land where it is lower in level than his land, but also to drain water brought on his land by the custom and usages of the country along irrigation channels.

An injunction as to easements which have been broken should be confined to a direction to the party breaking not to obstruct the exercise of the easement and should not descend into details, so as to prevent the servient owner from taking advantage of the privilege given to him by section 22 of the Easements Act.

Per *Phillips, J.* (*Obiter.*)—An owner of land can have no natural right to pass water, which has come on his land artificially, on to adjoining land.

Easements Act—concld.

M DORAISWAMI MUTTIRIYAN *v.* MUTTACHI, (1918) M. W. N. 167; 23 M. L. T. 210 **500**

——— **s. 24, III. (d)**—*Public paths—Dedication, nature of—Easement, indeterminate body of persons, whether can claim—Public path closed—Right of deviation, extent of.*

Public rights of way are not easements. Public, differing from private rights of way originate from a dedication to the public by the owner of the soil over which they pass. Dedication means a gift not necessarily by a deed or any written document, and it is more often implied from custom and user than from any definite act of the owner of the land. Even when no such overt act can be shown, if the public use a way for some time to the knowledge of a land-owner and without resistance, dedication will be inferred and a right gained.

There can be no right of easement in favour of an indeterminate body of persons.

If a person encloses a public path over his land and allows a new one to be opened in its place, he must be presumed to have made a fresh grant to the public of the new path.

When the owner of the land renders a way impassable, the persons entitled to use the way may deviate from it and pass over the adjoining land of the owner provided that the deviation is reasonable

A cultivator, *prima facie*, has a right to the exclusive use of his own field and very strong evidence is necessary before it can be held that other people have a right of way, public or private, over his land. **N** LAXMAN *v.* TUKIA, 14 N. L. R. 78 **868**

Endowment, *deed of, validity of*—Pardanashin *lady, deed executed by—Evidence, nature of—Burden of proof.*

Where the execution of a deed of endowment by a *pardanashin* lady was questioned, and the evidence showed affirmatively and conclusively that the deed was explained to her, and she thoroughly understood it and signed it after execution not under duress or undue influence but from her free and independent will, that the disposition of the property was a most natural disposition and that besides her strength of will and business capacity, she had independent outside advice coming from members of her own family, who were interested in the promotion of the objects she had at heart:

Held, that the deed of endowment was a valid and legal disposition. **O** GANGA BAKHSH SINGH *v.* GOKUL PRASAD, 4 O. L. J. 744 **645**

Estoppel **304, 547, 570**

——— *and prescription, acquisition of permanent occupancy rights by—Burden of proof.*

The mere fact of the tenants alienating the lands without protest or demur by the temple trustees will not confer on the tenants a right of permanent occupancy by estoppel or prescription **M** MUNA MUHAMMAD *v.* MUTHU ALAGAPPA CHETTIAR, 23 M. L. T. 161; 34 M. L. J. 254; 7 L. W. 330 **894**

——— *by representation, plea of.*

Estoppel by representation only arises where the representation is as to a matter of fact.

It is absolutely necessary to plead estoppel if it is intended to rely upon it. **C** CHANDI CHARAN NATH *v.* SOMLA BIBI, 22 C. W. N. 179; 28 C. L. J. 91 **254**

Estoppel—concld.

——— *, title by.*

There is no such thing in law as title by estoppel. **N** DEOBA *v.* LAXMAN **978**

Evidence—*Inadmissible evidence admitted at request of parties, whether can be objected to in appeal.*

Where the parties themselves request either that certain evidence which is not in itself admissible as evidence, if objections are taken, should be considered by the Court or where they request that the Judge should himself put questions to witnesses, it does not lie in the mouth of either party, who asks that that course should be taken, afterwards to question it in appeal **Pat** NARAIN SINGH *v.* BABA, 4 P. L. W. 89; 1 P. 181) PAT 131 **262**

Evidence Act (I of 1872), s. 21 **699**

——— **ss. 24, 25, 26, 27**—*S. 27, whether controls s. 24—Confession of co-accused, admissibility of—Supplementary statements by accused during verification proceedings, admissibility of.*

Section 27 of the Evidence Act qualifies not only sections 26 and 25 but also section 24. Therefore, when a confession as a whole is excluded, whether by reason of the provisions of section 26 or of section 25 or of section 24, so much of the information given by the person making the confession when he was an accused and in custody as distinctly relates to a relevant fact thereby discovered becomes admissible.

Under section 27 of the Evidence Act so much of the information as set the Police in motion and led to the "discovery" is admissible It does not matter whether the accused himself produced the articles said to be discovered by his statement or confession.

Per *Shamsul Huda, J.*—Section 24 of the Evidence Act does not control section 27 If a single statement made by the accused contains more information than what is contemplated in section 24, the statement is not to go in as a whole nor is it to go in as a statement at all, but what is admissible is the particular information given by the statement which has led to the discovery.

The verification of a confession by taking the accused to various places referred to in the confession lends itself to great abuses and should be avoided. There is perhaps nothing objectionable if a verification is made independently of the confessing accused and unaided by him.

It would be difficult to hold that the supplemental statements made by the confessing accused in the course of the verification proceedings were voluntary even where they are recorded by the Magistrate in the manner provided in section 164, Criminal Procedure Code. **C** AMIRUDDIN *v.* EMPEROR, 22 C. W. N. 213; 27 C. L. J. 145; 19 CR. L. J. 305 **321**

——— **s. 25**—*Excise officer, whether Police Officer—Confession to Excise Officer, admissibility of.*

An Excise Inspector is not a Police Officer, and, therefore, a confession made to him is admissible in evidence against the accused. **P** EMPEROR *v.* WAZIR SINGH, 3 P. R. 1918 CR; 19 CR. L. J. 364 **588**

——— **s. 27**—*Statement of accused leading to discovery, nature of, admissibility of.*

It is quite legitimate for a Magistrate to record evidence under section 27 of the Evidence Act that an accused person said "I will point out certain property," if that statement of the accused leads to a discovery, but it is not legitimate to record as

evidence that an accused person said, "I will point out certain property which I obtained as my share of the booty in the dacoity." **P** GURDIT SINGH *v.* EMPEROR, 9 P. W. R. 1918 CR.; 19 CR. L. J. 439 **967**

——— **ss. 32, 34.**

A *jamabandi* which cannot be admitted as corroborative evidence without independent evidence of the fact of collection of rent at a certain rate under section 34 of the Evidence Act, can be used as independent evidence if it is relevant under section 32 of the Act. But although it would not, as a matter of law, require corroboration, yet the Court is not bound to act upon it without corroboration. **Pat** CHARITTER RAI *v.* KAILASH BEHARI, 4 P. L. W. 213; (1918) PAT. 145; 3 P. L. J. 306 **422**

——— **s. 34** **422**

——— **ss. 68, 69, 70, 71**—*Attestation of document—Admission by executant, effect of.*

An admission of execution of a document by the executant thereof dispenses with the necessity of complying with the provisions of section 68 of the Evidence Act as against the party making the admission. Those provisions, however, must be complied with in order to prove the execution of a document as against the other parties to the suit who do not admit such execution. The document must be proved as against them in accordance with the provisions of sections 68, 69, 70 and 71 of the Act. **C** NIBARAN CHANDRA SEN *v.* NAGENDRA CHANDRA SEN, 22 C. W. N. 444 **984**

——— **s. 68**—*Mortgage-deed—Attestation, proof of—Witness summoned, but not examined—"Called," meaning of—Document incorporated in subsequent deed, effect of.*

Defendants executed a mortgage in favour of plaintiffs, but it was discovered that the scribe had erroneously entered a lower rate of interest in the deed than was agreed upon between the parties. A fresh deed was thereupon drawn up and executed, which described the correct rate of interest and incorporated some clauses of the previous deed. In a suit on the mortgage it was found that one of the attesting witnesses of the first deed was dead. The second attesting witness was summoned but not examined:

Held, (1) that the first deed could not be used in evidence as an independent document either requiring attestation or in fact attested, inasmuch as the provisions of section 68 of the Evidence Act had not been complied with;

(2) that the second deed having been duly attested and executed and having incorporated the prior deed, the prior deed was admissible in evidence as part of the second deed.

The word "called" in section 68 of the Evidence act means tendered for the purpose of giving evidence. **A** MOTI CHAND *v.* LALTA PRASAD, 16 A. L. J. 121 **596**

——— **s. 69**—*Proof of document where all attesting witnesses are dead.*

Where all the attesting witnesses of a mortgage-bond including the scribe were dead and a witness was called who proved the handwriting of the attesting witnesses and who said that he was present at the execution of the document, but did not say that he saw the mortgagor signing his name nor did he say that the signature on the document was the signature of the mortgagor:

Held, that there was a defect in the proof of the mortgage-bond under section 69 of the Evidence Act. **C** RAJESWARI DASI *v.* BENODA SUNDARI DASI, 22 C. W. N. 278 **533**

——— **ss. 70, 71** **984**

——— **ss. 74, 83**—*Survey maps, evidentiary value of.*

Survey maps are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible and valuable evidence of the state of things at the time they were prepared. They are not conclusive and may be shown to be wrong: but in the absence of evidence to the contrary they may be judicially received in evidence as correct when made. **L B** MAUNG THIN *v* MA ZI ZAN **247**

——— **s. 83** **247**

——— **s. 90**—*Document more than 30 years old—Presumption—Genuineness—Admissibility of document—Objection not taken in trial Court, whether can be taken in appeal.*

Where a party producing a document is unable to say who prepared or signed it or where the document itself does not purport to show who prepared or signed it, the mere fact of the document being more than 30 years old does not make it admissible without proof under section 90 of the Evidence Act.

Where a document is admitted in evidence without objection in the trial Court, no objection as to its formal proof can be taken in appeal. **Pat** CHARITTER RAI *v.* KAILASH BEHARI, 4 P. L. W. 213; (1918) PAT. 145; 3 P. L. J. 306 **422**

——— **s. 90**—*Presumption as to genuineness of ancient documents—Discretion of Court—Appellate Court, interference by.*

The question of making a presumption with regard to the genuineness of a document under section 90 of the Evidence Act is one in which the Court has to exercise its discretion and when that discretion has been exercised with due care and the presumption allowed by law has been made an Appellate Court should be slow to interfere with such discretion. **P** MUHAMMAD USMAN *v.* RAHIM BAKHSH, 57 P. W. R. 1918 **559**

——— **s. 105** **675**

——— **s. 114**—*Presumption as to correctness of official acts—Burden of proof—Procedure.*

There is a presumption under section 114 of the Evidence Act that an official act has been regularly performed but when an applicant before the Court is attempting to rebut that presumption, it is not for the Court itself to give assistance to the other side or to deal with the matter otherwise than impartially. **Pat** SOHAGBATI *v.* SOURENDRA MOHAN SINGH, 4 P. L. W. 296 **661**

——— **s. 114, Ill. (b)** **967**

——— **s. 115**—*Estoppel—Mortgage—Co-mortgagees, agreement between, to pay off prior mortgage—Failure by one mortgagee to inform co-mortgagee of his charge, effect of.*

One *S.* executed a mortgage in favour of *A* and *B*. Some payments were made by *S.* towards the satisfaction of the mortgage debt which were admittedly taken by *B.* alone. Subsequently *S.* executed another

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mortgage in favour of *B* and *C* in order to pay off the prior mortgage. *B* and *C* foreclosed the property. *B* sold his half share in the foreclosed property to the plaintiff and he also sold his right under the prior mortgage, alleging that it had not been fully satisfied. Plaintiff sued to foreclose *C's* share of the property on the basis of the first mortgage, alleging that it had not been completely satisfied:

Held, that in view of the implied terms of the contract between *B* and *C*, that contract being that they embarked upon a joint adventure for the purpose of extinguishing the prior mortgage and taking a first charge on the property, it was the legal duty of *B* to inform his co-mortgagee within a reasonable time that he had still an outstanding claim under the prior mortgage and that *B's* omission to give the information amounted to such an omission as is contemplated by section 115 of the Evidence Act and operated as an estoppel against *A* under that section. **N** PANDURANG SHAMJI *v.* NARAYAN RAO **547**

——— **s. 116** **368**

——— **s. 138** **343**

——— **s. 154** **33**

Execution—*Decree, assignment of—Question whether assignee real or ostensible transferee, whether can be decided in execution proceedings.*

N. took an assignment of a mortgage-decree and applied to the execution Court to have her name substituted in the place of the decree-holder. The judgment-debtors lodged an objection to the effect that *N.* was not the real assignee of the decree, but that her husband, who was the Pleader for the judgment-debtors in the execution case, was the real purchaser of the decree, and that the effect of the purchase of the decree by the Pleader for the judgment-debtors was to satisfy the decree and to discharge the judgment-debtors:

Held, that the Pleader was not and could not be a party to the execution case and no question could consequently be decided as between him and his wife as to who was the beneficial owner of the decree. **C** NAGENDRAE BALA DASSI *v.* DEBENDRA NATH, 22 C. W. N. 491; 27 C. L. J. 388 **13**

———*Decree, assignment of, pending appeal—Assignee, right of, to execute decree in appeal.*

When a decree is assigned, what is transferred is not the decree itself but the interest of the decree-holder in the decree as may be finally determined.

An assignment of a decree, therefore, during the pendency of an appeal against it carries with it the right to execute the decree passed in appeal. **M** PONNUSAMI PILLAI *v.* CHIDAMBARAM CHETTIAR, (1918) M. W. N. 194; 23 M. L. T. 213; 7 L. W. 566 **849**

———*Duty of executing Court—Decree to be executed literally—Subject-matter of decree altered materially—Decree, whether capable of execution.*

An executing Court cannot tamper with decrees which must be executed literally.

When a decree cannot be executed literally it cannot be executed at all.

Plaintiff obtained a decree that he was entitled to share the water flowing through a certain *rajbaha* equally with the defendant. Subsequently the canal authorities made certain alterations, as a result of which the volume of water flowing through the *rajbaha* was increased and many other persons besides the plaintiff and the defendant became entitled to share in the water:

Held, that the decree in favour of the plaintiff was no longer capable of execution. **P** KHAWAJA MAHMUD *v.* GHULAM RASUL, 59 P. W. R. 1918 **530**

———Father's estate, whether liable in hands of daughter **561**

———Mortgage debt, whether can be sold apart from security **528**

———*Sale, suit to set aside—Court, duty of.*

When a Court-sale is challenged, it is not the business of the Court to collect materials upon which the sale may be supported for the sake of the reputation of the Court. **Pat** SOHAGBATI *v.* SOURENDRA MOHAN SINGH, 4 P. L. W. 296 **661**

———*Small Cause Court, whether can attach and sell preliminary decree for foreclosure of immoveable property.*

A Small Cause Court can attach and sell a preliminary decree for foreclosure of immoveable property. **N** KRISHNAJI *v.* BALIRAM **252**

Fishery, *right of—Ownership of tank, whether carries with it right to fish—Prescriptive right, claim of, by villagers—Burden of proof—Lost grant, doctrine of, applicability of—Presumption—Unreasonableness of right claimed—Pleadings—Finding on point not covered by issue—Evidence taken—Remand.*

Plaintiff, the lessee of a Zemindari village, claimed the exclusive right of fishing in a tank situated therein and sued defendants, the *ryots*, for an injunction restraining them from obstructing him in the enjoyment of such right. Defendants pleaded that they had acquired a prescriptive right to fish in the tank on payment of *'pasivari'* cess to the Zemindar. The plea was upheld by the Court, though no specific issue was framed on the point:

Held, (1) that the plaintiff must prove both his title and possession within 12 years before suit;

(2) that proof of plaintiff's ownership of the tank did not relieve plaintiff from establishing that the ownership of the tank carried with it the exclusive right of fishing therein, especially after evidence had been let in by defendants to prove the prescriptive right which they claimed;

(3) that on proof of a prescriptive title by defendants, it was competent to the Court to presume a legal origin for it on the principle of a lost grant;

(4) 'that defendants' right by prescription could not be negatived on the ground of its being unlimited, unreasonable or without stint;

(5) that as evidence was let in by the lower Courts on the question of prescription, it was not necessary to remit the case back for raising an issue and recording a fresh finding. **M** SUBRAMANIAN CHETTY *v.* VIJIA BAGHUNATHA PILLAI, 6 L. W. 769; 22 M. L. T. 523 **419**

Fraud, *decree obtained by, suit to set aside—Burden of proof—Suspicious circumstances*—"Ei qui affirmat non ei qui negat incumbit probatio."

Where a plaintiff seeks to set aside a decree as having been obtained by fraud, and fraud is not proved, the plaintiff fails, and if in the absence of

Fraud—concld.
direct proof the circumstances which are established are equally consistent with the allegation of the plaintiff as with the denial of the defendant, the plaintiff fails for the very simple reason that he is bound to establish the affirmative of the proposition; *ei qui affirmat non ei qui negat incumbit probatio.* **C** AMJAD ALI HAZI *v.* ISMAIL, 27 C. L. J. 137 **504**

———, *decree obtained by, suit to set aside—Evidence—Process suppressed, effect of.*

In a suit for a declaration that a certain decree was obtained by fraud and is of no effect, a solid foundation is furnished, if the plaintiff establishes that the usual processes were suppressed by the defendant. **C** GENDU NASYA *v.* SADI BANIA **983**

Full Bench, reference to, of whole case, legality of **699**

Further Inquiry, *order for—Dismissal of complaint under section* 203, *Criminal Procedure Code, after enquiry by police, validity of—Report of Police Officer, whether can be sent to Magistrate other than one directing investigation.*

Where a Magistrate sends a case to the Police under section 202, Criminal Procedure Code, for investigation and report, the Police Officer to whom the case is sent acts wrongly in sending the papers after the investigation to another Magistrate and applying to him for a *kharij-ul-waqua* order, when the case is pending in the Court of the Magistrate who referred it to the Police. **P** THAKAR SINGH *v.* KIRPAL SINGH, 10 P. W. R. 1918 CR; 19 CR. L. J. 436 **964**

General Clauses Act (X of 1897), s. 26 **974**

Gift *of occupancy holding by widow, validity of.*

In the absence of legal necessity a Hindu widow cannot alienate more than her life-interest merely because to do so would be to give effect to some wish, indicated but not carried into effect, by her husband during his lifetime. **N** KALWA *v.* BHAWAR SINGH **1001**

Government of India Act, (5 & 6 Geo. V, C. 61), s. 107 **564**

——— **s. 107**—*Revision—High Court, whether can interfere with proceedings under Ch. XII of Code of Criminal Procedure.*

Section 107 of the Government of India Act cannot be invoked so as to question proceedings which purport to be proceedings lawfully taken by a Magistrate under Chapter XII of the Code of Criminal Procedure.

If proceedings totally without legal foundation or legislative authority are taken by a Magistrate in the name of proceedings under Chapter XII but not seriously purporting to be taken under or to comply with the provisions of that Chapter and the High Court is satisfied of that fact by reliable evidence, there is clearly a case for interference. It is always open to a party in such a case to satisfy the High Court that the property of which he is entitled to possession has been dealt with by an order which has no legal authority at all, and he may do so by an affidavit or in any other reliable manner, and thereby invoke the superintending power of the Court, but he cannot ask the High Court to interfere in revision or to send for the record merely by showing that on the face of the judgment the Magistrate has neglected or misinterpreted some of the provisions of the chapter. **A** SUNDAR NATH *v.* EMPEROR, 16 A. L. J. 189; 19 CR. L. J. 369 **673**

Ground rent and house rent, *distinction between.*

The distinction between a house rent and a ground rent lies in the contract between the lessor and the lessee. If a lessee takes a parcel of land and then builds a house upon it, the rent that he pays to his lessor is a ground rent. If the lessor builds the house and then lets house and land together, the rent is a house rent. **Pat** ERNEST MYLNE *v.* NATHU SUNDI, 4 P. L. W. 218 **887**

Guardians & Wards Act (VIII of 1890), ss. 12, 25—*Suit by father for custody of child, maintainability of.*

A suit by a father for the custody of his child is maintainable where no remedy under the Guardians and Wards Act exists that he can apply for. **L B** MATHURABAN *v.* TEWARY, 10 BUR. L. T. 186 **753**

——— **s. 25** **753**

——— **s. 29,** *applicability of—Transfer by guardian* ad litem*—Sanction of Court, whether necessary.*

Section 29 of the Guardians and Wards Act does not apply to transfers of property made on behalf of minors by their guardians *ad litem.* No sanction of the Court is, therefore, necessary in the case of such transfers. **P** BARKAT *v.* JAMILA, 61 P. W. R. 1918 **554**

High Courts Act (24 & 25 Vic. C. 104), s. 9 **185**

——— **s. 15** **763**

Hindu Law, *applicability of—Apostacy, effect of—Gonds, whether Hindus—'Sudra,' who is—Burden of proof.*

Apostates from the Hindu religion cease to be Hindus and where such apostacy takes the form of conversion to a religion which in itself regulates the devolution of property, *e. g.*, the Muhammadan religion, then, except on proof of a well-established custom to the contrary and that only in regard to inheritance and succession, the convert becomes subject to the law of his adopted religion.

The Gonds in the Central Provinces are not Hindus and they are not governed by the Hindu Law except when it is adopted by any family, sect or branch among them.

Every Hindu, properly so called, who does not belong to one or other of the three regenerate classes is a Sudra, and to him the Hindu Law relating to Sudras applies of its own force, but no non-Hindu can be a Sudra, any more than he can be a member of any of the regenerate classes. Since a Gond is not a Hindu at all he cannot be brought within the category of Sudras.

Although the Hindu Law is primarily a personal law, it has also become attached to localities, and, therefore, a Hindu must be presumed to be governed by the law of the locality where he resides.

A man does not become a Hindu by calling himself one, nor is the adoption by a non-Hindu of usages resembling some parts of the Hindu Law a sufficient ground for applying the whole of that law to him *en bloc*, in the same way and to the same extent as if he were a Hindu.

In the case of a family which is not originally Hindu but which has adopted Hinduism, the burden of proving that the family is governed in a particular matter by the Hindu Law is upon the person who asserts that it is so governed. **N** UJWARA *v.* TILOCHAN **435**

Hindu Law—contd.

———*Promissory note, executed for promise made by executant's father—Repudiation of promise by father, effect of.*

A promissory note given by a Hindu on a promise made by his father cannot be enforced against him as a pious obligation if the promise was repudiated by the father or is otherwise not enforceable. **M** PERUMAL MUDALIAR *v.* SENDANATHA MUDALIAR, (1918) M. W. N. 173 **479**

———, *whether overridden by Statute Law—Inheritance, rules of, under Hindu Law and Statute Law, conflict between.*

A special Statute like the Agra Tenancy Act can and does modify the operation of the ordinary Hindu Law in certain matters. The scheme of inheritance, therefore, laid down by section 22 of the Act, being other than that prescribed by the ordinary rules of Hindu Law does, within the scope of its operation, override and prevail against the ordinary Hindu Law of inheritance. **A** KALLU *v.* SITAL, 16 A. L. J. 225 **717**

———**Adoption**—*Adoptee, whether bound by anti-adoption contract made by natural father restricting adoptee's rights.*

An anti-adoption agreement by the adoptive mother with the natural father of the adopted son, if it amounts only to a fair and reasonable arrangement for the enjoyment of her husband's property by the widow during her lifetime, is valid and binding on the adopted son, especially where there is authority from the husband in that connection.

Neither the adoptive mother nor the natural father of the adopted son has, however, any legal authority to impose a personal contract upon the minor adoptee. Such an agreement between the adoptive mother and the natural father is void unless ratified by the minor.

A Hindu widow before making an adoption made an agreement with the natural father of her prospective adopted son that a certain monthly allowance was to be paid to her brother's son during his lifetime:

Held, that the agreement being in restriction of the adopted son's rights was not binding upon him. **C** PANCHANON MAJUMDAR *v.* BINOY KRISHNA BANERJI, 27 C. L. J. 274 **538**

———*of married Sudra, validity of.*

The adoption of a married Sudra is invalid according to the Mitakshara as interpreted according to the Benares School of Hindu Law. **N** KRISHNA MALI *v.* DEOLIA **928**

———*Mitakshara—Adoption by widow of separated brother—Consent of husband's relatives, whether necessary—Maintenance, deed of, agreement as to, whether family arrangement.*

After the death of *A.*, a Maheswari Hindu governed by the Mitakshara School, his business was carried on by the defendant, who was the son of a deceased separated brother of *A.* Disputes having arisen between the defendant and *A.*'s widow regarding the latter's maintenance, agreements were entered into between the parties on the footing that on the death of the widow the defendant would be entitled to the estate of *A.*, and the defendant in pursuance of the agreements deposited a sum with a Bank providing for the maintenance of the widow with interest thereof. Subsequently the plaintiff was adopted by the widow without the consent of her husband's relatives,

Held, (1) that the deeds of agreement entered into by the widow only with reference to her maintenance could not be set up as deeds of family arrangement between the members of the family then in existence as barring the rights of the adopted son;

(2) that as *A.* was separated from his brothers, his widow was entitled to adopt of her own motion without the consent of her husband's kinsmen, although she had no authority from her husband to do so. **C** MATHURA DASS KARNANI *v.* SRIKISSEN KARNANI, 27 C. L. J. 517 **5**

———**Adoption**—*Presumption* — Dvyamushyayana *form.*

In the absence of any express agreement to the effect that an adoption is to be in the *dvyamushyayana* form, it must be presumed to be an ordinary adoption. **B** HUCHRAO TIMMAJI *v.* BHIMRAO GURURAO DESHPANDE, 20 BOM. L. R. 161 **851**

———**Alienation** *by father—'Antecedent debt,' what is—Son, whether bound—Illegal and immoral debts—Burden of proof.*

A cash advance does not constitute an "antecedent" debt if its payment and the transfer securing its repayment are in reality parts of the same transaction.

A mortgage of joint ancestral property will not be binding on the mortgagor's son after his death unless the debt secured thereby was either an antecedent debt or was justified by legal necessity.

A Hindu father can make a mortgage of the joint family estate in order to discharge an antecedent debt and such a mortgage can be enforced during his lifetime against his son. This is an exception to the general rule that the ancestral property cannot be alienated except with the consent of all the coparceners or for legal necessity.

It is, however, open to the son to prove that the original debts were incurred for immoral purposes.

A son who seeks to avoid debts contracted by his father on the ground of their having been borrowed for an immoral or illegal purpose is not bound to show that the creditor had knowledge of the immoral or illegal purpose when the loans were advanced. **N** DILLI SINGH *v.* BINA, 14 N. L. R. 41 **506**

———*by Hindu female—Reversioners, consent of—Presumption as to legal necessity, strength of—Consent—Attestation, mere, whether proof of consent.*

Where it is clearly proved that the nearest reversioners for the time being gave their *real* consent to an alienation made by a Hindu female, *i. e.*, they did so with a full knowledge of the effect of their consent upon their interests and with an intelligent intention to consent to the production of that effect, there is a strong presumption that there was legal necessity in fact, or that the alienee acted with circumspection and made inquiries which induced the honest belief that such legal necessity did in fact exist, and the alienation is valid and binding on the actual reversioners if the said presumption is not rebutted by very cogent proof.

Mere attestation of the deed of transfer is not sufficient proof of consent to the alienation, there must

be clear proof of real consent. **O** BALWANT *v.* RAM DAT, 4 O L. J. 711 **611**

———**Alienation** *by manager of joint family—Prospective trade, whether justifies alienation—Necessity—Purchase, intended, of fresh property—Adult co-parceners joining in sale, effect of, on minor members—Partition, suit for, by co-parceners after setting aside alienation—Vendor describing himself as guardian of co-parcener, effect of—Limitation—Mesne profits, claim for nature and extent of.*

The starting of a prospective trade is not a justifiable ground for alienation of family properties by the manager, whether the family is a trading or non-trading one.

The sale or mortgage of ancestral lands for the purpose of purchasing other lands can only be justified if there is clear benefit to the family.

When evidence as to the necessity for a sale is clear, the fact that all the adult members of the family joined in it would have an important bearing on its validity, but when there is no justifying necessity, the mere fact that all the adult co-parceners joined would not give any additional weight to the transaction.

In cases of unwarranted alienations by the manager the other co-parceners are not, as of right, entitled to mesne profits from the date of the alienation. Mesne profits being in the nature of damages, each case must be dealt with on its own merits. **M** GANESA AIYAR *v.* AMIRTHASAMI ODAYAR, 23 M L. T. 245 **605**

———**Joint family**—*Mortgage of joint property by manager who is not father—Necessity—Burden of proof—Mortgage without necessity, whether binds mortgagor's own share.*

A mortgage of joint family property made by the manager of the family, who is not the father of the other members of the family, can only be justified so far as it is necessary for joint family purposes. If the necessity cannot be established by direct evidence, it may be assumed if it can be shown that reasonable care was taken to ascertain if such circumstances existed and the transferee acted in good faith. In either case the burden of proof lies on the person who claims the benefit of the mortgage.

If the mortgage debt was not incurred for necessity, not even the mortgagor's own interest can be sold in enforcement of the mortgage,

When the mortgage is for a larger amount than the necessity warrants, it will only be upheld to the extent to which necessity is proved.

A *zemindar*, manager of a joint family, mortgaged three joint villages for Rs. 3,000 to pay the Government revenue. The lender sued on the mortgage and the other members of the joint family contested the validity of the mortgage. It was proved that Rs. 1,698 odd were actually paid as revenue of two of the villages out of the money lent, but no evidence was given as to the disposal of the balance:

Held, that the mortgage was enforceable to the extent of Rs. 1,698 only against the joint villages and that as regards the balance, not even the mortgagor's own share in those villages was bound. **P C** ANANT RAM *v.* COLLECTOR OF ETAH, 34 M. L. J. 291; 7 L. W. 323; 4 P. L. W. 226; 16 A. L. J. 245; 23 M. L. T. 228; 22 C. W. N. 484; 27 C. L. J. 363; 20 BOM. L. R. 524; 40 A. 171 **290**

———**Joint family**—*Relinquishment by one co-parcener of his share in favour of some of other members of co parcenary body, effect of—Alienation by co-parcener of joint family property without consent of other co-parceners, validity of.*

A relinquishment of his share by one member of the co-parcenary body in a joint Hindu family in favour of some members of the body does not enure to the benefit of those members only but enures to that of the entire co-parcenary body.

Under the Law of the Mitakshara joint family property owned by all the members of the family as co-parceners cannot be the subject of a gift, sale or mortgage by one co-parcener except with the consent, express or implied, of all other co-parceners. Any deed of gift, sale or mortgage granted by one co-parcener on his own account of or over the joint family property is invalid and the estate is wholly unaffected by it and in its entirety stands free of it.

Obiter.—A share taken by a mother on a partition of the family property between her sons will not be her *stridhan*. It will devolve after her death upon all the heirs of her husband. **N** RAO VINAYAK *v.* LAXMAN, 14 N. L. R. 56 **51**

——— ———*Self-acquired property—Gains obtained from education received at expense of joint family, whether partible—"Science" acquired at the expense of ancestral wealth"—Special and general education—Question of fact.*

The rule laid down by the Mitakshara that "what is earned by science acquired at the expense of ancestral wealth must be shared with the whole of the brethren and with the father" does not apply to gains which are the result, not of the education received at the expense of the joint family but of the peculiar skill, mental abilities and individual effort in applying and improving such education exercised by the person educated at the expense of the joint family. There is no authority in the Mitakshara for the contention that gains made personally and without the aid of joint funds by a member of a joint family, who received an ordinary education suitable to his position as a member of the family to which he belonged, should in law be regarded as partible and not as his self-acquired property.

The question whether a member of a joint family who carries on a personal business without detriment to the joint funds carries it on for his own benefit or for the benefit of the family is a question of fact to be determined on the evidence. **P C** METHARAM RAMRAKHIOMAL *v.* REWACHAND RAMRAKHIOMAL, 22 C. W. N. 377; 4 P. L. W. 197; 34 M. L. J. 327; 7 L. W. 361; 23 M. L. T. 218; 16 A. L. J. 281; 27 C. L J. 345; 20 BOM. L. R. 566 **269**

——— ———*Separation in mess and residence—Separate property—Burden of proof.*

In a suit for partition between brothers who were members of a joint Hindu family, it was admitted that the wife of the plaintiff during his absence from home which lasted for a considerable time, was on account of her quarrelsome disposition sent to live in a portion of the family house and to have her meals separately:

Held, that this did not constitute such an admission of separation in estate among the members as would relieve the defendant from proving that the property

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in dispute was his separate property. **O** GOBINDEY *v.* RAM ADHIN, 20 O. C. 398 **78**

——— **Joint family,** *trading — Power-of-attorney granted by two members, whether terminates on death of one.*

A power-of-attorney granted to a person by two or more members of a Hindu trading family is not terminated by the death of one of them where the interest of the deceased member passes to the surviving member. The analogy of section 253 (10) of the Contract Act does not apply to such cases. **M** PONNUSAMI PILLAI *v.* CHIDAMBARAM CHETTIAR, (1918) M. W. N. 194; 23 M. L. T. 213; 7 L. W. 566 **849**

——— **Partition**—*Mithila School—Grandmother, whether entitled to share*—Stridhan—*Devolution of property assigned to grandmother on partition—Minor member, whether can express intention to separate—Institution of suit, whether sufficient indication of intention to separate.*

According to the Mithila School of Hindu Law a paternal grandmother is entitled to a share on partition of the joint property between her son and grandson. Such share, however, is not her *stridhan* and on her death goes back to the estate from which it came.

The mother or grandmother's share on partition is taken in lieu of maintenance and on her death reverts to the general estate and does not cease to be ancestral property.

The institution of a suit for partition of joint family property is a sufficient indication to separate, so that the birth of a member subsequent to the institution of the suit does not affect the share which the plaintiff is entitled to receive.

A minor can either himself or through his guardian express an intention to do that which is clearly not against his own interest. The institution of a suit by a minor member of a joint Hindu family for partition of the family property may, therefore, amount to the indication of an intention to separate. **Pat** KRISHNA LAL JHA *v.* NANDESHWAR JHA **146**

——— **Succession**—*Apostacy by Hindu widow and subsequent re-marriage, effect of—Caste Disabilities Removal Act (XXI of 1850)—Hindu Widows' Remarriage Act (XV of 1856), s 2.*

Section 2 of Act XV of 1856 does not apply to the case of a widow who has been converted to another religion and while in the second religion marries a husband.

The word 'widow' in the section applies only to such widows who continue to be Hindus at the time of re-marriage.

Therefore, where the property of her deceased husband has once vested in a Hindu widow, her subsequent conversion to another religion and re-marriage thereafter will not divest it. **M** KARNAM CHOWDAPPA *v.* KARNAM NARASAMMA, 23 M. L. T. 81; 7 L. W. 411; (1918) M. W. N. 274 **299**

——— *Succession—Reversioner, right of, nature of—Guardian of minor reversioner, whether can bind his interest.*

A Hindu reversioner has no right or interest *in præsenti* in the property which a female owner holds for her life, until it vests in him on her death, should he survive her. Till that time he has nothing to assign or to relinquish or even to transmit to his heirs. His right becomes concrete only on her demise; until then it is a mere *spes successionis*. His guardian, if he happens to be a minor, cannot bargain with it on his behalf or bind him by any contractual engagement in respect thereto.

A Hindu died leaving a widow *R.*, a daughter *K.* and a daughter's son *A.* Mutation of his estate was effected in the name of his widow and on the latter's death in the name of his daughter *K.* His collaterals disputed *K.'s* right to succeed to his estate and the matter was referred to arbitration. *K.'s* husband represented *K.* and her son *A.*, who was a minor, in the arbitration proceedings. Finally a compromise was arrived at and the arbitrators gave an award in the terms of the compromise. On *K's* death *A.* sued for the possession of the estate:

Held, that he was not bound by the award, inasmuch as his right at the time of the arbitration was a mere *spes successionis* which could not be dealt with on his behalf by his father. **P C** AMRIT NARAYAN SINGH *v.* GAYA SINGH, 23 M. L. T. 142; 22 C. W. N. 409; 27 C. L. J. 296; 34 M. L. T. 298; 4 P. L. W. 221; 16 A. L. J. 265; (1918) M. W. N. 306; 7 L. W. 581 **408**

——— **Trust**—*Religious and charitable trusts—Temple manager, power of, to pledge credit of temple—Fireworks, purchase of, for festival—Liability of temple assets—Trustee, power of, to act without concurrence of co-trustees.*

As a general rule of Hindu Law, property given for the maintenance of religious worship and of the charities connected with it is inalienable.

The manager of a temple has no authority to pledge the credit of the temple except for necessity, which necessity must relate to the preservation of the temple or the maintenance of the religious service. He should ordinarily only apply the income in the administration of the charity.

The purchase of fireworks for use at festivals cannot be charged on the assets of the temple, as it is not necessary for the preservation of the temple or the maintenance of religious service.

Per *Bakewell, J., obiter.*—Even if under the scheme of management of a temple one of several managers has authority to collect and disburse its income, it does not follow that he can exercise the abnormal power of alienating or charging the temple property or otherwise dealing with its capital without the concurrence of his co-trustees. **M** ADIRAJA ARSU *v.* BUDAN SAHIB, 34 M. L. J 358; 23 M. L T. 278; (1918) M. W. N. 331 **815**

——— **Will,** *construction of—Life-estate to daughter-in-law, with reversion to her male issue—Son, whether can alienate property during lifetime of devisee.*

The single rule of construction in a Hindu as in an English Will is to try to find out the meaning of the testator taking the whole of the document together and to give effect to this meaning.

Plaintiff sued for a declaration that the alienation of certain property effected by her son was null and void, on the ground that under the Will of her late father-in-law she was the sole owner of the property during her lifetime and that the defendant had no interest in it. The Will gave a life-estate to the plaintiff and provided that her husband "should

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receive one-half of the income accruing from the property during his lifetime", that after his death "the right to income accruing from immoveable property shall devolve upon his male issue, if any," and that after the plaintiff's death the property shall devolve upon the male issue, if any, of the plaintiff and her husband:

Held, (1) that the testator intended that his estate should vest in his daughter-in-law for her lifetime and that his son (plaintiff's husband) and, after his death, his male issue should receive a moiety of the income accruing therefrom;

(2) that during the lifetime of the plaintiff her son had no right whatsoever in the estate and was not consequently entitled to dispose of it either temporarily or permanently. **P** JASODHAN *v.* BISHAN SINGH **209**

——— — **Will**, *necessary elements of.*

A document sent by a person, containing the relevant particulars relating to the history of his estate and a declaration as to who is to be his successor, in pursuance of an advertisement appearing in a paper announcing the intention of the advertiser to prepare a compilation showing the family history of the *taluqdars* of Oudh, can for the purposes of Hindu Law be treated as a testamentary declaration by the writer of his intention with respect to his property, which he desires to be carried into effect after his death. **O** BALRAJ KUAR *v.* MAHADEO PAL SINGH, 20 O. C. 360; 4 O. L. J. 589 **59**

Hindu Widows' Re-marriage Act (XV of 1856), s. 2 **299**

Hostile witness—*Prosecution witness making admission in favour of defence, whether hostile.*

A witness is not necessarily hostile because in an absent-minded moment he lets out the truth. It must be shown before a witness can be declared hostile that there is good ground for believing that the statement he has made in favour of the defence is due to enmity to the prosecution. It may be an unfriendly act to let out the truth, but it is not necessarily a hostile act. **Pat** FOUZDAR RAI *v.* EMPEROR, 4 P. L. W. 111; 19 CR. L. J. 24'; 3 P. L. J. 419; (1918) PAT. 254 **33**

Injunction **500**

———, *meaning of.*

An injunction is in its essence the grant of a mode of relief consequential upon an infringement of a legal right. It forms part of a decree made at a hearing upon the merits, whereby the defendant is perpetually inhibited from the assertion of a right, or perpetually restrained from the commission of an act contrary to equity and good conscience. **Pat** ARJUN SUIE *v.* EMPEROR, 3 P. L. J. 106; 19 CR. L. J. 285 **737**

———, suit for **844**

Insolvency proceedings—*Court, power of, to hold summary proceedings for discovering properties of insolvent—Creditor, remedy of, where insolvent conceals property.*

The Provincial Insolvency Act contains no section corresponding to section 27 of the Bankruptcy Act. An Insolvency Court has, therefore, no jurisdiction to hold summary proceedings for the purpose of summoning before it and examining persons in order to discover whether any portion of the insolvent's property has been concealed by him by having vested

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it in a *benamdar* and thereupon directing the *benamdar* to transfer to the Official Receiver the property so vested in him.

When a scheduled creditor in an insolvency proceeding has a *prima facie* case that a portion of the insolvent's property has been concealed by the insolvent by having vested it in a *benamdar*, his remedy is to apply to the Court to direct the Official Receiver to institute a suit against the *benamdar* to recover the property in question on condition that the creditor so applying shall put the Official Receiver in funds and properly indemnify him against the costs in the suit. **C** JOY CHANDRA DAS *v.* MAHAMAD AMIR, 22 C. W. N. 702 **143**

Intention, *what is.*

Intention is a question of fact which must be decided upon the circumstances of each particular case. It may be a legal fiction as, for instance, where knowledge is presumed in the case of a person who is intoxicated and intention is the inference drawn from such knowledge, or it may be proved by evidence of the particular circumstances in each case. **U B** NGA PO THA *v.* EMPEROR, 3 U. B. R (1917) 54 19 CR. L. J. 375 **679**

Interpretation of Statutes—*Headings, whether can be referred to.*

The headings prefixed to sections or sets of sections may be used for the purpose of interpreting the meaning, scope and intention of Statutes.

The recital or preamble of an Act is a key for opening the meaning and intent of the Act

Per *Roe, J.*—It is only when words are of doubtful meaning that the Courts should look to probable intention.

Per *Mullick, J.*—The words of the heading should not be allowed to affect the construction of a section. **Pat** JANKI SINGH *v.* JAGANNATH DAS, 3 P. L. J. 1 **94**

——— — *Indian Act based on English Act, construction of—English decisions, whether binding.*

In considering the construction of a section in an Indian Act which is professedly based on and in fact reproduces the language of an English enactment the Courts in India are, in practice if not in theory, bound by the decisions of the English Court of Appeal **C** PREMSUK DAS ASSARAM *v.* UDAIRAM-GUNGABUX, 22 C. W. N. 204; 45 C. 138 **233**

——— — *Preamble, whether governs express provisions.*

The preamble cannot restrict the enacting part of an Act though it may be referred to for the purpose of solving an ambiguity. **C** MANI LALL SING *v.* TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA, 27 C. L. J. 104 **770**

——— *Retention of old provision, effect of.*

In construing a Statute the Court is entitled to look at the course of legislation up to the date of the Statute, and if the words of a previous Statute are re-enacted it may be assumed that it was intended that the law should be continued as it previously existed. **Pat** NARAIN SINGH *v.* BABA, 4 P. L. W. 189; (1918) PAT. 131 **262**

Irregularity not amounting to miscarriage of justice—Revision—High Court, power of **119**

Joint trial—*Evidence, discussion of, as against each accused—Court, duty of.*

Where several persons are charged with an offence, the judgment of the Court should contain a discussion of the evidence as against each accused. **M** PENUMESA THIRUMALRAJU *v.* EMPEROR, 19 CR. L. J. 248 **40**

Jurisdiction 296, 328, 353, 609, 671, 689, 816, 863, 881, 885, 966, 967

——— of Civil and Revenue Courts **817**

——— *of Civil and Revenue Courts—Landlord and tenant—Under-proprietary right, claim for—Evidence—Proof—Suit, maintainability of—Oudh Rent Act (XXII of 1886), s. 108 (10).*

At the time of the first regular settlement in 1877 a suit was brought by certain persons claiming to be under-proprietors of an entire village. The Settlement Court dismissed the suit on the ground that each under-proprietor should bring a separate suit for the *sir* plots in his possession. One of those persons then brought a separate suit for a declaration of his rights to certain *sir* plots, impleading the superior proprietors as defendants in his suit. His allegation was that he was one of the old proprietors of the village and had been in possession of the plots in dispute in proprietary right on payment of a certain amount of annual rent to the superior proprietors. Some of the superior proprietors admitted the claim. The suit was, however, dismissed otherwise than on merits, and it was left open to the said person to sue for his rights after the bar to the trial of the suit was removed. No such suit was thereafter filed by that person or his successors-in-interest. But, in 1882, the then superior proprietor issued a notice of ejectment against that person, who contested it and succeeded in getting it cancelled on the ground that he was a *zemindar* and that his right as such had been admitted by the persons from whom the then superior proprietor derived his title. In 1902 the superior proprietors sought to eject the successors-in-interest of the said person, *i. e.*, the present plaintiffs, from the said plots, by notice through the Revenue Court. The plaintiffs contested the notice on the ground that they were under-proprietors, but the finding of the Revenue Court was against them and they were ejected in 1903. Then they brought a suit for possession of the plots in the Civil Court, alleging that they were under-proprietors and had been wrongfully ejected by the Revenue Court, but their suit was dismissed on the ground that they should first seek their remedy under section 108 (10) of the Oudh Rent Act. They accordingly went to the Revenue Court, but that Court dismissed their suit on the point of limitation. Then followed the present suit for possession and damages, filed in the Civil Court in 1915, similar to the previous suit dismissed by that Court:

Held, (1) that under the above circumstances the plaintiffs' under-proprietary title was satisfactorily established;

(2) that the present suit in the Civil Court was not barred by reason of the fact that the plaintiffs' remedy under section 108 (10) of the Oudh Rent Act had been found by the Revenue Court to be barred by time. **O** KHADIM HUSAIN *v.* JAMIL BIBI, 4 O. L. J 577 **357**

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——— *of Civil Courts to determine legality of tax—Suit for recovery of amount paid as tax, whether cognisable by Small Cause Court.*

The power conferred by a special Act on a local authority to impose a particular tax for particular purposes in a specified manner does not oust the jurisdiction of the Civil Courts to give relief against an illegality committed by that body under cover of statutory powers.

A Civil Court has jurisdiction to determine the question whether the imposition of a tax is illegal and *ultra vires* and to give relief if a tax has been levied from a person who is not liable to pay the same. **P** COMMITTEE OF NOTIFIED AREA, UNA *v.* CHATAR BEHARI NARAIN, 74 P. W. R 1918 **910**

——— •—, question of, consideration of **887**

Kachin Hill Tribes Regulation (I of 1895), ss. I (3), I I—*Civil Procedure Code (Act V. of 1908), ss. 9, 20—Jurisdiction—Regulation, whether applies to Kachins outside hill-tracts.*

The Kachin Hill Tribes Regulation applies to Kachins in the defined hill-tracts and does not apply outside those hill-tracts.

Section 11 of the Kachin Hill Tribes Regulation applies to suits triable within a hill-tract by an officer exercising jurisdiction therein. It is permissive and gives the Special Court power to try any suit of the nature described, but it does not lay down, and it cannot be inferred, that where a suit is triable outside a hill-tract, the jurisdiction of the ordinary Civil Courts is superseded. **U B** PAUKSI HOW *v.* SINWA NAUNG, 3 U. B. R. (1917) 49 **659**

Khoti Lands—*Survey and revised settlements—* Kabuliyats *passed by* khots—Khots, *right of, to trees on* varkas *land.*

Certain villages to which Dunlop's Proclamation of 1824 applied were originally surveyed about 1855 and the survey settlement was introduced into them in 1865-66. In the settlement register the land in dispute was described as Varkas and particular Survey and Falni Numbers were given to it. A revision survey settlement was introduced in 1902. After 1870 the Khots passed annual *kabuliyats* to the Government. The Khots had to pay a certain fixed amount in respect of the Varkas lands of these villages every year to the Government and they used to recover the customary dues from those who used or were in occupation of the Varkas lands prior to the settlement of 1865-66. After the settlement the dues payable to the Khots by the occupants in respect of the Varkas land were the fixed assessment and the Fayda. Under one of the clauses of these *kabuliyats* the Khots were entitled to one-third of the value of teak trees standing on the Varkas lands. The Government sold certain teak trees to the Khatedars and the Khots sued to establish their right to the entire value of the trees under Dunlop's Proclamation or alternatively to one-third of the value under their *kabuliyats*:

Held (per *Heaton, J.*), that as between the Khots and the Government the matter in dispute was concluded by the *kabuliyats* and that the Khots could not, therefore, obtain more than one-third of the proceeds of the sale of the trees.

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Per *Shah, J.*—(1) That Dunlop's Proclamation may apply even to Varkas lands, provided the person who claims the benefit of the Proclamation can prove that the land, on which the trees stand, is his in a popular sense, *i. e.*, it is sufficiently marked out as being in his permanent occupation in his own right so as to make it properly describable as his land;

(2) that the Khots in this case were not in permanent occupation of the lands in question nor did they have such interest in the lands as would enable them to obtain the benefit of Dunlop's Proclamation;

(3) that if the Proclamation applied to the lands in question, the Khot's rights to the trees were not affected by the *kabuliyats*, inasmuch as the *kabuliyats* regulated only such rights to trees as a Khot enjoyed only as a Khot and which would come to an end if he ceased to be a Khot;

(4) that the Khots had no claim to the teak trees under section 40 of the Bombay Land Revenue Code **B** SADASHIV PARSHARAM *v.* SECRETARY OF STATE, 20 BOM. L. R. 1411 **872**

Land Acquisition Act (I of 1894), ss. 9, 25 (2)—*Notice to persons interested —Failure to make claim on date fixed, effect of—Collector, jurisdiction of, to consider claim before award—Cost of construction, whether can be taken into account.*

In a suit for compensation for a house acquired by the Government it appeared that the notice issued by the Collector under section 9 of the Land Acquisition Act directed the persons interested to appear and state their objections on the 20th July 1912. The plaintiff failed to appear on that date inspite of the fact that the notice was duly served upon him. Eventually he appeared on the 21st August and filed written objections, which were considered by the Collector who made his award. The plaintiff objected and a reference was made to the Court in accordance with law:

Held, (1) that the plaintiff could not be said to have omitted to make a claim pursuant to the notice given under section 9 merely because he did not make it by the date originally fixed in the notice;

(2) that at any time before giving his award the Collector had jurisdiction to deal with any claim made to him under section 9 2) of the Act;

(3) that the cost of construction of the house could be taken into account in fixing its market value. **P** SECRETARY OF STATE *v.* SOHAN LAL, 76 P. W. R. 1918; 60 P. R. 1918 **883**

——— ss. 23, 49—*Compound appurtenant to house under cultivation of occupancy tenants, whether can be treated as 'building site' - Compensation, assessment of, mode of—Annual profits, whether can form basis of award—Market value.*

A compound appurtenant to a house but in cultivating possession of occupancy tenants was acquired under the Land Acquisition Act and compensation was assessed on the basis of 16 years' purchase of the annual profits then derived by the owner from the land. The owner objected that compensation should have been assessed according to the market value of the land considered as a building site:

Land Acquisition Act—concld.

Held, that the method of assessment was correct as the land in suit was not at the disposal of the owner for sale as building site, inasmuch as any one desiring to acquire it for that purpose would have to deal not only with the owner but also with the occupancy tenants having vested rights not transferable except under stringent limitations laid down by the Tenancy Act. **A** ORDE *v.* SECRETARY OF STATE FOR INDIA, 16 A. L. J. 301 **923**

——— s. 23—*Quarry, compensation for, mode of calculation of.*

Per *Fletcher* and *Greaves, JJ. (Huda, J*, dissenting—The basis of the compensation to be paid for acquiring a quarry is the amount of workable stone likely to be gotten therefrom taken at a rate to be determined from the evidence.

Per *Huda, J.*—In cases of this kind it is generally necessary to take two or all the methods of valuation available in order to arrive at a fairly correct valuation, as exact valuation is practically impossible and approximate market value is all that can be aimed at. **C** MAZAFFAR ALI KHAN *v.* SECRETARY OF STATE FOR INDIA . **I**

——— s. 23 (2) **363**
——— s. 25 (2) **883**
——— s. 49 **923**

Landlord and tenant—*Acquiescence—Tenant cultivating waste land without objection—Presumption of contract of tenancy.*

Where a plea of acquiescence or of standing by has been raised by a tenant in order to resist the claim of the landlord to eject him and it is proved that the tenant has been encouraged to spend money, he can claim the protection given by a Court of Equity. In the absence of such a plea of "standing by" or acquiescence a Court of fact may, if the circumstances of the case justify, come to the conclusion that the landlord had expressly or impliedly contracted to lease the land to a tenant whose reclamation of waste land has not been objected to for some years. This, however, is not a presumption of law but a presumption of fact which may or may not arise in a case. **N** SAWAI SINGHAI NATHURAM *v.* KALLOO **517**

——— —*Agreement to pay rent—Tenant, whether can question right of landlord to sue for rent—Estoppel—Agra Tenancy Act (II of 1901), s. 10—U. P. Land Revenue Act (III of 190), s. 36—Mortgage of* sir *and* khudkasht *land—Ex-proprietary rights - Agreement of rent between mortgagor and mortgagee, whether can be accepted by Revenue Authorities.*

Defendant, a proprietor in a *mahal*, mortgaged his entire share, including his *sir* and *khudkasht* lands, to the plaintiff, and then entered into a contract of lease with the latter by which he undertook to hold the *sir* and *khudkasht* lands as tenant of the plaintiff and agreed to pay a certain rent therefor. The rent agreed upon between the parties was accepted by the Assistant Collector as a fair rent under section 36 of the U. P. Land Revenue Act. The plaintiff sued for rent on the basis of that agreement and the defendant resisted the claim on the grounds, (1) that the right to sue

Landlord and tenant—contd.

vested in the entire body of co-sharers in the *mahal* to which the lands in suit appertained, (2) that the agreement to pay a certain rent contravened the provisions of section 10 of the Agra Tenancy Act:

Held, (1) that the defendant having admitted the plaintiff to have held the demised lands in severalty and having covenanted to occupy them as his tenant and to pay him rent therefor, it was not open to him to object that the other co-sharers should have joined in the suit;

(2) that it was competent to the Assistant Collector acting under section 36 of the U. P. Land Revenue Act to accept the agreement of rent come to between the parties. **A** JAHANGIRA *v.* KARRAR HUSAIN, 16 A. L. J. 212 **513**

———*Ante-Jagir tenant, position of—Fruit trees planted by tenant—Tenant, right of, to share in fruit.*

An ante-Jagir tenant is the owner of his land subject to the payment of the rent to the Jagirdar. As long as this is paid the Jagirdar cannot evict him.

Any trees planted in his ante-Jagir holding by such tenant or planted with his permission by any one else do not affect the Jagirdar who, so long as the rent is regularly paid, cannot claim either the land or the trees.

In the absence of an express agreement to the contrary the proprietorship of the land carries with it the ownership of the trees thereon.

There is no custom in Berar that a lessee planting fruit trees on his holding is entitled to half the fruit of the trees even after the termination of his lease. **N** SHAM RAO KUNBI *v.* SITARAM **865**

———*Charge on crops—Liability of person removing crops.*

Where the landlord has a charge for rent on the crops, a person removing the crops with notice of the charge is liable for the difference between the amount of the rent due and the quantity of the crops not removed, and not for the whole of the crops removed. **L B** MAUNG HTAT *v.* MAUNG SAN DUN **109**

———*Consent decree limiting remedy of landlord to eject tenant in case of refusal to cultivate—Landlord, right of, to sue for rent when land left uncultivated.*

Where according to the terms of a consent decree, in the event of the defendant-tenant refusing to cultivate the land and to render the plaintiff landlord his share of the produce, the only remedy which the plaintiff would have was to eject the defendant:

Held, that the clause relating to ejectment was in the nature of a clause for re-entry and had not the effect of depriving the landlord of his ordinary right to sue for the arrears of rent due by the tenant. **C** PROBODH CHANDRA *v* INDRA CHANDRA **925**

———*Decree against heirs of original tenant, whether binds unregistered transferee.*

A *mourasi mokurari jote* was held by P., who bequeathed it to the plaintiff. The plaintiff's name not having been registered in the landlord's books, the landlord, though aware of the bequest in plaintiff's favour, sued the heirs of P. for rent got a collusive decree and in execution thereof sold away the *jote*:

Landlord and tenant—contd.

Held, that the plaintiff's right to the *jote* was not extinguished by the sale in execution of the landlord's decree for rent against the heirs of P. **C** JAGADISH CHANDRA *v.* SRIDAM MAHATA **26**

———Mirasi *tenure*—Thunduvaram, *levy of—Customary right—Agreement by tenant to pay cess, admissibility of—Admission against interest*—Thunduvaram, *whether rent or 'dues'—Limitation Act (IX of 1908), Sch. I, Art.* 131.

By the Full Bench—The liability to pay *thunduvaram* is a well-known incident of *mirasi* tenure in the Chingleput District but as it is not universally applicable, it is for the *mirasidar* to show that he is entitled to enforce it by the custom of the estate or the neighbourhood.

The recognition of a *mirasidar's* right to *swantantram* or *thunduvaram* in the Settlement Register is of great evidentiary value as a strong instance of the assertion of the right on the estate and is, therefore, entitled to great weight while, on the other hand, the refusal of the Settlement Officer to register the *swantantram*, is not conclusive as he has no authority to determine the question and does not detract from the weight of other evidence relating to the *mirasidar's* right by custom to collect such dues.

A written agreement by a tenant to pay the *swantantram* or *thunduvaram* is admissible as an admission of the evidence of custom unless the tenant explains away the admission and its effect cannot be discounted or neutralised on the ground that the admission is recent.

By the Division Bench, (Sadasiva Aiyar and Napier, JJ.)—The *thunduvaram* cess claimed by a *mirasidar* is not of the nature of rent but comes under the general expression 'dues' in Article 13 of the Provincial Small Causes Courts Act.

The refusal of Government to recognise the *thunduvaram* does not amount to a 'refusal' by the tenant to pay the due. to the *mirasidar* within the meaning of Article 131 of the Limitation Act. **M** KUMARAPPA REDDI *v.* MANAVALA GOUNDAN, (1918) M. W. N. 350; 23 M. L. T. 44; 34 M. L. J. 104; 7 L. W. 243; 41 M. 374 **699**

———Mokurrari *tenure—Dispossession of tenure-holder from portion of holding—Tenure-holder, whether can withhold rent.*

Where a lessor is directly or indirectly concerned in the dispossession of a tenure-holder from a *mokurrari*, the tenure-holder is entitled to withhold payment of the entire rent to the superior landlord. **Pat** MOSUDAN POTDAR *v.* SATIS CHANDRA ROY, 3 P. L. W. 364 **658**

———*Occupancy holding, mortgage of—Death of tenant, without heirs, effect of.*

Where a non-transferable occupancy holding is usufructuarily mortgaged by the tenant without the consent of the landlord, the latter is entitled to eject the mortgagee from the holding on the death of the tenant without heirs. **C** HARAPALI SARKAR *v.* RAJAB-ALI MIA **721**

———*Suit for rent against some out of several joint tenants, maintainability of—Co-tenant's liability for rent, whether joint and several.*

The plaintiff brought a suit for arrears of rent against six persons, three of whom were dead, and obtained a decree. In execution the representatives

of the deceased defendants were brought on the record, but they objected to the execution of the decree on the ground that the decree was a nullity having been obtained against persons some of whom were dead:

Held, that the decree was not a nullity and could be executed as a money decree as against those judgment-debtors who were living at the date of the suit and the decree passed therein, although it could not be executed as against the representatives of the judgment-debtors who were dead when the suit was instituted.

Per *Richardson, J.*—The liability of co-tenants is presumably joint and several, unless it is shown to be merely joint.

In England it is the right of persons jointly liable to pay a debt to insist on being sued together. But in India, apart from express agreement, this right has been abrogated by section 43 of the Contract Act.

Difference between 'joint liability' and 'joint and several liability' explained.

Per *Chatterjea, J.*—Where a landlord creates a tenancy in favour of two persons jointly, whether each is liable for the entire rent depends upon the intention of the parties and where there is a written contract, the intention would depend largely on the contract.

The liability of joint tenants for rent is, like the liability of joint promisors, a joint and several liability. **C** KRISHNA DAS ROY *v.* KALI TARA CHOWDURANI, 22 C. W. N. 289 **80**

———*Tenant holding over—Suit for damages for use and occupation—Damages, measure of.*

In the case of a tenant holding over wilfully and contumaciously damages for use and occupation are assessed at double the ordinary rent. **P** MADAN MOHAN LAL *v.* FIRM OF MESSRS. B. BOROOAH & COMPANY, 11 P. L. R. 1918; 71 P. W. R. 1918 **859**

———*—Tenant, right of, to cut trees—Bengal Tenancy Act (VIII B. C. of 1885), s. 23—Tenure-holder, whether entitled to cut trees.*

A permanent tenure-holder is entitled to cut down trees situate within his tenure He can only be prevented from doing so by the landlord showing a custom contrary to the right of the tenure-holder.

Whatever the tenant, whether he be a tenure-holder or a lessee, has grown upon the land that belongs to him. **Pat** SARDAR SINGH *v.* EMPEROR. 4 P. L. W. 291; 19 CR. L. J. 339 **451**

———*—Tharam Faisal Muchilikas, execution of, before passing of Madras Estates Land Act (Mad. I of 1908), effect of—Tenants described Ulavadai Kudikani Mirasidars, effect of—Occupancy rights, claim of—Lease by trustees of temple-lands—Alienation by tenants without protest by trustees, effect of.*

In certain Tharam Faisal Muchilikas executed by the lessees in favour of their landlords, the trustees of a temple in a village in the Tanjore District, long before the passing of Madras Act I of 1908, it was recited that the tenants agreed, (1) to accept the lands from the temple for *purposes of cultivation* from the current Fasli, (2) that they would pay the Melvaram Tirva due to Government in cash instead of in grain, though the said Tirva was directly due by the lessor (temple) to Government, (3) that they would pay the equivalent price of the paddy grain besides the Punja cash rent due to the temple as Swamibogam (soil proprietor's dues) and that such rent would be paid *as long as the occupants were in possession*, (4) that they would pay additional revenue to Government for raising garden crops, (5) that when waste lands were newly cultivated, they would pay additional *tirva* or Swamibogam to Government, and (6) that they would supply Kudimaramath labour for repairs and men for carrying the temple paraphernalia in times of fairs and festivals. The tenants described themselves as Ulavadai Kudikani tenants:

Held, (1) that the executants of such Tharam Faisal Muchilikas could not be said to possess permanent rights of occupancy;

(2) that the mere assertion by the tenants that they were Ulavadai Kudikani Mirasidars in the village could not invest them with such rights;

(3) that the onus of proving the existence of occupancy rights lay on the lessees. **M** MUNA MUHAMMAD *v.* MUTHU ALAGAPPA CHETTIAR, 23 M. L. T. 161; 34 M. L. J. 234; 7 L. W. 380 **894**

Legal Practitioners Act (XVIII of 1879), s. 13 (f)—*Pleader asking Judicial Officer to decide case in favour of one of the parties—Grossly improper conduct.*

A Legal Practitioner, who writes a letter to a Judicial Officer recommending that a case pending before that officer should be decided in favour of one of the parties, is guilty of grossly improper conduct within the meaning of section 13 *(f)* of the Legal Practitioners Act, and it is immaterial whether the party for whom the recommendation is made is on the right or wrong side, and whether the letter is written by the Pleader at the instigation of another or of his own accord. **P** *In the matter of* NARINDRA SINGH, 3 P. W. R. 1918 CR.; 161 P. L. R. 1917; 19 CR. L. J. 267 **123**

———**s. 36**—*Tout, person proclaimed as—Evidence of general repute, admissibility of—'General repute or otherwise,' meaning of—S. 36 (3), interpretation of—Criminal Procedure Code (Act V of 1898), s. 110.*

The evidence which may legitimately be tendered in a case under section 36 of the Legal Practitioners Act, is of general repute. The phrase 'general repute' in the section clearly includes hearsay evidence, which may be tested when admissible by cross-examination just as any other evidence may be tested and challenged. The words 'or otherwise' are clearly intended to include all the ordinary modes of proof known to the law which might otherwise be said to have been impliedly excluded, such as personal observation, evidence of conduct, admissions in conversation and the like, proved by first hand testimony.

The recognised principles applicable in cases under section 110 of the Criminal Procedure Code apply to cases under section 36 of the Legal Practitioners Act.

Legal Practitioners Act—concld.

Sub-section (3), section 36, of the Legal Practitioners Act means that the exhibition of the copy-list there referred to is necessary to constitute a man a proclaimed tout. A mere removal or failure, however, to keep the list exhibited in the Court of a District Judge has not the effect of cancelling the list altogether, inasmuch as it is to be exhibited in all Courts subordinate to the District Court and its mere removal in one Court out of many does not *per se* cancel the original order. **A** KALKA PRASAD *v.* EMPEROR, 16 A. L. J. 76; 19 CR. L. J. 269; 40 A. 153 **125**

Legal Practitioner and Court, *differences between—Professional etiquette, breach of—Matter calling for disciplinary powers—Court, duty of.*

Where a Court has reason to think that there has been any breach of professional etiquette or any matter calling for the exercise of disciplinary powers in the conduct of a Pleader or Advocate in a case, the proper course is to decide the merits and reserve any such question for further consideration after the disposal of the suit. **A** BISHESHAR NATH *v.* EMPEROR, 16 A. L. J. 64; 40 A. 147 **28**

Legitimacy, proof of **57**

Letters Patent (Bom.), cl. 15—*Judgment—Order of single Judge refusing to excuse delay in presentation of appeal, whether judgment.*

An order of a single Judge refusing to excuse the delay in presenting an appeal has the effect of dismissing or rejecting the appeal, and being thus an order of a final character, is a judgment within the meaning of clause 15 of the Letters Patent and an appeal lies against it under that clause. **B** RAMCHANDRA GANGADHAR *v.* MAHADEV MORESHVAR, 20 BOM. L. R. 172; 42 B. 260 **913**

Letters Patent (Cal.), cl. 15 **999**

——— Cl. 15—*'Judgment,' meaning of—Decision of single Judge setting aside order of District Judge and remanding case, whether judgment.*

A decision of a single Judge of the High Court, by which an order of a District Judge reversing in appeal an order of a Munsif cancelling a sale is set aside and the case is remanded to the District Judge for re-hearing, is a 'judgment' within the meaning of Article 15 of the Letters Patent. **C** KUMAR CHANDRA KISHORE ROY *v.* BASAT ALI, 27 C. L. J. 418; 22 C. W. N. 627 **763**

Limitation—*Declaration, suit for—Right to take fallen wood, nature of—Invasion of right—Cause of action.*

The right to take wood falling from certain trees is one which can only be exercised on occasion, that is, when any wood may fall or be cut from the trees. It does not occur every year or at stated times. Each invasion of the right gives rise to a fresh cause of action, and a suit for a declaration can be brought within six years of each invasion. **A** DEBI PRASAD *v.* BADRI PARSHAD, 16 A. L. J. 345 **980**

———Suit for declaration of title and confirmation of possession, whether can be treated as suit for recovery of possession for purpose of limitation.

Where a plaintiff in a suit for declaration of title and confirmation of possession alleges facts which show that he was out of possession, his suit, even though framed for confirmation of possession, may be treated as one for recovery of possession if his title to recover possession has not been barred by limitation; but where the plaintiff in such a suit makes a case that he is in possession, but fails to prove his possession, the Court will not give him recovery of possession, even though he proves his title and the suit has been instituted within the limitation period prescribed for suits for recovery of possession. **C** MAHAMAD JALIS *v.* SECRETARY OF STATE **996**

Limitation—concld.

Limitation Act (XIV of 1859) **630**
Limitation Act (IX of 1871) **630**
Limitation Act (IX of 1908) **630**

——— ss. 3, 6—*Minor, assignee of, whether can take advantage of s. 6—Limitation, plea of, not taken in lower Court—Appellate Court, duty of—Appeal on particular point—Suit, whether can be dismissed in toto—Court-fee payable.*

An assignee of a minor cannot avail himself of the benefit conferred upon the minor by section 6 of the Limitation Act.

The abandonment of a point of limitation in a lower Court does not relieve an Appellate Court of the duty of taking notice of the Statute. But the plea of limitation in order to be effective must be properly before the Court.

Where the plea of limitation involves the dismissal of a suit *in toto*, the defendant must appeal on the whole case and not merely on a particular point, and must pay Court-fee on the whole claim. If he fails to pay full Court-fee within the time limited by the law, the appeal must be dismissed. **P** HUKAM SINGH *v.* SHAHAB DIN, 14 P. W. R. 1918 **890**

——— ss. 4, 5, 12, 29—*Applicability of ss. 4, 5, 12 to proceedings under Act. III of 1907—'Alter' and 'affect' in s. 29, meaning of.*

Per *Ayling, J.*—The application of the general provisions of the Limitation Act extending in certain circumstances the period fixed by a special law must be deemed to 'affect' that period within the meaning of section 29 of the Limitation Act.

Per *Seshagiri Aiyar, J.*—Wherever an attempt is made to construe a special period fixed by an enactment with reference to the general provisions of the Limitation Act contained in sections 5 to 18, the effect of such a process would be to affect the period of limitation fixed by the local Act.

Even where an Act is not complete in itself, if by importing the general provisions of the Limitation Act the period fixed in a special Act is likely to be enlarged either by the process of computation in obtaining copies or by excluding the period during which a fraud was practised or during which another litigation was proceeding in a different Court, still the period of limitation would be affected. **M** KOPPARTHI LINGAYYA *v.* ARAVETI CHINNARAYANA, 33 M. L. J. 566; 41 M. 169; 7 L. W. 443 **805**

——— s. 5 **9**

Limitation Act, 1908—contd.

——— **ss. 5, 15,** *applicability of—Execution, application for—Decree offered as security for costs—Exclusion of period during which decree served as security, whether allowable—Limitation, whether can be excluded by agreement—Estoppel.*

It is the duty of the Court to look into the question of limitation itself and it is not relieved from the duty of doing so by the fact that the parties or one of them has agreed not to plead limitation.

If to an action the Statute of Limitation is pleaded and proof is given that the action clearly commenced after the period of limitation had expired, the defendant, notwithstanding the existence of any agreement, is entitled to a verdict.

Section 5 of the Limitation Act is not applicable to an application for execution of a decree.

A plaintiff wishing to appeal to the Privy Council against a decree of the High Court offered as security for costs a decree for rent which he had obtained against the defendant. The security was accepted by the High Court and the plaintiff was thereby enabled to appeal to the Privy Council. His appeal failed and costs were awarded against him. He then applied for execution of his rent-decree:

Held, (1) that the acceptance of the security by the High Court did not involve an order staying execution of the rent-decree, and that section 15 of the Limitation Act had no application to the case;

(2) that, therefore, the time during which the appeal was pending before the Privy Council could not be excluded from the period of limitation provided for the execution of the decree. **Pat** MIDNAPUR ZAMINDARY CO. *v.* DEPUTY COMMISSIONER OF MANBHUM, 3 P. L. J. 132. **570**

——— **s. 6** **890**

——— **s. 7**—*Manager of Hindu family, whether can give valid discharge of decree-debt—Execution—Attachment—Dismissal of execution petition, whether removes attachment.*

A major manager of a joint Hindu family is competent to give a valid discharge of a decree-debt within the meaning of section 7 of the Limitation Act so as to make the time run against the minor members of the family. **M** CHIVIKULA VENKATASUBBIAH *v* GOLLAPUDI VENKATESWARULU, (1917) M. W. N. 816 **566**

——— **s. 7**—*Manager of joint family, whether can give discharge—Minority, effect of.*

An elder brother, who is in the position of a manager of a joint Hindu family, can give a valid discharge within the meaning of section 7 of the Limitation Act without the concurrence of his minor brothers who are joint with him in interest. **B** HUCHRAO TIMMAJI *v.* BHIMRAO GURURAO DESHPANDE, 20 BOM. L. R. 161 **851**

——— **s. 12** **805**

——— **ss. 13, 20,** *scope of—Entries in debtor's books, whether payments.*

Entries in the account books of a debtor cannot be treated as payments of interest within the meaning of section 20 of the Limitation Act. **M** PALANIAPPA CHETTIAR *v.* VEERAPPA CHETTIAR, 34 M. L. J. 41; 41 M. 445 **466**

——— **s. 15** **570**

Limitation Act, 1908—contd.

——— **s. 15,** *applicability of, to s 48 of Civil Procedure Code—"Prescribed", scope of—Order granting time to judgment-debtor, whether order staying execution.*

An order granting time to the judgment-debtor is not an order staying execution of the decree within the meaning of section 15 of the Limitation Act.

The word "prescribed" in section 15 of the Limitation Act refers to periods prescribed by that Act, and has no application to the provisions of section 48 of the Civil Procedure Code **A** JURAWAN *v.* MAHABIR DUBE, 16 A. L. J 71; 40 A. 198 **24**

——— **s. 20**—*Acknowledgment by judgment-debtor whether saves limitation against auction-purchaser.*

An auction-purchaser of a property in execution of a money-decree is entitled to have the property purchased by him in the condition in which it was at the time of attachment. Therefore, an acknowledgment of a lien on the property made by the judgment-debtor after its attachment cannot prevail against the auction-purchaser, although such acknowledgment if made before attachment may save limitation as against the auction-purchaser. **C** RAJESWARI DASI *v.* BENODA SUNDARI DASI, 22 C. W. N. 278 **533**

——— **s. 20**—*Mortgage without possession—Sub-mortgagee, rights of—Payment made by mortgagor to sub-mortgagee, whether saves limitation against sub-mortgagor.*

A sub-mortgage comprises amongst other things the personal covenant of the sub-mortgagor and under that covenant his position in relation to the sub-mortgagee is closely analogous to that of a surety and he is thus entitled to recover the debt from the original debtor, though he is bound to pay it over to the sub-mortgagee in discharge of the sub-mortgage.

There is no essential distinction between his position and that of an acknowledged surety.

If the mortgagor, therefore, makes a payment to the sub mortgagee, it operates to save limitation also as against the sub-mortgagor. **P** RAM CHAND *v.* MEWA RAM, 3 P. R. 1918 **213**

——— **s. 20**—*Part-payment of principal, endorsement of, not signed by payer, whether saves limitation.*

An endorsement of a part-payment of the principal written on the back of a bond on behalf of the person making the payment, but not signed by the payer or bearing his mark, does not operate to save limitation under section 20 of the Limitation Act. **C** BALIRAM *v* SABHA SHEIKH **516**

——— **s. 20,** scope of **466**

——— **s. 23** **31**

——— **s. 29** **805**

——— **Sch. I, Art. 11** **528**

——— ——— **Art. 11**—*Civil Procedure Code (Act V of 1908), O. XXI, rr. 58, 63—Claim rejected for default—Limitation for title suit.*

Article 11 of Schedule I of the Limitation Act applies in a case where a person sues to establish his right to property in respect of which a claim preferred by him under Order XXI, rule 58, Civil Procedure Code, has been dismissed for default and without investigation.

Limitation Act, 1908—contd.

The language of Article 11 of Schedule I of the Limitation Act of 1908 is more comprehensive than the language of the preceding Acts and the applicability of the Article cannot be restricted to those cases only in which the claim preferred under Order XXI, rule 58, Civil Procedure Code, has been disallowed after an investigation. **C** NOGENDRA LAL CHOWDHURY *v* FANI BHUSAN DAS **265**

——— **Sch. I, Arts. 11, 29, 120**—*Civil Procedure Code (Act V of 1908), O. XXI, r. 63—Claim proceedings—Order releasing attachment—Suit by decree-holder to declare alienation fraudulent—Limitation, commencement of—Cause of action.*

A suit by the holder of a decree to declare an alienation as fraudulent, based on an order passed under Order XXI, rule 63, Civil Procedure Code, is governed by Article 11 of the Limitation Act and should be filed within one year from the date of the order.

Order XXI, rule 63, Civil Procedure Code, gives a right of suit whether the order in the claim petition is correct or not.

Obiter.—Even if Article 120 be held to apply, the cause of action for a suit based on fraud does not arise on the date of the alienation, but on the date when the creditor seeking to set aside the alienation knows that he has been defrauded, defeated or delayed. **M** VENKATESWARA AIYAR *v.* SOMASUNDARAM CHETTIAR, 7 L. W. 280; (1918) M. W. N. 244 **551**

——— ——— **Art. 11**, scope of **1005**

——— ——— **Art. 29** **551**

——— ——— ——— **Arts. 44, 126.**

The fact that a Hindu father executes a sale-deed as guardian of his son will not take the case out of Article 126 of the Limitation Act and bring it under Article 44, which applies to cases where property belonging to a minor is transferred by his guardian. **M** GANESH AIYAR *v.* AMIRTHASAMI ODAYAR, 23 M. L. T. 245 **605**

——— ——— **Arts. 57, 61, 62, 115, 120**—*Hindu Law—Joint family—Partnership of some members, claim by, against family for moneys advanced—Limitation—Cause of action, when arises—Barred debt, whether can be recovered—Set-off, claim by way of, whether allowable.*

A suit by some of the members of a joint Hindu family who constitute a partnership against the family for advances made to it out of the partnership funds is governed by Article 120 of the Limitation Act.

The claim cannot be enforced in an action for partition after it has become barred either by way of equitable set-off or as an item in the account of dealings between the family and the partnership or by treating the liability of the family as assets or property to be brought into hotchpot at the time of division.

A suit lies by one firm against another firm notwithstanding that the firms have common partners. The proper prayer in such a suit ought to be for the taking of the accounts of both partnerships, if necessary for adjusting the rights of the partners, and for the grant of just and equitable reliefs which arise on the facts.

Limitation Act, 1908—contd.

Per *Sadasiva Aiyar, J.*—A Hindu joint family cannot be treated as of the nature of a partnership firm and a claim of some of the members who are members of a separate partnership firm against the joint family cannot be treated as the claim of one partnership against another partnership firm. The partnership, by lending to the joint family possesses an immediate cause of action against the latter and it can sue the other members of the family alone as defendants praying for proper equitable reliefs.

Per *Phillips, J.*—Relief by way of set-off is, strictly speaking, confined to a defendant and a plaintiff who invokes the aid of the Court against a defendant is not entitled to any equity as against him.

Where the members of the partnership who sue are themselves the managing members of the family, Article 107 of the Limitation Act would apply. **M** VELLAYAPPA MOOTHAN *v.* KRISHNA MOOTHAN, 34 M L. J. 32 **428**

——— **Sch. I, Arts. 61, 62** **428**

——— ——— **Arts. 62, 97**, *applicability of—Suit by vendee to recover purchase-money on deprivation of possession—Limitation, commencement of.*

Limitation for a suit by a vendee, who has been deprived by his vendor of the land purchased by him, to recover the purchase money paid by him begins to run from the date of the failure of consideration, that is, the date on which the vendee is dispossessed from the land, and the suit is governed by Article 97 and not by Article 62 of the Limitation Act. **C** PARSURAM MAHAJAN *v.* BHAL CHANDRA SHAHA, **719**

——— ——— **Art. 97** **719**

——— ——— **Art. 115** **428**

——— ——— **Arts. 116, 120, 132**—*Mortgage for loan of paddy, suit on—Limitation.*

A suit on a mortgage-bond executed for a loan not of money but of paddy is governed by Article 116 or Article 120 and not by Article 132 of the Limitation Act. **C** KANDARPA NARAN MANDAL *v.* SRIDHAR ROY **518**

——— ——— **Art. 120 428, 518, 551**

——— ——— **Art. 120**—*Suit for declaration of proprietary title—Adverse entry in revenue records, effect of—Cause of action—Limitation, commencement of.*

A declaratory suit brought by a plaintiff who has all along been in enjoyment of the property is not barred simply because an entry adverse to his rights was made or because he came to know of that entry more than six years prior to the institution of the suit.

Even if the right to demand correction of the revenue entries is lost by limitation, the plaintiff is entitled to a declaration of his proprietary title, the period of limitation running from the date when the defendant attempted to oust the plaintiff from the property.

Where, therefore, in a suit for a declaration to the effect that plaintiff was owner of 1/12th share in certain lands and not of a 1/18th share only as recorded in the revenue papers, it appeared that the income derived from the land was spent on the

upkeep of certain joint family property in which the plaintiff had a 1/12th share which share had been awarded to him:

Held, that the cause of action arose when the plaintiff asked the Revenue Officer to make an entry in his favour and the defendants denied his title. **P** GOKAL CHAND *v.* HUKAM CHAND, 73 P. W. R. 1918 **912**

——— Sch. I, Art. 126 **605**

——— ——— Art. 131 **699**

——— ——— Art. 132 **518**

——— ——— Art. 134—*Transfer, whether includes permanent lease—Suit to recover* debutter *property transferred by* shebait—*Limitation, commencement of*—Shebait, *position of.*

The word 'transfer' in Article 134 of Schedule I of the Limitation Act includes a transfer by way of a permanent lease.

A suit by a *shebait* to recover *debutter* property held by the defendant under a permanent lease granted by the plaintiff's predecessor is governed by Article 134 of Schedule I of the Limitation Act and must be brought within twelve years of the date of the transfer.

The representation of an idol by the *shebaits* is a continuing representation and limitation runs against the *shebaits* continuously and not as against each *shebait* individually as and when he succeeds to the office, the *shebaits* not being holders of successive life-estates in the management or in the property of the endowment. **C** MONMOTHO NATH LAHA *v.* ANNODA PROSAD ROY, 27 C. L. J. 201 **567**

——— ——— Art. 141 **368**

——— ——— Art. 142—*Dispossession and discontinuance of possession of mine—Surrender—Relinquishment.*

The mere fact that a mine has not been worked does not amount to a dispossession or discontinuance of possession within the meaning of Article 142, Schedule I, of the Limitation Act.

In this country a surrender or relinquishment does not require to be in writing but can be inferred from the acts of the parties.

Where a lessee, having been defeated in a suit by a rival lessee for restraining him from exercising his leasehold rights, ceased to pay rent to his landlords and some of the co-sharer landlords then granted a fresh lease to another person:

Held, that the lessee abandoned the lease and that the abandonment was accepted and acted upon by the co-sharer landlords. **C** BENGAL COAL COMPANY, LTD. *v* MONORANJAN BAGCHI, 22 C. W. N. 441 **297**

——— ——— Art. 144 **368**

——— ——— Art. 181 **560**

——— ——— Art. 182 **301**

——— ——— Art. 182 (2) **141**

——— ——— Art. 182—*Civil Procedure Code (Act V of 1908), O. XXI, rr. 11, 17 (2)—Execution application rejected for not specifying particulars, whether step-in-aid of execution*—Res judicata *in execution proceedings—Objection taken against one application, whether can be taken against subsequent application.*

An application for execution rejected under Order XXI, rule 17 (2), of the Civil Procedure Code on the ground that it did not specify correctly all the particulars required to be specified therein by rule 11 of that Order, is not an application in accordance with law or a step-in-aid of execution taken in accordance with law within the meaning of Article 182, Schedule I of the Limitation Act.

Limitation Act, 1908—contd.

A decree-holder applied for execution on the 25th March 1916. His previous application made on 12th May 1914 was withdrawn, the order then made by the Court being "the execution case is dismissed for non-prosecution and the objection case of the judgment-debtor is also dismissed for the present." In that objection case the judgment-debtor had pleaded that the application of the 12th May 1914 was out of time, having been made more than three years after the application for execution which preceded it:

Held, that regard being had to the way in which the execution case of 12th May 1914 terminated, it could not be said that the objection of the judgment-debtor on the ground of limitation was adjudicated upon, so that no question of *res judicata*, constructive or otherwise, could arise and it was open to the judgment-debtor to take the same objection in the present case. **C** ISHAN CHANDRA SAMUI *v.* DULAL CHANDRA DE **220**

——— Sch. I, Art. 182—"*Where there has been an appeal*," *meaning of*—"*Review of judgment*," *whether includes application for re-hearing of suit dismissed for default.*

The words "where there has been an appeal" in clause 2 of the last column of Article 182 of the First Schedule to the Limitation Act mean where there has been an appeal against a decree in the suit and cannot be held to include an appeal against an order made on an application to set aside that decree.

Clause 3 in the third column of Article 182 of the Limitation Act does not apply where an application for a re-hearing or review has been dismissed. The intention of the Legislature was to allow further time to a holder of a decree or order for costs where there has been an application for review which has been heard and a fresh decision has been pronounced, not to allow further time where an application for re-hearing or review has been put forward on untenable grounds and has consequently been rejected or dismissed.

Quære.—Whether the words "review of judgment" in clause 3 of Article 182 of Schedule I of the Limitation Act cover an application for re-hearing of a suit dismissed for default. **Pat** RAI BRIJRAJ *v.* NAURATAN LAL, 3 P. L. J. 119 **575**

——— ——— Art. 182, cl. (5)—*Step-in-aid of execution—Filing list of witnesses, whether step-in-aid of execution.*

A decree-holder applied for the execution of his decree and the judgment-debtor put in an objection to execution. The Court directed both parties to adduce evidence in support of their respective cases on a certain date. On that date the decree-holder filed a list of his witnesses who were present in Court, and intimated to the Court that he was ready to proceed with his case:

Held, that the conduct of the decree-holder implied an application to the Court to take the evidence

Limitation Act, 1908 - concld.

which he was prepared to adduce to reple the objection of the judgment-debtor and should be taken to be an application to the Court to take some step-in-aid of execution. **C** BROJENDRA KISHORE ROY *v.* DIL MUHMUD SARKAR **604**

Lis pendens, doctrine of **471**

Lost grant, doctrine of, applicability of **419**

Madras Civil Courts Act (III Mad. of 1873), ss. 13, 27 120

Madras Court of Wards Act (I of 1902), s. 41, *scope of—Unnotified claims—Failure to give notice, effect of—Cessation of interest, finality of—Notified claims, priority of payment of, effect of, on unnotified secured claims—Executing Court, functions of, whether affected by section.*

The penalty provided in the first part of section 41 of the Madras Court of Wards Act as to cessation of interest on unnotified claims is final, the claimant being left to prosecute his legal remedies for the amount already accrued due to him.

A restrictive construction should not be put on the highly general provisions of section 41 of the Madras Court of Wards Act.

The latter part of the section postponing unnotified claims to those notified or admitted under section 38 cannot be construed as depriving secured creditors who have notified their security or as authorising the application of money raised on their securities otherwise than in satisfaction of their claims. It only prohibits payments to them by the Court of Wards out of the unencumbered funds at its disposal, and does not prohibit the realisation of the security and satisfaction out of the proceeds of the secured creditor's claims.

The prohibition of payment in the section is confined to the Court of Wards and does not extend to the authorities executing decrees even during the continuance of its superintendence. Creditors, whether they have notified or not, are not prevented from obtaining decrees and executing them.

The provisions of the section do not affect the duties of executing Courts or the functions of the decree-collector under sections 321 to 325 (*c*) of the Civil Procedure Code of 1882 **M** SRINIVASA RANGA RAO *v.* RAJA OF KARVETNAGAR, 7 L. W. 206; 23 M. L. T. 127; 34 M. L. J 454, 41 M. 503 **15**

Madras District Municipalities Act (IV Mad. of 1884), ss. 172, 173.

Plaintiff sued the Municipal Council of Vizagapatam for injuries sustained by him by falling on a heap of gravel thrown on to the side of a road and allowed to project 9 feet into the roadway in the course of some repairs which were entrusted to a contractor:

Held, that the Municipal Council was liable in damages for negligence.

Per *Seshagiri Aiyar, J.*—Municipal Councils in Madras are statutory bodies with very circumscribed powers and are not self-governing in the sense that Municipal Corporations in England are. Though they are not a department of Government, their powers are derived from the Government and they are controlled by the provisions of the District Municipalities Act,

Madras District Municipalities Act—concld.

The public have a right to use the full breadth of a public road and any obstruction to such use amounts to misfeasance.

Per *Napier, J.*—Section 173 of the Madras District Municipalities Act does not apply to the case of a contractor executing repairs to a road under the orders of a Municipal Council. The section has reference to temporary obstructions to a thoroughfare by the erecting of *pandals* or arches by a private person and has nothing to do with the execution of repairs by the employees of the Municipality. **M** MUNICIPAL COUNCIL OF VIZAGAPATAM *v.* WILLIAM FOSTER; 41 M. 538 **308**

Madras Estates Land Act (I Mad. of 1908), ss. 3 (4), 13 (3)—*Landlord and tenant—Tenancy, incidents of—Improvements, what are*—Mathiri kasavu *and* sadalwar *cesses, legality of—Irrigation with well water—Garden rates, levy of, legality of—Contract and usage, suit based on—Presumption.*

Mathiri kasavu (straw rent) and *sadalwar* are charges incidental to a *ryot's* holding and are payable with the rent.

A landlord is entitled to charge garden rates for crops grown with the aid of water from wells sunk by a *ryot* if they are based on any contract, express or implied, with the *ryot* or any local usage.

Section 13 (3) of Madras Act I of 1908 does not preserve the distinction between local usage and contracts for rents, express or implied, contained in section 11 of Act VIII of 1865.

Where, therefore, a claim for enhanced rent is not based expressly in the plaint on a contract with the *ryot*, express or implied, but on custom, it is competent for the Court to go into the question whether the usage is the result of a valid contract.

Where enhanced rent has been paid by tenants for a long period of time, not only can the existence of an agreement to pay rent at such rate be presumed but the consideration for the same can also be presumed. Both presumptions are presumptions of fact.

Section 13 (3) of the Madras Estates Land Act would not affect the liability of *ryots* to pay enhanced rents, if the improvements were made before the Act and if there had been a contract between the landlord and the tenant entered into before the passing of the Act to pay rent at such rates.

Where wells are sunk by a *ryot* in estate *porambake*, the mere abstention of the landholder from charging rent on the sites occupied by the wells might amount in law to a consideration for a contract to pay enhanced rates.

An improvement made by a *ryot* which prejudicially affects another land of the landholder, if made without his consent in writing, would not be an improvement of which the *ryot* could claim the advantage provided by section 13 (3) of the Act. **M** PRAYAGA DOSS JEE VARU *v* VENKAMA NAIDU, 23 M. L. T. 137; 7 L. W. 477; (1918) M. W. N. 343 **641**

—— —— **s. 4**—*Landlord and tenant*—Varam *tenure—Lands left waste, liability for rent for—Custom, reasonable—Burden of proof—Agricultural holding, use of, as house site—Rent, liability for, at* punjah *rate.*

Madras Estates Land Act—concld.

Section 4 of the Madras Estates Land Act does not override any custom or agreement not to charge rent upon portions left waste in a tenant's holding.

Where lands are let on *waram* tenure, it is open to the tenant to claim exemption from rent for portions that were left fallow through no default of his.

A ryot cannot claim exemption from rent by reason of his having put an agricultural holding to some other use. The landlord is entitled to claim rent at *punjah* rate for use of agricultural land as a house site.

Per *Sadasiva Aiyar, J.*—A custom to let lands lie waste without regard to reasonable area and without regard to good or bad seasons and existence or absence of facilities for irrigation for indefinite periods at the tenant's will and pleasure, with absolute freedom from liability to payment of any rent, is not a reasonable custom which can be recognised by the Courts.

The onus is on the ryot to prove that the lands were left waste through no default of his. **M** RAMASAMI SERVAIGARAN *v.* ATHIVARAHA CHARIAR, 23 M. L. T. 183; 7 L. W. 471; (1918) M. W. N. 340 **663**

——— **s. 13 (3)** **641**

——— **s. 185,** *scope of—Private land of* zemindar *—Evidence other than that specified in section, admissibility of—Presumption*

Section 185 of the Madras Estates Land Act permits the landlord to produce any evidence other than that specified in the section to prove that the land in dispute is his private land, and not *ryoti* land.

The section raises a presumption in favour of the *ryot*, but the question to be considered is whether the evidence adduced by the landlord is sufficient to rebut that presumption. **M** APPU ROW *v.* KAVERI, 23 M. L. T. 154; 7 L. W. 271; (1918) M. W. N. 171 **519**

Madras High Court Appellate Side Rules, r. 2 **699**

Madras High Court Fees Rules, r. 40—*Fees, award of, on higher scale—'Special grounds', meaning of—Fraudulent or reprehensible conduct of party, whether 'special ground.'*

The 'special grounds' which would justify an award of fees to a party on the higher scale under rule 40 of the High Court Fees Rules are limited to cases where the special grounds are such as to affect the costs of the litigation. The reprehensible or fraudulent conduct of a party is not such a 'special ground' as would justify such an award. **M** GANTASALA KUPPIAH CHETTY *v.* GUNAVATHIAMMA, 22 M. L. T. 541 **995**

Madras Town Nuisances Act (Mad. Act III of 1889), s. 3.

Money or coins can be said to be used for the purpose of gaming under section 3 of the Madras Town Nuisances Act III of 1889 only if they are actually staked. To justify their confiscation the money or coins should have been actually used or displayed in the act of gambling.

Where some sovereigns were found tied up in the waist cloth of one accused and some others concealed in the mouth of another accused who were convicted under the Madras Town Nuisances Act and the Magistrate ordered confiscation of the sovereigns:

Madras Town Nuisances Act—concld.

Held, that the order so far as it related to the sovereigns found in the mouth of one of the accused was legal, as it could be reasonably inferred that they were intentionally secreted to avoid exposure but that the confiscation of the coins tied in the waist cloth was illegal. **M** APPAJI IYER *v.* EMPEROR, 34 M. L. J. 253; 7 L. W. 528; 19 CR. L. J. 301; 41 M. 644 **205**

Majority Act (IX of 1875), s. 2—*'Capacity to act,' meaning of minor, renunciation of dower by, validity of.*

The relinquishment of dower by a Muhammadan minor does not bind her when she attains age according to the Indian Majority Act.

The injunction of Muhammadan Law which prohibits acts being done by a minor to his prejudice must be taken to operate till the age at which the minor attains majority under the ordinary law of the land.

The Majority Act should not be construed so as to deprive a person of rights which he would otherwise be entitled to

A Muhammadan female cannot be said 'to act' in the matter of dower within the meaning of section 2 of the Majority Act when she gives up her rights to it.

When the Legislature by section 2 of the Majority Act permitted a person to act in the matter of dower, it only intended to allow that person who was not otherwise competent under the ordinary law to act in that matter to initiate the religious acts or ceremony which under the personal law he or she was capable of initiating. The legal consequences flowing from this primary act were not intended to be controlled by the section. **M** ABI DHUNIMSA BIBI AMMAL *v.* MUHAMMAD FATHI UDINI SAHIB, 23 M. L. T. 78; (1918) M. W. N. 246 **293**

Malabar Compensation for Tenants' Improvements Act (I Mad. of 1900), ss. 4, 9 to 12—*Conversion of forest into paddy fields—Tanks and channels dug by tenant, claim for value of—Method of valuation—Absence of specific provision in contract, effect of—Scope of s. 9—Trees of spontaneous growth on plot reserved for landlord, whether 'improvements.'*

Per *Curiam* (*Seshagiri Aiyar, J., dubitante*).—A tenant is entitled, under Madras Act I of 1900, to compensation for reclaimed lands only at the rates specified in the contract between the parties. He cannot, ignoring the valuation under the contract, resort to section 9 for appraising compensation for tanks and channels dug by him in land, which, at the time of the demise, was a forest.

In all matters which are provided for by the contract, the parties are governed by it.

Per *Seshagiri Aiyar, J.*—Section 9 deals with cases where, at the time of demise, the land was of some value and an additional value was imparted to it by the labour of the tenant. The section is intended to apply to cases where the Court has to fix the entire valuation under the Act, ignoring the contract, if any, between the parties. There cannot be first a valuation under the contract and a further valuation invoking the aid of section 9.

A tenant is not entitled to claim as improvements the value of trees of spontaneous growth standing on land reserved for the use of the landlord.

Malabar Compensation for Tenants' Improvements Act—concld.

Per *Napier, J.*—After the tenant has been given compensation at the rate fixed in the contract, he cannot for the purpose of valuing the improvements made by the construction of tanks and channels import the increase in the value of the annual net produce as a factor in ascertaining the value. The compensation for the value of tanks and channels must be ascertained under section 11. **M** THATHAMANGALAM PARAKAT SAMU MENON *v.* VALIA NAMBIDI, (1918) M. W. N. 141; 7 L. W. 287 **242**

—— —— **ss. 5, 6,** *scheme of—Landlord and tenant—Ejectment, decree for, with compensation to tenant—Decree barred—Fresh suit in ejectment, maintainability of.*

A landlord who obtains a decree in ejectment against his tenant, which also directs payment of compensation to the latter under the Malabar Compensation for Tenants' Improvements Act, cannot on the decree becoming barred maintain another suit on the same cause of action.

Per *Wallis, C. J.*—When a man has a cause of action and brings a suit upon it, that cause of action is merged in the decree, *transit in rem judicatum*, and then his remedy is in execution and if he does not enforce his remedy and allows it to become barred, his rights are gone.

The payment of compensation which is assessed in a suit for ejectment by a decree under the Malabar Compensation for Tenants' Improvements Act, is a matter relating to execution and is intended to be dealt with as such. According to the scheme of the Act, the decree for ejectment on payment of compensation is left to be governed by the law of limitation with regard to the execution of decrees and it was not intended to interfere with the general principle that a man who sues on his cause of action and obtains a decree and allows his decree to become barred has no further remedy.

Per *Sadasiva Aiyar, J.*—When a plaintiff has obtained in one suit based on some legal title a decree for the reliefs which he was entitled to as against a defendant and has allowed that decree to become barred, he cannot be allowed to bring another suit for obtaining *the very same relief* against the very same defendant, though on a different basis, if the latter ground of claim is founded on a right or title which existed and could have been relied on as a basis of relief when the first suit was brought. **M** NYNAM VEETILL MAYAN KUTTI *v.* VALAPPILAKATH KUNHAMMAD, 7 L. W. 143 34 M. L. J. 167; 23 M. L. T. 156; (1918) M. W. N. 205; 41 M. 641 **110**

—— **ss. 9 to 12** **242**

Malabar Law—Karnavan, *position of—Mortgage by* karnavan *to pay barred debt—Consideration*—Tarwad, *liability of.*

The status of a *karnavan* in a Malabar *tarwad* is more akin to that of a manager of a Hindu family than to that of a Hindu father. The peculiar obligations which a Hindu son incurs in respect of the debts of his father are not those with which a junior member of a *tarwad* is chargeable with reference to the *karnavan's* debts.

Malabar Law—concld.

A mortgage executed by a *karnavan* in payment of a barred decree-debt is not binding on the junior members of the *tarwad.* **M** MANKOOTTIL CHATHUKUTTI NAIR *v.* KOMAPPAN NAIR, (1918) M. W. N. 144 **572**

——— —Uralan *and* Samudayi, *position and functions of—Principal and agent—Prescription, acquisition of title by, by* Samudayi *to* Devaswom *properties—Right of suit by* Samudayi—*Possession, proof of—Limitation Acts*, 1859, 1871, 1908.

A Samudayi cannot accurately be described in all cases as the agent of the Uralan. There may be a temple in which the Uralan is the person in whom the property and the management vest and such a temple may have a Samudayi who will be the agent of the Uralan. In such a case, the Samudayi will not be entitled to sue or defend actions in his own name. There may be institutions in which an absentee Uralan performs only the functions of a supervisor or controller, leaving the management and legal ownership of the Dewaswom properties in the Samudayi. The Uralan in such a case will have very nearly the powers of a Temple Committee and the Samudayi those of a trustee. The right of suit will be in the Samudayi in these institutions. There may be a temple in regard to which the founder's family which exercised the Uraima right ceased to exist generations ago. In such a case the Samudayi will be the real Uralan.

In the case of hereditary Samudayis, the declarations and acts of a Samudayi will not bind his successor-in-office belonging to the same family.

Alike under the Limitation Act of 1908 as under the earlier Acts of 1859 and 1871 it was competent for the Samudayi to acquire a title by prescription to the Devaswom properties and to be recognised as a trustee.

A Samudayi, therefore, is entitled to sue for recovery of the Devaswom properties on proof of possession adverse to that of the Uralan and of repudiation of his agency. It is not necessary for him to show that he became a trustee. It is enough if he proves possession and the management of the temple affairs.

Per *Napier, J.*—A hereditary Samudayi, whose office entails the doing of many acts of management, is not a mere agent of the Uralan affected by the ordinary principles of agency. **M** RAMAN SOMAYAJIPAD *v.* KUNHU KUTTI KOVILAMMA, 23 M. L. T. 187; (1918) M. W. N. 179; 34 M. L. J. 344; 7 L. W. 490 **630**

Maxim :—

"*Ei qui affirmat non ei qui negat incumbit probatio.*" **504**

Merchant Shipping Act (57 and 58 Vict., C. 60), s. 686—"*Natural born British subject*", *whether includes subject of Native State.*

The expression "natural born British subject" in section 686 of the Merchant Shipping Act does not include a natural born subject of a Native Indian State. **B** PUNJA GUNI *v.* EMPEROR, 20 BOM. L. R. 98; 19 Cr. L. J. 337; 42 B. 234 **449**

Mesne profits, claim for, nature and extent of **605**

Mining lease—*Lessee of share working mine, whether can be restrained by lessees of other shares—Accounts of profit, claim for, by other lessees, whether maintainable—Acquiescence.*

Where a lessee of a share in a mine works the mine, the lessees of other shares are not entitled to an account of profits unless it is shown that the defendant has worked more than his fair share or that there has been an actual ouster or destruction of common property by his working the mine, nor can the plaintiffs get a decree for ejectment of the defendant from the mine. The proper remedy of the other lessees is a suit for partition and when such a suit is brought, the Commissioner for partition should be directed to award, if possible, to the lessee who has been working the mine the portion of the property of which he is in possession and on which he has spent money.

The claim of a lessee of a share in a mine for accounts of profits from the lessee of other shares who has been working the mine would be barred by acquiescence, if the plaintiff knowing that the other lessee was spending large sums of money to develop the mine did not promptly come in with his claim for an account of the profits. **C** BENGAL COAL CO., LTD *v.* MONORANJAN BAGCHI, 22 C. W. N. 441 **297**

Mortgage **919**

——— *Acquisitions by mortgagee—Redemption—Mortgagor, whether can claim possession on redemption.*

A mortgagee who has acquired what any stranger or even the mortgagor himself could have acquired equally well despite the mortgage, cannot be compelled to hand over his rights to the mortgagor.

It is, therefore, competent to a mortgagee during the continuance of the mortgage to purchase an absolute occupancy tenure for himself and to treat it as his separate property after the mortgage comes to an end.

Plaintiff's father had mortgaged certain properties to the defendants and the latter during the subsistence of the mortgages bought out a number of occupancy tenants. The plaintiffs redeemed the mortgages by private arrangement but the defendants refused to give possession of the land which had been subject to the occupancy tenures, alleging that they had not acquired these tenancies as mortgages and that they were, therefore, entitled to retain them for their own benefit. Plaintiffs thereupon claimed possession of these tenancies on payment of the sum for which they had been acquired:

Held, that the mortgagees were entitled to retain the benefit of their acquisitions for themselves and that the plaintiffs' suit must fail. **P** GIRDHARI RAM *v* MUHAMMAD KARM DAD KHAN, 53 P. W. R. 1918; 26 P. L. R. 1918 **266**

——— and charge, distinction between **734**

——— *Co mortgagees, whether joint promisees—Payment to one co-mortgagee, whether discharges debt.*

Co-mortgagees are joint promisees and the payment of the mortgage debt to one of them discharges the whole debt.

In view of the difference in the conditions of social life in India and in England, it is doubtful whether and to what extent the presumption that when a claim is on a money bond to two or more obligees, they are tenants-in-common

Mortgage—contd.

and not joint tenants of the debt with the consequence that the discharge by one obligee cannot be set up as a defence against the other obligee suing for his share of the debt, which in England prevails only in cases in which equitable relief is claimed, should have effect given to it in India. **U B** MAUNG NYAN MO *v.* MA PO, 3 U. B. R. (1917) 42 **627**

——— *decree, execution of—Property assessed to revenue—Decree describing property as* muafi—*Objection by purchaser in execution of money decree—Identity of property—Objector not deceived.*

A mortgage-deed described the mortgaged property as *muafi* whereas it was assessed to a small sum of revenue. The mortgagee sued upon the basis of the mortgage and obtained a decree in which the property was again described as *muafi*. In execution it was objected by a previous purchaser of the property in execution of a money-decree that the property was not revenue-free and was, therefore, not the property mortgaged. At the time of the objector's purchase the burden of the mortgagee's loan had been duly notified:

Held, that as the objector was not in any way deceived when he purchased the property, the burden of the mortgage having been clearly notified at the time of his purchase, it was utterly unjust to allow a slight misdescription to prevent a Court from doing what was right. **A** BASANTI *v.* KUNJ BIHARI LAL, 16 A. L. J. 262 **998**

——— *Ejectment, suit for—Redemption, whether can be allowed.*

A Court can in its discretion pass a decree for redemption in a suit in which the plaintiff sues for ejectment. **N** KRISHNAJI HATKAR *v.* RAOJI **921**

——— *Endorsement of satisfaction without consideration, effect of—Assignee of mortgagee rights*—Bona fide *purchaser for value—Adverse possession against remainderman.*

The principle of English Law that a deed imports consideration has no application to India, and an endorsement on a mortgage-deed that the mortgage has been satisfied made without consideration amounts only to a gratuitous promise not binding on the releasor.

An assignee of an equity of redemption who laims also to be an assignee of the mortgagee's rights but who has taken no re-transfer of the property from the mortgagee or his representatives, and whose assignor has taken no re-transfer of those rights, cannot set up the plea of *bona fide* purchaser for value without notice.

Where property is held by a Hindu widow under a life-interest adverse possession begins to run against the reversioner on the termination of the widow's interest. **B** BAI JAYAGAVRI *v.* PURSHOTAM DAS, 20 BOM. L. R. 177 **926**

——— *, equitable—Hypothecation of immoveable property, whether passes fixtures.*

Where immoveable property is hypothecated the fixtures pass to the mortgagee. The rule in this respect as between landlord and tenant does not apply as between mortgagor and mortgagee. **C** HARIPDA SADHUKHAN *v.* ANATH NATH DEY, 22 C. W. N. 758 **211**

Mortgage—contd.

——— *Lease by mortgagee—Redemption of mortgage by owner or purchaser of equity of redemption—Determination of lease.*

Obiter.—A lease created by a mortgagee determines *ipso facto* on redemption of the mortgage by the mortgagor or the purchaser of the equity of redemption. The position is, however, different where the mortgage is only assigned. **M** GOVINDASAMI PILLAI *v.* PETHAPERUMAL CHETTY **839**

——— Lekha mukhi *mortgage—Redemption, suit for—Failure of mortgagee to keep full and regular accounts, effect of—Presmption.*

In a suit for redemption of a *lekha mukhi* mortgage, the question of the liability of the mortgagor and the mortgagees *inter se* was referred to a Local Commissioner, who found that the mortgagees did not keep full and regular accounts of the income and expenditure of the land in suit and who, therefore, based his report on the statement of the mortgagees' *daubir*:

Held, (1) that it was the duty of the mortgagees to keep full and regular accounts of the income and expenditure of the mortgaged land;

(2) that in view of their failure to keep such accounts every presumption should be made against them;

(3) that the report of the local Commissioner based on the statement of the mortgagees' own *daubir* must be accepted as correct. **P** ALLAH YAR *v.* THAKAR DAS, 46 P. W. R 1918; 24 P. L. R. 1918 **9**

——— *Mortgagee giving up rights under mortgage in consideration of* Hundi—Hundi *insufficiently stamped—Mortgagee, whether can sue on mortgage.*

Plaintiff gave up his rights under a mortgage in consideration for cash payment and a Hundi executed in his favour by the mortgagor. He made an endorsement on the back of the mortgage-deed that he had received the full amount of the mortgage-debt from the mortgagor. The Hundi executed by the mortgagor in his favour was not properly stamped:

Held, that the plaintiff by acknowledging the receipt of the entire money due on the mortgage-deed had discharged the mortgagor from his liability on the deed, the Hundi being the only contract between the parties, and that for want of proper stamp the Hundi being inadmissible in evidence the creditor must lose his money and could not sue on the original mortgage-deed. **P** BHAGAT RAM GANPAT RAI *v.* CHHAJJU RAM, 15 P. W. R. 1918 **886**

——— *of holding—Purchaser of holding, whether can redeem—Suit on mortgage—Purchaser not made party, effect of.*

Plaintiff, mortgagee of a *raiyati* holding, brought a suit on foot of his mortgage. Defendant, who was the purchaser of the holding and had been recognised by the landlord, applied to be made a party to the suit. He did not claim to redeem the mortgage, but set up a title paramount to the mortgagee and also questioned the *bona fides* of the mortgage transaction. His application was rejected. The plaintiff obtained a decree and purchased the holding in execution thereof. He then brought a suit to eject the defendant;

Mortgage—contd.

Held, that the defendant had a right to redeem the mortgage. **C** REBATI MOHAN DAS *v.* NADIABASHI DE, 22 C. W. N. 543. **521**

——— *Prior and puisne encumbrancers—Decree for sale in first mortgagee's suit—Puisne mortgagee not impleaded—Purchaser at auction sale, rights of—Accounts of profits, enquiry as to, after date of sale—Revivor of mortgage, nature and extent of—Subrogation, principles relating to—Improvements, right to, by transferee from purchaser.*

Defendants Nos. 1 to 3 mortgaged some houses to the Hindu Permanent Fund on 29th March 1899. On 26th September 1899 they mortgaged the same houses and certain lands to *S.* On 9th February 1901 they again mortgaged the houses to plaintiff's husband. *S* sued on his mortgage, obtained a decree for sale, purchased the lands and houses and soon afterwards obtained possession. His decree was satisfied except for a small sum of Rs. 95. *S.* then redeemed the mortgage to the Fund. In 1906 plaintiff's husband, who was not a party to *S.'s* suit, claimed to redeem *S.* but did not prosecute his suit. After his death plaintiff sued on her mortgage, offering to redeem *S.* or his assignees, but she claimed to do so only on what would be found due on the prior mortgage up to the date of delivery of possession to *S.* In the meantime *S.* had sold the properties to 6th defendant:

Held, (1) that *S.* and his assignees were entitled to the principal and interest due on foot of the two mortgages dated March and September 1899, but were bound to account for the rents and profits of the properties from the respective dates on which *S.* obtained possession through Court, the account being carried up to the date fixed for payment;

(2) that 6th defendant was not entitled to the value of the improvements effected by him after his purchase.

If the owner of an equity of redemption is a party to a suit to enforce a mortgage, but a puisne encumbrancer is not, the purchaser becomes the assignee of the mortgage sued on, as well as the transferee of the equity of redemption, subject to the mesne mortgage, and if the purchaser obtains possession on sale from the owner, he must account for the profits at least in cases where the price he pays is not more than sufficient to pay the mortgage sued on; for in such a case the purchaser pays nothing for the equity of redemption and the profits of the land are to be considered as the money of the mortgagor placed in the hands of the purchaser to discharge the mortgage *pro tanto*.

Principles affecting the doctrine of subrogation and revivor of discharged mortgages discussed. **M** MUTHAMMAL *v.* RAZU PILLAI, 23 M. L. T. 105; (1918) M. W. N. 251; 7 L. W. 420 **753**

——— *Priority—Property belonging to five brothers mortgaged by four of them—Mortgagees, rights of, on partition.*

A property belonging to five brothers, one of whom was a minor and was represented by his duly appointed guardian, the eldest of the four adult brothers, was mortgaged to *N.*, and then it was mortgaged by the four adult brothers to *G.* On the

Mortgage—concld.

adjudication of the four adult brothers as insolvents the Receiver in insolvency got the joint properties partitioned and the mortgaged property was allotted to the four adult brothers, which was then sold by the Receiver at the instance of a prior mortgagee who was paid off out of the sale-proceeds:

Held, that *N.* was entitled to the whole of the balance of the sale-proceeds in priority to *G.* as he had not lost the priority to the extent of the 1/5th share which belonged to the minor brother by reason of the partition and sale of the property. **C** GOPI NATH MONDAL *v.* ASHUTOSH GHOSE, **1003**

——— *Redemption—Purchaser of share of equity of redemption, whether can redeem entire mortgage*

A purchaser of a share of the equity of redemption other than the mortgagee is entitled to redeem the entire mortgage. **C** BAIKANTHA NATH DEY *v.* MOHESH CHANDRA DEY, 22 C. W. N. 128 **77**

——— *Redemption, suit for—Burden of proof—Admission of party, effect of—Amendment of plaint.*

In a suit for redemption of a mortgage, the plaintiff has to prove, ordinarily, that there is a subsisting mortgage capable of being redeemed. The rule, however, is subject to exceptions. Where the defendant admits the existence of the mortgage, the onus is shifted to him to prove that he subsequently acquired an irredeemable right.

A plaintiff in a redemption suit may be permitted to amend a plaint which is based on a specific mortgage and claim a decree on the defendant's admission. **M** MADHAVAN VYDIAR *v.* LAKSHMANA PATTAR, (1918) M. W. N. 139; 7 L. W. 284 **447**

——— *to two persons—Shares in mortgage-money not specified, effect of—Co-mortgagees, position of—Presumption—Redemption, partial, effect of.*

Where money is advanced by two co-mortgagees without any specification of shares, the presumption is that each of them advances half the money; and if one of them accepts satisfaction of his interest as mortgagee from the mortgagor, the result is that the only mortgagee interest outstanding is the interest of the other co-mortgagee which extends to one-half of the mortgage-money. **O** RAM DATT *v.* DEOTA DIN, 4 O. L. J. 735 **621**

——— without possession—Sub-mortgagee, rights of **213**

Muhammadan Law—*Dower, incidents of.*

Dower, under Muhammadan Law, is in the nature of a debt, being a recompense for the matrimonial restraint. The wife has a lien over the property of her husband in her possession for unpaid dower and she ranks *pari pasu* with other creditors in the distribution of her husband's estate. **M** ABI DHUNIMSA BIBI AMMAL *v.* MUHAMMAD FATHI UDINI SAHIB, 23 M. L. T. 78; (1918) M. W. N. 246 **293**

——— *Minor—Alienation by de facto guardian, validity of.*

Where a *de facto* but not a *de jure* guardian of a Muhammadan minor alienates the minor's property the alienee cannot enforce the alienation against the minor; but the minor, if he comes into Court to challenge the alienation, must before re-entry restore

Muhammadan Law—concld.

to the alienee all the benefits that he personally has derived from the alienation—this on the equitable ground that he who seeks equity must do equity. **P** SARDARA *v* KAURA RAM, 7 P. W. R. 1918; 152 P. L. R. 1917; 36 P. R. 1918 **219**

——— *Sale—Pre-emption, right of, whether can be defeated—Construction of document.*

Where a transaction in its nature is a sale, the vendor and vendee cannot defeat the right of pre-emption arising under the Muhammadan Law by dressing it up in the garb of a lease.

In determining the real nature of the transaction the Court is entitled to take into consideration the sum paid down, the amount of the rent reserved and the value of the property. **A** MOHAMMAD NIAZ KHAN *v.* MOHAMMAD ADREES KHAN, 16 A. L. J. 233; 40 A. 322 **227**

Municipalities, *liability of, for misfeasance—Gravel thrown on public road, injury caused by—Negligence—Damages—Extent of liability—Negligence of contractor, effect of, on relations between Municipality and public.*

Municipal Corporations in India are liable for acts of misfeasance.

It is the duty of Municipalities to lay and maintain roads so that the public may pass over them safely and they are liable for injuries resulting to the public through the negligent or improper performance of that duty.

The liability of statutory bodies for negligence is not based on whether a profit is derived by the levy of a cess or toll from the public. The question whether it gives them an income over expenditure is not a criterion for enforcing liability.

Municipalities in India do not act in the exercise of sovereign powers or as agents of the State in laying or maintaining roads.

In the case of statutory bodies entrusted with the performance of public duties, their liability cannot be shifted to a contractor employed by them for a particular purpose. They may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed. But they are not thereby themselves relieved from liability to those injured by the failure to perform it.

Quære.—Whether a public body can be liable for mere non-feasance?

Whether the making of roads by the Government is an act of sovereign power? **M** MUNICIPAL COUNCIL OF VIZAGAPATAM *v.* WILLIAM FOSTER, 41 M. 538 **308**

Negotiable Instruments Act (XXVI of 1881), ss. 4, 27—*Promissory note, execution of, by illiterate person—Mark of executant, absence of—Execution, proof of, by authority—Agency.*

A promissory note purporting to have been executed by one *C.* contained the words 'Nishi mark of *C.*,' but there was no separate mark:

Held, (1) that a separate mark was unnecessary to prove execution of the document;

(2) that the payee was at liberty to prove execution by the authority of the executant. **M** CHELLA BALAYYA *v.* KANUPARTHI SUBBAYYA, 40 M. 1171 **813**

——— s. 27 **813**

Negotiable Instruments Act—concld.

——— **s. 56**—*Promissory note, transfer of balance due upon, validity of.*

The object of section 56 of the Negotiable Instruments Act is simply to prevent a promissory note from being transferred for a portion only of the sum at the time due upon it. It has no application to the transfer of the whole of the balance due upon a promissory note. **P** JAI CHAND *v.* SARDAR SINGH, 5 P. W. R. 1918; 150 P. L. R. 1917: **264**

Occupancy tenancy, *devolution of—One of several tenants, whether can take up entire holding.*

On the death of an occupancy tenant the occupancy right devolves by operation of law on all the heirs as co-tenants and any one of them willing to do so can take up the whole tenancy in the event of the other heirs being unwilling to do so. **N** KALWA *v.* BHAWAR SINGH **1001**

Opium Act (I of 1878), s. 9—*Illegal possession of opium—Joint possession—Evidence Act (I of 1872), s. 25—Excise Officer, whether Police Officer—Confession to Excise Officer, admissibility of.*

A person found in possession of a quantity of opium in excess of what he can lawfully possess for his own personal use is guilty of an offence under section 9 of the Opium Act, and the fact that he used to give opium to the other members of his family to eat does not make them joint possessors of the opium with him. **P** EMPEROR *v.* WAZIR SINGH, 3 P. R. 1918 CR.; 19 CR. L. J. 364 **588**

——— **s. 9 (c), (f)** **974**

Orissa Tenancy Act (II B. & O. of 1913), ss. 57, 215, 220, 221—*Incumbrance, under-raiyati interest, whether is—Ejectment of under-raiyat—Procedure.*

An under-*raiyat* in occupation of land is an incumbrancer upon such land within the meaning of section 215 of the Orissa Tenancy Act.

A purchaser at an auction-sale has one, and only one, remedy open to him for annulling an incumbrance, namely, that prescribed by section 221 of the Orissa Tenancy Act, and in cases where this remedy is not followed and a year is allowed to elapse by the purchaser without taking steps to annul the incumbrance affecting the lands or interest he has purchased, he is not entitled to eject the under-*raiyat* under section 57 of the Act. If the purchaser does take the steps open to him to annul the incumbrance and the under-*raiyat* refuses to give up possession consequential thereon, he can be ejected under section 57, but if the purchaser does not avail himself of the only remedy which is open to him he is not entitled to eject the under-*raiyat* in any other way. **Pat** SHIBA DAS *v.* GAJENDRA NATH DAS, 3 P. L. J. 112 **593**

——— **ss. 215, 220, 221** **593**

Oudh Civil Digest (1917), para. 272—*Certificate of fee—Government Pleader appearing for liquidator, whether bound to file certificate.*

Paragraph 272 of the Oudh Civil Digest is mandatory and a Government Pleader appearing in a case for a Tahsildar, who has been impleaded in his capacity as a liquidator appointed under section 42 (1) of the Co-operative Societies Act, is not exempted from filing his fee certificate as required by the paragraph. **O** BENI MADHO SINGH *v.* LIQUIDATOR, DEWARA BANK, 4 O. L. J. 583 **353**

Oudh Civil Digest (1917)—concld.

Oudh Estates Act (I of 1869), ss. 15, 22, 23—*Estate entered in List II and held under primogeniture* sanad—*Bequest in favour of person not* taluqdar *or grantee and outside line of succession—* Sanad, *applicability of—Ordinary law, whether includes terms of* sanad.

Section 15 of the Oudh Estates Act is a declaratory section, operating both prospectively and retrospectively.

Where a person whose estate was entered in List II died before the Oudh Estates Act came into force, bequeathing his estate to his son-in-law, who was neither a *taluqdar* nor a grantee, nor a person who would have succeeded to the estate, had the testator died intestate:

Held, per *Lindsay, J. C.*, that the effect of section 15 of the Oudh Estates Act was to put the *sanad* out of consideration altogether, and that the succession to the estate on the death of such a legatee would be governed by the rules which would have governed the succession if the legatee had *bought* the estate from a person, not being a *taluqdar* or grantee, or in other words, by the ordinary law, irrespective of the rule of succession contained in the *sanad*.

Per *Kanhaiya Lal, A. J. C.*, that the effect of the section was to relieve such a legatee from the disability imposed by the Oudh Estates Act on *taluqdars* and grantees in the matters of transfer and succession, and not from any rules which might be applicable independently of the Act, and that the succession to such legatee would be governed by the rule of succession laid down in the *sanad* as restricting or qualifying the personal law.

Per *Curiam*, that the rule of succession contained in the *sanad* was inapplicable to a person who got the estate otherwise than by inheritance. **O** BALRAJ KUAR *v.* MAHADEO PAL SINGH, 20 O. C. 360; 4 O. L. J. 559 **59**

——— **s. 22** **368**

——— **ss. 22, 23** **59**

Oudh Rent Act (XXII of 1886), ss. 53, 107B, Ch. VII A—*Tenant holding at favourable rent—Ejectment—Procedure—Resumption.*

Section 107B of the Oudh Rent Act supersedes, in the case of tenants holding at a favourable rate of rent, section 53 of the Act.

Where there is a special provision governing a special class of cases the latter should be dealt with under it, and not under the general provision governing general cases.

A tenant holding at a deliberately, and not accidentally, favourable rate of rent comes under section 107B of the Oudh Rent Act, and is subject to resumption proceedings under Chapter VII A of the Act and cannot be ejected by notice as an ordinary tenant **U P B R** RAM KUMAR *v.* PARTAB BAHADUR SINGH, 4 O. L. J. 737 **644**

——— **s. 107B** **644**

——— **s. 108 (10)** **357**

——— **Ch. VII A** **644**

Pakka adatias, position of **284**

Pardanashin lady, deed executed by **645**

Partition—*Decree for partition, effect of—Rights of co-sharers—Remand for fresh enquiry "so far as appellants are concerned"—Suit, whether can be dismissed* in toto.

The property in suit belonged to three brothers one of whom *N.* alienated part of it and in 1903 another brother *T.* brought a suit against his co-sharers for his one-third share and joined the alienees also as defendants. This suit was decreed even against the alienees, two of whom preferred appeals which having been accepted, the case was remanded for fresh enquiry "so far as the appellants were concerned". After remand a final decree was passed by which the whole suit was dismissed. An application for execution of the first decree having been made, the widow of the third brother demanded her share of the property and sought relief against the alienees:

Held, (1) that the original decree stood as between the plaintiff and those defendants who did not appeal and could not be treated as having been set aside as a whole;

(2) that inasmuch as every co-sharer is entitled to obtain possession of the share allotted to him under a decree for partition, whether he be the plaintiff or the defendant, the widow of the third brother in this case being herself a defendant was entitled to take advantage of the decree passed in favour of the plaintiff and to claim a one-third share under it. **P** DEBI SAHAI *v.* TARA CHAND, 44 P. W. R. 1918; 22 P. L. R. 1918 **135**

Partition suit—*Consent decree by High Court, directing valuation—Supplementary decree by trial Court set aside—Execution—Limitation, commencement of.*

In a partition suit the High Court on appeal passed a consent decree directing that the plaintiff do pay to the defendant the price to be ascertained by the Court of first instance within one month from the date of the valuation being made, and upon such payment being made the defendant do convey her share to the plaintiff. The case then went back to the Court of first instance, which made the valuation and passed a supplementary decree in the terms of the High Court decree. On revision the High Court held that no supplementary decree should have been passed and that the only decree in the case was the consent decree passed by the High Court. The defendant then applied for execution of the decree offering to execute the conveyance and agreeing to recover from the plaintiff as much as she could out of the valuation fixed by the Court of first instance:

Held, (1) that the decree was capable of execution;

(2) that limitation under Article 182 (2), Schedule I, of the Limitation Act began to run from the date on which the High Court set aside the supplementary decree passed by the Court of first instance. **C** GURU PADA HALDR *v.* TARIAT BHUSAN ROY CHOWDHURY, 22 C. W. N. 158 **141**

——*Preliminary decree—Appeal—Final decree as regards portion of joint property—Supplementary final decree—Jurisdiction.*

In an appeal from a preliminary decree in a suit for partition, the High Court during the pendency of the appeal stayed proceedings upon the preliminary decree, in so far as it related to a joint business. In the meanwhile the trial Court on the report of the Commissioner made a final decree partitioning all other properties involved in the suit. Subsequently upon the dismissal of the appeal by the High Court an application purporting to be under section 151, Civil Procedure Code, made by the plaintiff to the trial Court for the partition of the joint business, was refused with the remark that the only course open to the plaintiff was an application for review under Order XLVII, Civil Procedure Code:

Held, that the trial Court had refused to exercise a jurisdiction which was vested in it, inasmuch as it was quite competent to deal with as much of the suit as had not already been dealt with in the final decree and to make a supplementary final decree in regard to the joint business. **C** JASHODA DASEE *v.* UPENDRA NATH **671**

Partnership, *suit against—Absence of one partner from British India, effect of—Deduction of time as against absentee defendant—Legal representatives of deceased partner, position of—Release by one partner, whether binds other partners—Contract Act (IX of 1872), ss.* 241, 263.

In a suit against a partnership firm for moneys due on accounts, the plaintiff is entitled to a deduction of the time during which any of the partners was absent from British India, but such absence will save limitation only as against the absentee partner and not as against those who were within jurisdiction.

The legal representative of a deceased partner does not continue to be a partner after the latter's death for purposes of winding up. He only becomes a lender in respect of any business that might be carried on by the surviving partners. If no business is carried on, he is a tenant-in-common with the surviving partners in respect of the assets of the business.

It is open to one of the partners of a firm to release a partnership liability.

After the death of one of the partners the surviving partners have power to release a claim. If the release is fraudulent, the other partners can avoid it and seek to recover their share of the released debt. The right, however, is personal to the partners, and the legal representative of a deceased partner is not entitled to it. **M** PALANIAPPA CHETTIAR *v.* VEERAPPA CHETTIAR, 34 M. L. J. 41; 41 M. 446 **466**

Patna High Court, *decisions of Calcutta High Court, whether binding upon.*

The decisions of the Calcutta High Court, which until recently exercised jurisdiction in the Province of Bihar and Orissa, although they do not prevent the Patna High Court from exercising an independent judgment, are entitled to the greatest respect and should not be departed from without cogent reasons **Pat** KRISHNA LAL JHA *v.* NANDESHWAR JHA **146**

Penal Code (Act XLV of 1860), s. 4—*Jurisdiction—Offence committed on high seas by subject of Native State, whether cognizable by British Indian Courts.*

British Indian Courts have no jurisdiction to try a subject of a Native Indian State for an offence committed on board a ship belonging to a subject of a Native State outside territorial waters. **B** PUNJA GUNI *v.* EMPEROR, 20 BOM. L. R. 98; 19 CR. L. J. 337; 42 B. 234 **449**

Penal Code—contd.

——— ss. 44, 323, 341, 385—*Threat to report suspected case of smuggling liquor, whether extortion—'Injury,' meaning of—Joint trial of charges of wrongful restraint, attempt at extortion and causing hurt in attempt, legality of.*

Accused, who was the proprietor of a certain estate, stopped complainant, a cooly, whom he suspected of smuggling Arrack from the Nizam's Dominions into British Territory, on the way, took and kept his liquor jar for the night and threatened to report the matter to the Police unless he paid something. He was charged with wrongful restraint, threat of injury to commit extortion and causing simple hurt in the course of the attempted extortion and was sentenced to a single fine of Rs. 100 for the three offences:

Held, (1) that the conviction under section 385 was bad, as complainant was not put in fear of any injury within the meaning of section 44 of the Penal Code and the accused only threatened to do what he was bound by law to do;

(2) that the conviction under section 341 was bad, as there was no physical restraint of complainant's person;

(3) that the charge of voluntarily causing hurt, which was non-cognisable and for which there was no complaint to a Magistrate, should not have been tried on the Police charge sheet with the other charges and that this irregularity prejudiced the accused, as the evidence of hurt was not considered except as combined with the evidence on the other Police charges.

For the purpose of section 385, Indian Penal Code, it is necessary that the accused should have put some person in fear of injury in order to extort some property from him. 'Injury' includes only such harm as may be caused illegally to a person's mind, body, reputation or property. **M** *In re* MANTRIPRAGADA MATTAPALLI NARASIMHA RAO, 19 CR. L. J. 445 **973**

——— ss. 75, 379 **183**

——— ss. 96, 97, 141, 447—*Trespass, resistance to—Private defence, right of, exercise of—Persons exceeding right, whether constitute 'unlawful assembly.'*

The right of private defence against an act of trespass on one's property is not lost by reason of the omission to send word to a Police Station which is at some distance from the place of occurrence.

Persons who exercise their right of resisting an unlawful trespass on their property do not become members of an unlawful assembly by repelling attacks made on them or by exceeding their right of private defence. **M** PENUMESA THIRUMALRAJU *v.* EMPEROR, 19 CR. L. J. 248 **40**

——— ss. 97, 324, 334—*Private defence, right of, extent of—Inflicting wound with sharp weapon on grave and sudden provocation—Offence.*

Accused was coming along the road on his bicycle when he was set upon and assaulted by the complainant. He fell off the bicycle on to the ground with the complainant on top of him. In the struggle which ensued the accused wounded the complainant in the breast with a sharp knife:

Held, that the accused was guilty of an offence under section 334 of the Penal Code, inasmuch as he acted under grave and sudden provocation.

Penal Code—contd.

The right of an accused person to defend himself upon a criminal charge can only be limited by the provisions of the Statute Law. **A** YUSUF HUSAIN *v.* EMPEROR, 16 A.L J. 169; 20 CR.L J. 371; 40 A. 284 **675**

——— ss. 97, 99, 141—*Right of private defence, extent of—Unlawful assembly—Rioting.*

The right of private defence extends to section 141 and subsequent sections of the Penal Code just as much as it extends to any other offence punishable under the Penal Code. Where a person in possession of property sees an actual invasion of his rights to that property, if that invasion amounts to an offence under the Code, he is entitled to resist it by force and to collect for that purpose such numbers and such arms as may be absolutely necessary for this purpose, provided only that there is no time to have recourse to the protection of the Police authorities. **Pat** FOUZDAR RAI *v.* EMPEROR, 4 P. L. W. 111; 19 CR. L. J. 241; 3 P. L J. 419; (1918) PAT. 254 **33**

——— s. 99 **33**

——— s. 99—Right of private defence against public servant **742**

——— s. 141 **33, 40**

——— s. 147—*Rioting—Warrant, defective execution of—Assault on Police—Offence.*

Two persons were accused under section 498 of the Penal Code of the abduction of one *K*. The Magistrate, intending to act under section 90 of the Code of Criminal Procedure, ordered the issue of a warrant for the arrest of *K*. By mistake, however, the warrant stated that *K*. herself was charged with an offence under section 498. The officer, to whom the warrant was made over for execution, went with some constables to the village of *K*. and on her failure to furnish bail arrested her and had taken her a short distance from the village, when the accused rescued *K*. and inflicted injuries on the Police:

Held, that the accused were guilty of an offence under section 147 of the Penal Code, the common object being to rescue *K*., the causing of hurt to the Police being a necessary incident of the rescue and, therefore, a part of the common object **P** ATTAR SINGH *v.* EMPEROR, 9 P. R. 1918 CR; 14 P. W. R. 1918 CR; 19 CR. L. J. 390 **742**

——— s. 182—*False information—Petition of resignation containing untrue statements—Offence.*

The accused, a peon of the Court of Wards, had a quarrel with one *S*, brother of a *zilladar* employed by the Court of Wards, and afterwards submitted a petition of resignation to the Collector, the officer in charge of the Court of Wards, in which he gave a distorted version of the whole affair in order to forestall any proceedings which might be taken against him by *S*. or his brother:

Held, (1) that the petition did not amount to a complaint;

(2) that the accused was not guilty of an offence under section 182 of the Penal Code inasmuch as he never intended the Collector to use his powers to the injury or annoyance of the persons mentioned in the petition nor had he any knowledge that such a result was likely. **A** DEBI *v.* EMPEROR, 16 A. L. J. 105; 19 CR. L. J. 257 **113**

Penal Code - contd.

——— **s. 182**—*False information—Suspicion, expression of, whether amounts to giving false information.*

Accused made a complaint to the Police that a *hukka* had been stolen from his house and that he suspected two persons. It was found that the *hukka* had really been stolen:

Held, that the stating of his suspicion by the accused did not amount to giving false information. **C** ANANGA MOHAN DUTTA *v.* EMPEROR, 27 C. L. J. 230; 22 C. W. N. 478; 19 CR. L. J. 336 **352**

——— **s. 188** **751**

——— **s. 295**—*Killing cow with intention of offending religious feelings of Hindus—Offence.*

The killing of a cow with the intention or knowledge of offending the religious susceptibilities of Hindus is not an offence under section 295 of the Penal Code.

Where in a village the Sikhs killed some fowls by the process known as *jhatka* in the vicinity of a mosque, thereby causing annoyance to the Muhammadans, who in retaliation killed a cow with the knowledge that the Sikhs would be likely to consider such killing as an insult to their religion:

Held, that the Muhammadans were not guilty of an offence under section 295 of the Penal Code. **P** ALI MUHAMMAD *v.* EMPEROR, 1 P. W. R. 1918 CR.; 160 P. L. R 1917; 10 P. R. 1918 CR; 19 CR. L. J. 314 **330**

——— **ss. 299, Exp. (1), 300 (2)**—*Accelerating death of person suffering from disorder-Knowledge of disorder—Offence.*

Explanation (1) to section 299 of the Penal Code assumes that the bodily injury was inflicted with the intention of causing death or the knowledge that it would be likely to cause death.' It was intended to repeat the English rule that an injury which accelerates the death of a dying man is deemed to be the cause of it, and where death has been caused it is no defence that the deceased was suffering from a complaint which would have caused his death in any event. Section 300 (2) of the Code makes it clear that the offender is not responsible for death in such a case unless he knew that the condition of the deceased was such that his act was likely to cause death. **S** IMPERATOR *v.* ISMAIL, 11 S. L. R. R. 79; 19 CR. L. J. 319 **335**

——— **s. 302**—*Murder—Death caused by arsenic—Offence.*

Accused administered arsenic to a boy of nine years of age with the object of preventing the boy's father from giving evidence against the accused in a criminal trial. The boy died from the effects of the poison:

Held, that the accused was guilty of murder, inasmuch as he knew that the act committed by him was so imminently dangerous that it must in all probability cause to the boy such bodily injury as was likely to cause death. **A** GAURI SHANKAR *v.* EMPEROR, 16 A. L. J. 178; 19 CR. L. J. 382 **686**

——— **s. 304**—*Beating woman to death believing her to be possessed by evil spirit—Offence.*

Accused, believing the deceased to be possessed by an evil spirit, beat her to death in the hope of curing her. The deceased protested that she was not possessed and did not consent to be beaten:

Penal Code—contd.

Held, that the accused were guilty of an offence under the second part of section 304 of the Penal Code. **U B** NGA PO THA *v.* EMPEROR, 3 U. B. R. (1917) 54; 19 CR. L. J. 375 **679**

——— **s. 323** **973**

——— **ss. 324, 334** **675**

——— **s. 341** **973**

——— **s. 341**—*Wrongful restraint—Joint owner locking up shop—Civil dispute—Procedure.*

One of two joint owners of a shop leased it to the complainant without the consent of the other joint owner, whereupon the latter put her lock on the shop. The complainant accused her of wrongful restraint:

Held, that the accused had committed no offence.

Obiter dictum.—Even if the action of the accused could be construed as coming within any of the penal provisions of the Penal Code, yet the matter in dispute was so plainly a civil dispute that a Magistrate would not only be justified, but would be acting in a very desirable way, if he dismissed the complaint as being an abuse of the process of a Criminal Court. **B** BAI SAMRATH *v.* EMPEROR, 20 BOM. L. R. 106; 19 CR L. J. 351 **463**

——— **s. 343**—*Wrongful confinement—Prostitute kept in brothel house—Offence.*

Accused No. 1 brought the complainant, his mistress, to Bombay and after living with her for a few days in a brothel house left her in charge of accused No 2, the brothel-keeper, who kept guard over the complainant and allowed her to go out only on rare occasions under proper control. Accused No. 1 was aware of the conditions under which the complainant would have to live in the house:

Held, that both the accused were guilty of the offence of wrongful confinement. **B** BANDU EBRAHIM *v.* EMPEROR, 20 BOM. L R 79; 19 CR. L. J. 258, 42 B. 181 **114**

——— **s. 378**—*Trees in possession of landlord cut by tenant—Offence.*

Where trees standing on a demised land are in the possession of the landlord, it is theft on the part of the tenant to sever them from the ground, apart from any question of the possession of the land itself.

A clause in a *kabuliyat* provided that if the tenant cut any trees he would pay to the landlord compensation at a certain rate. The tenant knowing this clause *mala fide* cut the trees in order to injure the landlord:

Held, that the tenant was guilty of theft. **C** ABDUL ALI FAKIR *v.* NETALI FAKIR, 27 C. L. J. 228; 19 Cr. L. J. 334 **350**

——— **s. 379** **183**

——— **s. 385** **973**

——— **ss. 415, 420**—*Cheating—Disposing of woman by misrepresenting caste and obtaining money—Offence.*

To palm off a woman as belonging to a caste different to the one to which she really belongs with the object of obtaining money amounts to the offence of cheating as defined in section 415 of the Penal Code. **P** EMPEROR *v.* JHANDA SINGH, 6 P. R. 1918 CR; 16 P. W. R. 1918 CR.; 19 CR. L. J. 335 **351**

——— **s. 420** **351**

——— **s. 425**—*Mischief—Cutting down trees without impairing value—Offence.*

Penal Code—contd.

Where there is a dispute between the parties as to the ownership of a tree and one of them cuts it down, the case is beyond the cognizance of a Criminal Court and outside the scope of section 425 of the Penal Code. The cutting down of a tree does not amount to mischief unless it destroys or diminishes the dignity or value of the tree. **Pat** SARDAR SINGH *v.* EMPEROR, 4 P. L. W. 291; 19 CR. L. J. 339 **451**

——— **s. 430,** *essentials of—Diminishing supply of water used for agriculture—Prevention of waste and storage of water for sale whether 'mischief'—Cutting* bund *erected on channel.*

An offence under section 430 is committed when a person without any sort of right takes water to which another is entitled, whereby the latter is deprived of the full supply that he has a right to claim. Such taking, in the absence of a *bona fide* claim of right, evidences an intention to cause wrongful loss.

Neither the prevention of the water from running waste, nor the storing of it with the intention of selling it to other landowners makes the act of taking any the less an offence when deprivation is caused to the person legally entitled to the water.

The cutting of a *bund* erected on a channel, whereby a person is wrongfully deprived of the use of water, constitutes an offence under section 430 of the Penal Code. **M** CHIDAMBARAM PILLAI *v.* MUHAMAD KHAN SAHIB, 34 M. L. J. 206; 23 M. L. T. 248; 19 CR. L. J. 356 **580**

——— **ss. 441, 443, 456, 509**—*Lurking house trespass by night—Evidence—Intention—Presumption.*

Where the evidence shows that a man has been found lurking at night inside the house of another person, a perfect stranger to him, or a person in whose house he has no apparent business, the prosecution is entitled to ask the Court to infer from these facts that there was a guilty intention on the part of the accused sufficient to bring his action within the purview of section 441 of the Penal Code.

In dealing with cases of this sort Magistrates should not overlook the existence of section 509 of the Penal Code, when they are considering the allegation on the part of the prosecution that the entry by the accused into the premises in question must presumably have been with intent to commit some offence.

Per *Walsh J.*—Where in a case of house-trespass the accused alleges that he went to the house to carry on an intrigue with a woman who was the inmate of the house, then if there was an invitation or complicity by the woman, combined with an intention to preserve strict secrecy, it is difficult to say that there was any intention to annoy a third person; but if that third person had expressly prohibited the accused, then his act becomes a direct defiance to an express order, and it is impossible to say that an intention to annoy the author of the order cannot be inferred from it. **A** LALA *v.* EMPEROR, 16 A. L. J. 157 (*Foot note* ; 19 CR. L. J. 243 **35**

——— **s. 443** **35**

——— **s. 447** **40**

Penal Code—concld.

——— **s. 448**—*Criminal trespass*—Bona fide *claimant guarding property—Offence.*

The essence of an offence under section 448 of the Penal Code is that there should be an intention to insult, annoy or intimidate the owner of the property or such person as is acting on behalf of the owner.

Where a person who is a rival claimant to some property comes on the premises in good faith with the intention of guarding the property, he is not guilty of criminal trespass, **Pat** MEWA LAL *v.* EMPEROR, (1917) PAT. 563; 3 P. L. J. 147; 19 CR. L. J. 249; 4 P. L. W. 359 **41**

——— **s. 456** **35**

——— **ss. 463, 464, 467, 471**—*Forgery—Burden of proof.*

In order to establish that a document is forged, the prosecution must give conclusive evidence to establish that the document is a false document within the meaning of section 464 of the Penal Code, and further that it was forged by the accused with one of the intents mentioned in section 463.

In a charge of forgery it is for the prosecution to prove that the document is a forged one and that the accused did forge it, and not for the defence to prove that the document is a genuine one. **Pat** LACHMI SINGH *v.* EMPEROR, (1918) PAT. 36; 19 CR. L. J. 344 **456**

——— **s. 465** **740**

——— **s. 467** **456, 740**

——— **s. 471** **456**

——— **ss. 497, 498**—*Enticing away married woman—Intention—Adultery, proof of—Benefit of doubt.*

For a conviction under section 498 of the Penal Code there must be an intention that the woman should leave her husband's control without any definite intention that she should return to him or an intention that she should remain away indefinitely.

Where it was alleged that the accused committed adultery with a woman while shut up in a shop with her angry husband outside, their entry in the shop together having been discovered at once and the door having been chained on them immediately:

Held, that it did not appear likely that the accused would commit adultery under such circumstances. **P** AHMAD *v.* EMPEROR, 145 P. L. R. 1917, 19 CR. L. J. 441 **969**

——— **s. 498** **204, 966, 971**

——— **s. 509** **35**

Pleader and client—*Admission of fact by Pleader, whether binding on client.*

An admission of fact by the Pleader of a party is binding upon his client and the opposite party cannot be arbitrarily deprived of the benefit of the admission. **C** JAHADALI *v.* AJIMANNESSA BIBI **18**

——— *Pleader for judgment-debtor purchasing decree, effect of—Judgment-debt, whether satisfied.*

That the effect of the purchase of a decree by the Pleader for the judgment-debtors is not to satisfy the decree and to release the judgment-debtors from their liability, although the Pleader holds the decree

Pleader and client—concld.

assigned to him in trust for his clients, and, if called upon by his client to do so, is bound to assign the decree to him. No Court will, however, decree such a re-conveyance except upon equitable terms. **C** NAGENDRAE BALA DASSI *v.* DEBENDRA NATH, 22 C W. N. 491; 27 C L. J 388 **13**

Pleadings, *construction of—Court, duty of.*

Pleadings in the Mufussil Courts, which are loosely drawn up and do not contain exhaustive statements as to the basis of claims and defences, describing in accurate legal language the alternative and distinctive ways of founding and describing the rights put forward therein, should not be taken too literally and the substance of the averments should be looked into. **M** PRAYAGA DOSS JEE VARU *v.* VENKAMA NAIDU; 23 M. L. T. 137; 7 L. W. 477; (1918) M. W. N. 346 **641**

———, *construction of—Litigating large rights in trivial proceedings—Practice—Court, duty of.*

Per *Seshagiri Aiyar, J.*—Courts should, as far as possible, refuse to allow plain plaints to be construed as containing hidden causes of action and pronounce opinion thereon. Litigants should not convert trivial and innocuous proceedings into suits for adjudication of grave issues and substantial rights. **M** RAMAN SOMAYAJIPAD *v.* KUNHU KUTTI KOVILAMMA, 23 M. L. T. 187; (1918) M. W. N. 179; 34 M. L. J. 344; 7 L. W 490 **630**

——— Finding on point not covered by issue—Evidence taken—Remand **419**

——— *Inconsistent pleas in different suits, whether can be allowed.*

It is an elementary rule based on the most obvious grounds of justice, equity and good conscience that parties litigants cannot be allowed to take up inconsistent positions in Court to the detriment of their opponents.

In 1906 plaintiff sued *K.* for recovery of possession of land on declaration of title. *K.* objected to the plaintiff's claim for recovery of possession on the ground that a lease granted by the plaintiff to *S.* was in existence at the date of the suit. *K.'s* objection was given effect to and though plaintiff's title was declared, his claim for recovery of possession was disallowed on the ground that the lease in favour of was in force at the date of suit. Subsequently in 1913 plaintiff brought the present suit for recovery of possession against *K.* and *S.* The suit was opposed by *K.* on the ground that it was not maintainable inasmuch as the plaintiff could and should have made the same prayer for possession against *S.* in the previous suit since the lease in favour of *S.* had terminated before the institution of the previous suit:

Held, that the plaintiff was entitled to succeed on proof that no sub-tenancy created by him existed at the date of the institution of the present suit.

Held, further, that it would be manifestly unjust, if the defendants were allowed to defeat the present claim on proof that, contrary to their previous allegation, a decree for recovery of possession might and should have been made in favour of the plaintiff in the previous suit. **C** GIRISH CHANDRA BIT *v* BIPIN BEHARI KHAN, 27 C. L. J. 535 **159**

Pleadings and proof, *variance between—Appellate Court, whether can raise new point.*

It is an elementary rule that the determination of causes depends on the allegations made in the pleadings and the proof.

An Appellate Court is not entitled to raise new points involving fresh evidence in appeal and to remand the case for the trial of questions which never occurred to the parties previously. **C** BASEEMATI DEBI *v.* TARIT BASANI DASSI **416**

Possession, *suit for—Some of several heirs, whether can sue for whole estate.*

Where some only out of several collaterals of a deceased proprietor bring a suit for possession of the property left by him, they can recover possession only of the shares to which they are entitled and not of the whole estate. **P** BHARI *v.* KHANNU, 7 P. R. 1918 **162**

Pre-emption suit **666**

Presidency Towns Insolvency Act (III of 1909), s. 7, *order under—Suit to set aside order, maintainability of—Appeal.*

No suit lies to set aside an order passed under section 7 of the Presidency Towns Insolvency Act. The proper remedy for the party aggrieved is to appeal against the order. **M** HAJEE ABDUL LATEEF SAHIB *v.* OFFICIAL ASSIGNEE OF MADRAS, 40 M. 1173 **847**

Press Act (I of 1910), s. 3—*Press exempted from depositing security—Subsequent order requiring security, validity of—Procedure, proper.*

An order under section 3 (2) of the Press Act can be passed only by the Local Government.

The keeper of an old press on the passing of the Press Act made the necessary declaration but was exempted from depositing security under section 3 (1) of the Act. Subsequently the District Magistrate directed him to deposit security within fifteen days:

Held, (1) that the District Magistrate had no power to issue such an order;

(2) that the proper procedure for the District Magistrate was to issue a notice to the keeper of the press to show cause why the order exempting him from security made at the time of the filing of his declaration should not be cancelled or varied in such manner as may seem good to the District Magistrate. **Pat** GANESH LAL *v.* EMPEROR, 4 P. L. W. 155; 19 CR. L. J. 355 **579**

Presumption **621**

Principal and surety **693**

——— *Contribution, suit for—Surety, liability of, to contribute to payment of principal's debt.*

Where the Chairman of a Company under an agreement very beneficial to himself financed the Company with money borrowed from a third person and at the request of the latter some of the Directors executed a pro-note as sureties, whereby, along with the Chairman, they made themselves jointly liable for the payment of the loan:

Held, that the sureties were not liable to contribute to the sum realised by the creditor from the principal. **L B** ABDUL BARI CHOWDRY *v.* JOAKIN. **231**

Probate and Administration Act (V of 1881), s. 5—"*Deposited in a Court of competent jurisdiction,*" *meaning of—Properly authenticated copy, what is.*

Section 5 of the Probate and Administration Act does not require that the Will should have been

Probate and Administration Act —contd.

deposited once and should have remained in Court for all time. The words in the section "when a Will has been proved and deposited in a Court of competent jurisdiction" do not mean "continues to remain in deposit." It is quite sufficient if the Will had in fact been deposited in a foreign Court of competent jurisdiction and that Court had before it the original Will at the time it made a judicial pronouncement as to the validity of the Will.

The copy of the Will, which has to be produced in a Court in British India under section 5 of the Probate and Administration Act for the issue of Letters of Administration with a copy of the Will annexed, does not necessarily mean a copy authenticated under the seal of the foreign Court; a copy authenticated by the notarial seal of a notary as provided for by the judicial process of a foreign Court is a properly authenticated copy within the meaning of the section. **C** SUSHILABALA DASI *v.* ANUKUL CHANDRA, 22 C. W. N. 713 **166**

——— s. 13.

Section 13 of the Probate and Administration Act forbids Letters being granted to a minor. **L B** MA SHAN MA BYU *v.* MA CHIT SAW, 10 BUR. L. T. 184 **138**

——— ss. 23, 41—*Object of Act—Letters of Administration, to whom may be granted—S.* 41, *applicability of.*

The object of proceedings under the Probate and Administration Act is to determine only the question of representation of the deceased for the purpose of administering the estate, and not for the purpose of determining any question of inheritance.

Any decision on questions such as adoption in administration proceedings is not final and would not operate as *res judicata* in any subsequent suit in which the party dissatisfied with the decision might raise the same question. It is not desirable, therefore, that such questions should be gone into in administration proceedings.

Where a sister applied for Letters of Administration to the estate of her deceased brother who had no children of his body, and the father of the minor respondent acting as her guardian set up that she had been adopted by the deceased and his wife, and the District Judge finding that the adoption had taken place rejected the application:

Held, that *prima facie* the sister was a person under section 23 of the Probate and Administration Act to whom Letters might be granted, but that even if she might as the result of litigation turn out to have no right to any part of the estate in consequence of the minor having been adopted with right of inheritance, she was a person to whom Letters of Administration might be granted under section 41 of the Act. **L B** MA SHAN MA BYU *v.* MA CHIT SAW, 10 BUR. L. T. 184 **138**

——— s. 34—*Administrator* pendente lite, *position of—Probate Court, power of, to direct Administrator* pendente lite *to advance to widow contesting Will money for maintenance and conduct of case.*

The position of an Administrator *pendente lite* in Probate proceedings is closely analogous to that of a Receiver in a partition suit and section 34 of the Probate and Administration Act gives ample power to the Court to direct the Administrator *pendente lite* to do such acts as may be necessary in the interests of the several parties to the proceedings.

A testator left immoveable property, the annual income of which was ten thousand rupees, and also cash and money lent out at interest. By a Will purporting to have been made by him, the widow was allowed Rs. 20 a month and her minor sons were given shares in the estate much less than what they would get by the law of inheritance. During the Probate proceedings the widow, who contested the Will, claimed on behalf of herself and her minor sons sums reasonably sufficient for their maintenance and also sufficient to enable her to contest the Will and to put her case adequately before the Court:

Held, that the Administrator *pendente lite* should be directed by the Court to advance to the widow one thousand rupees and thereafter under the orders of the Court such sums as might be found to be reasonably necessary for the maintenance of the widow and her minor sons and for the proper conduct of their defence in the Probate proceedings. **C** GOUR MONI DASSI *v.* BRODA KANTA JANA **657**

——— s. 41 **138**

——— s. 98 (1)—*Order directing executor to furnish accounts annually, legality of.*

An order directing an executor to furnish accounts annually is not in accordance with the provisions of section 98 (1) of the Probate and Administration Act. **C** JAGAT DURLAV MAZUMDAR *v.* INDU BHUSAN MUZUMDAR **58**

Probate and Administration Act —concld.

Provincial Insolvency Act (III of 1907), s. 6 (3)—*Petition of insolvency, dismissal of, on ground that debtor is able to pay debts.*

Where a debtor, who fulfils either of the conditions laid down in section 6 (3) of the Provincial Insolvency Act, presents a petition to be adjudged an insolvent, the Court is not entitled to dismiss the petition on the ground that the petitioner is well able to pay his debts and that the application is made really to defraud creditors. **P** MEHR SINGH *v.* DAYA NAND COLLEGE, LAHORE, 27 P. R. 1918; 40 P. W. R. 1918 **850**

——— s. 15 **850**

——— ss. 16, 18, 20, 23—*Petition for adjudication—Court, power of, to call upon debtor of insolvent to pay money into Court.*

Where a debtor presents a petition for adjudication as an insolvent, the Court has no power, without making an order for adjudication or appointing a Receiver, to order a debtor of the insolvent to pay into Court any money which he owes to the insolvent. **N** GANPAT WANJARI *v.* AMRITA **537**

——— ss. 18, 20 **537**

——— s. 22—*Civil Procedure Code (Act V of* 1908,) *O. XXI, r.* 90, *applicability of, to contracts of sale by Receiver—Jurisdiction—District Court, powers of superintendence of, over acts of Receiver.*

A District Court has no jurisdiction to entertain an application under Order XXI, rule 90, Civil Procedure Code, to annul a contract of sale completed by a Receiver. Its powers are limited to applications preferred within 21 days of the contract under section 22 of the Provincial Insolvency Act.

The District Court has, however, powers of supervision over the Official Receiver and can give him

Provincial Insolvency Act—concld.
directions not to complete a contract of sale in exercise of such powers. **M** AVANASHI CHETTI *v.* MUTHUKRUPPAN CHETTI, 7 L. W. 406; 34 M. L. J. 319; (1918) M. W. N. 345 **885**
——— **s. 23** **537**
——— **s. 36**—*Annulment of transfer—Notice to transferee, form of—Notice to prove debt, whether sufficient.*
When a question arises whether a transfer should or should not be annulled under section 36 of the Provincial Insolvency Act, it is requisite that the transferee should have proper notice that proceedings are contemplated under that section and a proper opportunity to put his case before the Court.
The question of proof of a debt under the Provincial Insolvency Act is different from the question of annulling a mortgage under section 36. **C** JUGALPADA DUTT *v.* GANESH CHANDRA PAL **168**
——— **s. 36**—*Transfer impugned—Antecedent debts—Dower claims.*
In a case arising under section 36 of the Provincial Insolvency Act, the burden of proving that the transaction impugned was carried out in good faith and for valuable consideration is on the transferee.
Antecedent debts might constitute a good consideration for a conveyance impugned under section 36 of the Provincial Insolvency Act.
The question whether a transfer challenged under the provisions of section 36, Provincial Insolvency Act, was in good faith involves as an important element the value for which the properties were sold.
An insolvent had transferred certain property to his wife in lieu of dower within two years before his adjudication. He continued in possession of the property along with his wife, but it was found that the dower debt was genuine and that the value of the property transferred was not incommensurate with the amount of the debt:
Held, that the transaction could not be impugned under section 36 of the Provincial Insolvency Act. **C** BASIRUDDIN *v.* MOKIMA BIBI, 22 C. W. N. 709 **915**
——— **s. 43 (2)**—*Omission to enter property in schedule—Offence.*
Where an insolvent, not knowing or forgetting that an equity of redemption is a valuable asset, failed to show in his schedule of assets certain land belonging to him but mortgaged with possession to two of his scheduled creditors:
Held, that he was not guilty of an offence under section 43 (2) of the Provincial Insolvency Act. **P** WADHAWA SINGH *v.* EMPEROR, 2 P. W. R. 1918 CR.; 158 P. L. R. 1917; 19 CR. L. J. 272 **128**
——— **s. 46**—*Appeal, presentation of, after time—Time occupied in obtaining copy of order, exclusion of.*
The Provincial Insolvency Act is not a self-contained enactment, nevertheless the general provisions of the Limitation Act should not be introduced into the construction of section 46, clause (4), of the former Act.
Recourse should not be had to the general provisions of the Limitation Act in dealing with the admission of petitions and appeals presented after the time prescribed under the provisions of the Provincial Insolvency Act. **M** KOPPARTHI LINGAYYA *v.* ARAVETI CHINNARAYANA, 33 M. L. J. 566; 41 M. L. J. 9; 7 L. W. 443 **805**
——— **s. 47** **850**

Provincial Small Causes Courts Act (IX of 1887), ss. 15, 16—*Suit to recover* mutharfa, *whether cognisable by Small Causes Court—Jurisdiction, question of, consideration of—Procedure.*
A Court in order to satisfy itself as to its jurisdiction is required to examine the plaint and decide on the plaint and not on the written statement what is the nature of the claim.
A suit to recover a sum from a tenant levied as *mutharfa*, irrespective of the area of the land upon which the tenant builds and of the dimensions of the house built by him, is cognisable by a Court of Small Causes, whether the sum is regarded as rent or as a tax. **Pat** ERNEST MYLNE *v.* NATHU SUNDI, 4 P. L. W. 218 **887**
——— **Sch. II, Art. 1** **910**
——— ——— **Art. 13** **699**
——— ——— **Art. 31**—*Suit for mesne profits of grove wrongfully received by defendant, whether cognizable by Small Cause Court—Jurisdiction.*
A suit to recover mesne profits of a grove which the plaintiff has been wrongfully kept out of possession of by the defendant, falls under Article 31, Schedule II of the Provincial Small Causes Court Act and is not cognizable by a Small Cause Court. **A** DRIG PAL SINGH *v.* KUNJAL, 16 A. L. J. 55; 40 A. 142 **689**
Public street—*Caste procession, obstruction to—Declaration of right and injunction, suit for, whether maintainable—Special damage, proof of, requisites of—Obstruction, what constitutes.*
Where a marriage procession is obstructed from passing along a public road, an action lies, on proof of special damage, for a declaration of the right to pass along the road and for an injunction restraining the obstruction.
In such cases, proof of actual obstruction or the use of violence is unnecessary. It is enough to show that owing to the hostile attitude of the obstructors, the procession was not able to start.
By special damage is not meant actual pecuniary loss.
The special damage may consist in the inconvenience or loss consequent on a postponement of the marriage or waste of time involved in taking another route, or it may consist in some damage peculiar to the community constituting the procession. **M** GANAPATHY MOOPPEN *v.* SUBBA NAYAKKAN, 23 M. L. T. 258 **834**
Punjab Alienation of Land Act (XIII of 1900), s. 16—*Mortgage—Debt, whether can be separated from security—Execution—Mortgage-debt, whether can be sold apart from security.*
A mortgage-debt cannot be separated from the security and sold in execution of a decree, where the mortgage itself is not liable to sale. The sale of the debt would carry with it the security.
Where, therefore, the provisions of section 16 of the Punjab Alienation of Land Act prevent a decree-holder from selling up his judgment-debtor's mortgage rights, he cannot sell up either the debt or the security. **P** LAL CHAND *v.* ALLAH DAD, 16 P. R. 1918; 37 P. W. R. 1918; 16 P. L. R. 1918 **528**

Punjab Courts Act (III of 1914), s. 41 (3)—*Appeal, second, on point of custom—Certificate, defective, effect of.*

A second appeal on a point of custom cannot be admitted upon a certificate granted by the lower Appellate Court in terms which do not satisfy the requirements of section 41 (3) of the Punjab Courts Act. P YAD RAM v. MANBHARI, 4 P. W. R. 1918; 148 P. L. R. 1917 **87**

——— **s. 41 (3)**—*Custom—Burden of proof, whether question of law or of custom—Appeal, second—Certificate, necessity of—Certificate refused on wrong ground, effect of.*

The question of *onus probandi* in a custom case is not a pure question of law unconnected with custom. On the other hand, it is not, under all circumstances, a question relating to the validity or existence of a custom except in so far as, in proving or disproving the validity or existence of a custom, a party to a suit may be held to be entitled to an initial presumption in his favour on the strength of a generally accepted rule of custom as laid down by judicial decisions or otherwise.

Where the lower Appellate Court, holding that the parties were governed by custom, decided that the defendant, the sister of the last male holder, on whom the onus lay of establishing that she was entitled to succeed to the property of her deceased brother in preference to his collaterals, had failed to discharge the onus:

Held, that the question of *onus probandi* in this case was one relating to the existence of a custom governing the succession to the property of the deceased, and that, therefore, a certificate under section 41 (3) of the Punjab Courts Act was necessary to the institution of a second appeal regarding the said question. P BHARI v. KHANNU, 7 P. R. 1918 **162**

——— **ss. 41 (3), 44** - *Lower Appellate Court, refusing certificate—Revision, whether lies.*

Where in a case in which a question of custom was in issue the lower Appellate Court refused to grant a certificate under section 41 (3) of the Punjab Court Act, on the ground that no question of custom arose:

Held, that the lower Appellate Court had failed to exercise the jurisdiction vested in it and the order was, therefore, open to revision under section 44 of the Act. P SARUP SINGH v. JOWAHRI, 18 P. R. 1918 **732**

——— **s. 44** **732**

Punjab Government Notification No. 99, dated 23rd February 1883 **326**

Punjab Land Revenue Act (XVII of 1887), s. 36 **117**

——— **s. 44**—*Mutation entries, effect of—Presumption—Burden of proof.*

Where the parties were present at the time when certain mutation entries were made with their consent, and the Revenue Officers made every effort to ascertain what the parties wished to be done, the entries themselves being quite clear, the onus of proving that a mistake was made lies heavily upon the party who asserts that his intention was not correctly expressed by the entries, and this onus is not discharged by showing merely that there is a certain amount of confusion in the report of the *patwari* and that the area given by that party is considerably in excess of the area received by him. P WADHAWA SINGH v. BALWANT SINGH, 2 P. W. R. 1918; 153 P. L. R. 1917 **277**

Punjab Municipal Act (III of 1911), ss. 13 (a), 175, 219—*Street—Removal of obstruction, when justified—Private property.*

Section 175 of the Punjab Municipal Act does not authorise a Municipal Committee to call upon anybody to remove a projection or an obstruction, unless it is proved by the Committee that the site on which the projection or obstruction stands is part of a "street" within the meaning of section 13 (*a*) of the Act.

Where, therefore, the petitioner was convicted under section 219 of the Punjab Municipal Act and ordered to demolish a latrine situated in a street close to his house and it appeared that the latrine had been in existence for 65 years, during which time the Municipal Committee treated it as private property:

Held, that the conviction could not stand. P SHAHAB-UD-DIN v. EMPEROR, 15 P. W. R. 1918 CR.: 19 CR. L. J. 254 **46**

——— **ss. 86, 242**—*Profession tax, levy of—Munsif, whether follows profession.*

The Punjab Government imposed a profession tax in the Una Notified Area and the plaintiff, a Munsif, was assessed to pay the tax. He paid it under protest and then brought a suit for the recovery of the amount:

Held, (1) that the suit was not one concerning an act purporting to be done by any person by order of the Local Government and was not, therefore, excluded from the jurisdiction of a Court of Small Causes;

(2) that the Munsif could not be said to follow a profession in the popular sense of the term and the Government could not have intended that he should be liable to pay a profession tax. P COMMITTEE OF NOTIFIED AREA, UNA v. CHATAR BEHARI NARAIN, 74 P. W. R. 1918 **910**

——— **ss. 175, 219** **46**

——— **s. 242** **910**

Punjab Redemption of Mortgages Act (II of 1913), s. 12—*Mortgages by father and mother of minor—Redemption of only one mortgage—Suit by mortgagee—Principles applicable—He who seeks equity must do equity.*

The proceedings under the Punjab Redemption of Mortgages Act are summary and in a disputed case neither party should be prejudiced by the Collector's action when the matter is later on submitted to the decision of the Civil Courts

Defendant's father mortgaged some land with possession to the plaintiff for Rs. 193 odd. After the father's death the defendant's mother, as his *de facto guardian*, created an additional mortgage of Rs. 100 on the land. Defendant made an application under the Punjab Redemption of Mortgages Act, and the Collector ordered redemption to take place on payment of Rs. 193 odd only. The plaintiff then instituted a suit under section 12 of the Act:

Held, that the defendant could not redeem the land without redeeming both the mortgages, inasmuch as had the Collector not intervened and the minor had applied to the Civil Courts for entry, he would have obtained a decree conditional on payment of both mortgages and his position could not be allowed to be improved by what turned out to be an erroneous executive order. P SARDARA v. KAURA RAM, 7 P. W. R. 1918; 152 P. L. R. 1917; 36 P. R. 1918 **219**

Punjab Tenancy Act (XVI of 1887), s. 59 433

Putni, *construction of*—Chowkidari chakran *lands, whether included in* putni.

Where a *putni* is granted in respect of a whole *mouza*, unless there is a provision to the contrary in the terms of the *putni* lease, the *chowkidari chakran* lands which form part of the Zemindar's estate in the *mouza* must be held to be included in the *putni*.

A clause in the *putni* lease of a whole *mouza* which reserves to or confers upon the Zemindar the right to appoint or dismiss *chowkidars*, has not the effect of reserving to the Zemindar and of excluding from the *putni* the *chowkidari chakran* lands in the *mouza*. **C** NAFAR CHANDRA CHANDRA *v.* BEJOY CHAND, 22 C. W. N. 487 526

Railways Act (IX of 1890), s. 75—*"Value", "loss," meanings of—Carrier, duty of—Misdelivery, effect of—Damages, suit for.*

The term "value of the articles" in sections 75 of the Railways Act means intrinsic or market value, *i.e.*, the price for which they would reasonably sell at the time in the market as well as the value in the market, independent of any circumstances peculiar to the plaintiff.

The loss for which a Railway Company is protected from liability by section 75 of the Railways Act must be loss to the Railway Company itself and it must be loss which occurs while the goods are in the custody of the Company in their capacity as carriers, and cannot apply to a loss to the owner. Negligent misdelivery of goods to a person other than the owner is not such a loss as is contemplated by section 75 of the Railways Act.

Whether the goods are to be delivered to the consignee at his house or at the termination of the journey depends on agreement and on the usual course of business. If the goods are delivered at the house to which they are addressed, the carrier has done all he contracted to do and the mere fact that he delivers to some other person than the consignee at that house is no proof of breach of duty on his part. But if he delivers at any other place to any person other than the consignee, he does so at his peril. But where the carrier is not bound to deliver at the house of the consignee, his liability as carrier ceases when he has brought the goods to the station of destination and has tendered or delivered them within a reasonable time to the consignee or has allowed the consignee reasonable time in which to remove the goods.

Plaintiff delivered 24 account books to the defendant Railway Company for carriage to Nagpur. The books arrived safely at Nagpur but were negligently delivered to some person other than the consignee. The intrinsic value of the books was below Rs. 100. The plaintiff sued the defendant Company for 25,000 as damages for the loss of the books:

Held, that the defendant's liability was not saved by section 75 of the Railways Act, inasmuch as (*a*) the intrinsic value of the books was below Rs. 100, and (*b*) the loss occurred not while the books were in the custody of the defendant Company as carriers, but after their arrival at their destination. **B** RAMCHANDRA JAGANNATH *v.* G. I. P. RAILWAY CO., 20 BOM. L. R. 591 401

——— **s. 76**—*Goods consigned under risk-note B, loss of—Damages, suit for—Burden of proof.*

Railways Act—concld.

In a suit for damages against a Railway Company for the loss or non-delivery of goods consigned under a risk-note in form *B*, the burden of proving the cause of loss or non-delivery is on the plaintiff. **C** EAST INDIAN RAILWAY CO. *v.* KANAK BEHARY HALDAR, 22 C. W. N. 622 691

——— **s. 120,** *scope of—Railway officials, applicability of section to—'Person', meaning of—Removing passengers from compartments in which they are entitled to travel—Offence.*

The word 'person' in section 120 of the Railways Act includes Railway officials.

The section applies to acts mentioned therein, even if they are committed by Railway servants.

Where a Railway guard removed two *gosha* ladies from a first class compartment in which they were entitled to travel and forced them to occupy another compartment:

Held, that he was guilty of an offence under section 120 of the Railways Act. **M** CUFFLY *v.* MUHAMADALI MUHAMMAD IBRAHIM SAHIB, 19 CR. L. J. 313 329

Recognised sub-division, *what is.*

A recognised Sub-Division of a Survey number is a holding which has a separate assessment fixed for it. **N** GADADHAR *v.* CHUNNILAL, 14 N. L. R. 55 541

Registration Act (XIX of 1843), s. 2—*Registration Act XVI of* 1908), *s.* 50—*Unregistered sale-deed accompanied by delivery of possession—Subsequent registered deed—Priority.*

A prior unregistered sale-deed, which is not compulsorily registrable and which is accompanied by delivery of possession, is not invalidated by a subsequent registered sale-deed of the same property either under section 2 of the Registration Act of 1843 or under section 50 of the Registration Act of 1908. The person claiming under the prior unregistered deed, however, must not only prove the deed but also the delivery of possession.

A title which has once vested by virtue of a deed, be it unregistered, cannot be divested by a subsequent registered document. **Pat** ASGAR ALI *v.* DOST MOHAMMAD 354

Registration Act (XVI of 1908), s. 17 483

——— **s. 17**—*Agreement by reversioner not to enforce right to declaration, whether compulsorily registrable.*

An agreement by the reversioners of a deceased Hindu not to enforce their right to a declaration in respect of a gift of the property of the deceased made by the latter's widow is not a document conveying any right, title or interest or purporting or operating to extinguish any right, title or interest, vested or contingent, in immoveable property and is not, therefore, compulsorily registrable. **A** BHANA *v.* GUMAN SINGH, 16 A. L. J. 191 629

——— **s. 17**—*Compromise containing lease, whether requires registration.*

A compromise between landlord and tenant creating a lease and not incorporated in a decree of Court requires registration under section 17 (1) (*d*) of the Registration Act and is not admissible in evidence unless so registered. **Pat** SRIKISHUN LAL *v.* SHEOBALAK GOPE, 4 P. L. W. 247 638

Registration Act—1908—contd.

——— s. 17—*Letter from mortgagor to equitable mortgagee showing object of mortgage, whether requires registration.*

A letter addressed by the mortgagor of an equitable mortgage to the mortgagee, showing for what purpose he has deposited the title-deeds, is not a document requiring registration under the provisions of the Registration Act as a mortgage. **C** HARIPADA SADHUKHAN *v.* ANATH NATH DEY, 22 C. W. N. 758 **211**

——— ss. 17, 49—*Secondary evidence of unregistered lost document, admissibility of, to prove oral agreement not affecting land.*

Secondary evidence of a lost unregistered document affecting an interest in immoveable property and therefore required to be registered is not admissible as evidence of any transaction affecting such property but such evidence is admissible to prove the document so far as it evidences an oral agreement not affecting the land or any interest in land. **L B** MA PAN U *v.* MA SHWE TINT **91**

——— s. 17 (1) (b), (2) (xi)—*Relinquishment of portion of mortgage debt, agreement for—Registration—'Interest,' meaning of.*

An agreement by which a mortgagee agrees to relinquish a portion of the mortgage debt is one which 'purports to limit or extinguish interest' in immoveable property and requires registration.

Per *Napier, J.*—A receipt for money paid in discharge of a mortgage debt is an instrument which operates to extinguish the mortgage within the meaning of section 17 (*b*) of the Registration Act. Extinction by receipt applies to the right, title and interest and thereby makes the amount covered by the security an 'interest' within the meaning of clause (*b*). Where the effect of the document is to 'limit', the same meaning must be applied to the word 'interest' and it must be read as applying to the amount of money secured. **M** CHUNDOORU LAKSHMANA SETTY *v.* DUGGISETTY CHENCHURAMAYYA, 34 M. L. J. 79; 7 L. W. 229; (1918) M. W. N 262 **132**

——— s. 17 (1) (d)—Lease, parol—Subsequent memoranda, whether compulsorily registrable **859**

——— s. 17 (1) (h)—*Document relinquishing rights in property—Registration.*

A document relinquishing rights in immoveable property of the value of Rs. 100 or upwards and indicating a clear intention that the title should pass at once, is a conveyance and not merely an agreement to convey and is compulsorily registrable **P** GOPI RAM *v.* RAM DHAN, 10 P. W. R. 1918; 157 P. L. R. 1917 **228**

——— s. 28—*Place of registration—Jurisdiction of Registrar—Transferor not entitled to property—Transfer, ostensible—Burden of proof.*

In the absence of fraud on the part of the transferee and collusion between him and the transferor, the mere fact that the transferor has no title to that portion of the property which is situated within the jurisdiction of the Registrar is not a bar to the Registrar's jurisdiction to register the document.

Where a party alleges that a document to which he put his signature in token of resigning an interest does not contain a correct statement of the facts and of the intention of the parties, the burden of proving his allegation lies on such party. **Pat** RAMDEI *v.* CHUNDRA BALI BIBI, 4 P. L. W. 237 **399**

Registration Act—1908—concld.

——— s. 49 **91**

——— s. 49—*Unregistered deed of gift, admissibility of, to explain origin of possession.*

In a suit for possession the lower Court held that although an unregistered deed of gift relied upon by the defendant was inadmissible in evidence for want of registration and could not, therefore, affect the subject of the gift, yet it was admissible for a collateral purpose, *viz.*, for the purpose of proving that defendant took possession of the subject of the gift from the date of the gift and remained in adverse possession of it for more than twelve years before the date of suit. There was no reference to delivery of possession in the deed of gift:

Held, that the deed was inadmissible in evidence even for the purpose of showing that the defendant had been in adverse possession of the property from the date of the deed. **P** SURJAN DAS *v* GANDA MAL, 13 P. W. R. 1918 **889**

——— s. 49—*Unregistered sale-deed, admissibility of, to prove dower.*

An unregistered sale-deed purporting to convey certain property of the value of Rs. 1,000 to the plaintiff in lieu of her dower is admissible in evidence to prove two collateral purposes: (1) that the dower was fixed at Rs. 1,000 in cash and (2) that a certain person stood surety for the payment of the sum. **P** MUHAMMAD BAKHSH *v.* AMIR BEGAM, 23 P. R. 1918 **837**

——— s. 50 **354**

——— s. 77—*Suit to enforce registration—Procedure—Suit for recovery of possession on declaration of title by purchase or on specific performance of contract of sale, maintainability of—Frame of suit—Alleged transferee from vendor, whether can be joined as party.*

Before a plaintiff can institute a suit under section 77 of the Registration Act to enforce registration of a document, he must follow strictly the procedure prescribed by the Act for obtaining registration of documents.

B executed a conveyance of certain land in favour of *A* but did not register it. Neither did he put *A* in possession of the land. *A* brought a suit against *B* praying for possession on declaration of title or on specific performance of the contract of sale. *A* made *C* a party to the suit, on the ground that the latter held a *kobala* of the land executed in his favour by *B*:

Held, that in such a case though *A* could not sue for enforcement of registration under section 77 of the Registration Act without following strictly the procedure laid down in the Act for enforcing registration of documents, yet as the agreement to sell remained unperformed, *A* was entitled to claim specific performance of the agreement to sell.

Held, further, that to avoid multiplicity of suits it was necessary for the plaintiff to join *C* as a party to the suit properly framed for specific performance. **C** NASIRUDDIN MIDDA *v.* SIDHOO MIA, 27 C. L. J. 538 **361**

ulation XVII of 1806, s. 8—*Mortgage Foreclosure—Notice misdescribing land, validity of.*
here land is mortgaged with a share in the *hilat*, a foreclosure notice issued under Regulation II of 1806 which specifies the land but omits ention the *shamilat*, is altogether invalid.
foreclosure notice cannot be held to be valid regards one part of the mortgaged land and valid as regards the other part.
Where a foreclosure notice misdescribes the mortgaged property, the mortgagor is very likely to be misled by the misdescription. **P** KARM ILAHI *v.* BINDRA BAN, 17 P. R. 1918; 39 P. W. R. 1918; 18 P. L. R. 1918 **540**

Relief, whether can be granted when cause of action accrues after suit **863**

Religious institution—*Takia of Rasul Shahi Faqirs in Lahore, whether* wakf.
The Takia of Rasul Shahi Faqirs in Lahore is a religious institution and *waqf* property. **P** MUHAMMAD ABDUL KADIR *v.* HUSSAIN BIBI, 11 P. W. R. 1918 **879**

Remand **18, 419**

——— *Further inquiry by lower Appellate Court, order for—Lower Appellate Court, whether can remand case to first Court for further inquiry—Procedure.*
A case was remanded to the lower Appellate Court for further inquiry. On the return of the case a preliminary objection was taken by the respondent that the further inquiry should have been made by the lower Appellate Court itself and that it had no authority to remand the case to the first Court for the recording of further evidence but should have itself recorded any further evidence it deemed necessary:
Held, that it was not the intention of the Chief Court, when issuing the remand order, that the lower Appellate Court should be precluded from directing the first Court to record any additional evidence, if necessary. **P** PARTAP SINGH *v.* PARTAPI, 147 P. L. R. 1917 **907**

Res judicata—*Execution proceedings—Objection disposed of at one stage, whether can be raised at subsequent stage.*
Where in execution an objection is raised and gone into, the same objection cannot be considered on any subsequent application in execution. If it is decided against the judgment-debtor it is decided for good and all against him, and if decided in his favour is equally binding.
Where a decision of the execution Court is that no property of a judgment-debtor can be attached, that decision is final. **Pat** JADUBANS PANDAY *v.* EKRAM RAI, 4 P. L. W. 279 **654**

Restitution of conjugal rights, *suit for—Cruelty—Defence.*
In a suit for restitution of conjugal rights it appeared that the parties had been on bad terms or a considerable period, that the husband suspected he wife's fidelity and that he had been bringing ivil and criminal cases against her:
Held, that the wife had reasonable grounds for lieving that her health and safety would be endgered if she returned to her husband's custody that the plaintiff was not, therefore, entitled to a e. **A** HAMID HUSAIN *v.* KUBRA BEGAM, 16 A. L. 32 **728**

il) **812, 850**

ower of, to interfere at inter-

Revision (Civil)—concld.

Where the record of a case has been sent for by the High Court and there appears on the record an obvious error, it is right and proper that the High Court should dispose of the matter even at an interlocutory stage and thus save the parties to the litigation unnecessary expenses and undue delay. **Pat** BANKEY BEHARI *v.* RAM BAHADUR, 4 P. L. W 281; (1918) PAT. 223 **891**

Revision (Criminal) **117, 119, 122, 332, 682**

Riparian rights—*Upper and lower owners, rights of—Natural right to use water of stream for irrigation—Prescriptive right to exclusive use of water, acquisition of.*
Riparian owners have a natural right to use the water of a natural streamlet for purposes of irrigation so long as that use is reasonable.
Where, however, a lower riparian owner has acquired a prescriptive right to the exclusive use of the water of a rivulet for irrigation purposes, a higher owner cannot use the water of the streamlet so as to interfere with the rights of the lower owner. **Pat** MAHABIR SAHU *v.* RAM SARAN SAHU **19**

Shamilat deh *recorded as* shamilat tarf—*Declaration, suit for—Admission, effect of—Appropriation of compensation money, effect of—Limitation, commencement of—Fresh invasion.*
In a suit for a declaration to the effect that the plaintiffs were the owners of a certain share of the village *shamilat* land, it appeared that the land in suit was entered as *shamilat deh* in the Settlements of 1856, 1868 and 1891-92. But in 1893 the entry was changed and the land was shown as *shamilat* of *taraf Bedi*—one of the 3 *tarafs* in the village, the plaintiffs' *taraf* being known as *taraf Vedi*—in consequence, as was urged on behalf of the *Bedi* defendants, of an admission made by the plaintiffs or their ancestors in that year. It appeared further that portions of the land having been acquired by the Government in 1906 and again in 1911 the compensation money was taken by the *Bedis* on the last occasion:
Held, (1) that the old entries being all in plaintiffs' favour the admissions of the *Vedis* meant nothing more than that the *Bedis* should continue to manage the land taking whatever income might accrue and incurring whatever expense might occur;
(2) that the action of the *Bedis* in 1911 in taking all the compensation money was a fresh invasion of the plaintiffs' rights and the suit was, therefore within time. **P** HARNAM SINGH *v.* MAKHAN SINGH, 43 P. W. R. 1918; 21 P. L. R. 1918 **31**

Sind Courts Act (XII Bom. of 1866), s. 16—"*Misbehaviour,*" *scope of—Pleader, duty of—Letter containing personal attack on Judge, whether misbehaviour.*
The jurisdiction of the Judicial Commissioner under section 16 of the Sind Courts Act extends not only to professional misbehaviour but to general misbehaviour; but while this jurisdiction is unlimited, the Court is reluctant to take cognizance of misconduct not connected with the office of Pleader unless it is morally disgraceful or shows that the individual is not a proper person to hold that office.
A Pleader by virtue of his *sanad* has certain rights and privileges, but he is not a chartered libertine and those rights and privileges carry with them corresponding duties and restraints.

Sind Courts Act—concld.

A Pleader is an officer of the Court and is bound to assist the Court in the administration of justice. Criticism which is permissible to a private individual is not permissible to a Pleader. The co-operation of Pleader and Judge would be impossible if the Pleader were attacking the Judge in the public press. Nor would it be possible for the business of the Court to be conducted with dignity, decorum and impartiality when the Pleader is posing in public as the chastiser of the Judge. Such condnct is not only a breach of the Pleader's duty to the Court but must also result in an actual obstruction to the administration of justice.

A letter published by a Pleader, alleging that a certain Judge is indolent and takes credit for cases not tried but compromised, even if written in good faith and even if it does not constitute the offence of libel, amounts to misbehaviour under section 16 of the Sind Courts Act. **S** MR. M., PLEADER, *re enquiry against*, 11 S. L. R. 81; 19 CR. L. J. 322 **338**

Specific performance of contract—*Contract embodied in* solenamah, *whether can be enforced after* solenamah *set aside by Court.*

Where a suit for specific performance of a contract to grant a lease was brought on the basis of an agreement embodied in a *solenamah* filed in Court which was subsequently set aside by the Court:

Held, that there was no contract subsisting which the plaintiff could put before the Court for enforcement.

Held, further, that in such a case the plaintiff could not fall back upon some verbal agreement to grant the lease. **C** JIBAN KRISHNA CHAKRAVARTI *v.* RAMESH CHANDRA DAS **225**

Specific Relief Act (I of 1877), s. 9, *applicability of—Dispossession by co-owner—Joint possession, whether can be decreed.*

Section 9 of the Specific Relief Act applies to cases where a co-owner in possession of property jointly with other co-owners is dispossessed by the latter. **N** GHOOTI *v.* SITKU **557**

——— **s. 9**—*Possession of* Thakur Bari, *what constitutes.*

Where plaintiff appointed the *pujari* of a *Thakur Bari*, defrayed the expenses of worship, repaired the building and held the actual possession of the key by which the door of the *Thakurghar* was opened:

Held, that the possession of the plaintiff was such physical possession as the provisions of section 9 of the Specific Relief Act were intended to protect, notwithstanding that the *Thakur Bari*, as the residence of a deity was open to the public. **C** NARENDRA NATH LAHIRI *v.* CHARU CHANDRA BOSE, **497**

——— **s. 21**—*Contract to refer to arbitration, when bars suit—Institution of suit, whether refusal to perform contract.*

Per *Fletcher, J.* (*Shamsul Huda, J.*, dissenting).—The mere filing of a suit by a plaintiff who has entered into an agreement with the defendant to refer the matter in dispute to arbitration is not a refusal on his part to perform his contract within the meaning of section 21 of the Specific Relief Act.

The plaintiff and the defendants who were brothers entered into a registered agreement whereby, to evoid litigation, they agreed to refer their dispute to arbitration. The plaintiff, however, shortly afterwards instituted a suit in respect of the m covered by the agreement:

Held, per *Fletcher, J.*—That the suit was not b by the proviso to section 21 of the Specific R Act, inasmuch as its mere institution did not am to a refusal within the meaning of that section.

Per *Shamsul Huda, J.*—That the institution of t suit amounted to a refusal on the part of the plaint to perform the contract he had entered into to have the dispute settled by arbitration instead of by suit, so that the suit was barred by the proviso to section 21 of the Specific Relief Act. **C** DURGA PRASAD JANA *v.* DINABANDHU JANA, 22 C. W. N. 362 **279**

Specific Relief Act—concld.

——— **s. 22**—*Specific performance of contract, suit for—Delay, effect of—Abandonment, failure to enforce registration, whether amounts to.*

Mere delay in the institution of a suit for specific performance of a contract to sell land is not sufficient to defend the claim. The delay must be of such a character as to give rise to an inference of the abandonment of the right or should disclose some prejudice to the defendant.

The failure of the plaintiff to obtain compulsory registration of the deed in his favour is not of itself sufficient to prove abandonment. **Pat** BATULAN *v.* NIRMAL DAS, 4 P. L. W. 192 **244**

——— **s. 27 (b)**—*Specific performance of contract, suit for—Subsequent* bona fide *transferee for value—Burden of proof.*

A party pleading an exception must prove the exception.

Where in a suit for specific performance of a contract the plaintiff proves his prior contract, the burden of proving a subsequent *bona fide* transfer for value without notice under section 27 (*b*) of the Specific Relief Act lies on the party alleging it. **Pat** DHARAMDEO SINGH *v.* RAM PRASAD SAH, 4 P. L. W. 152 **470**

——— **ss. 42, 52, 54** **834**

Stamp Act (II of 1899), s. 2 (10), Sch. I, Art. 23—*"Conveyance," meaning of—Letter reciting previous sale and admitting receipt of consideration, whether conveyance—Interpretation of Statutes—Fiscal enactments.*

The Stamp Act is a fiscal Act and must be rigorously construed in favour of the public, whenever any ambiguity arises.

A conveyance is an instrument which transfers property from one person to another.

A document ran as follows:—

"I am enclosing herewith the original sale-deed in respect of the land measuring 38 *kanals* 18 *marlas*, *Khasra* No. 3388, in Mauza Mozang, situate on J Road, which I have sold to you for the sum Rs. 1,000 and in respect of which I have alread received the purchase-money from you:"

Held, (1) that the document was a mere le reciting an earlier sale and an earlier receipt of consideration for that sale;

(2) that at most it was a receipt for the consi tion money and an admission of the sale not in itself the instrument of sale o

(3) that had for the words "w words "which I hereby sell" document would have been

Reg[illegible]ip Act—concld.

W[illegible]hat therefore the document was not a con-
shan[illegible]ce and was not liable to stamp duty. **P**
XV[illegible] to [illegible]MJI *v.* EMPEROR, 1 P. W. R. 1918; 151 P. L. R.
A[illegible] **261**
as[illegible] **— Sch. I, Arts. 13, 35** —*Lease, agricul-*
in[illegible]*al—Document hypothecating moveable property*
-Stamp duty chargeable.

[illegible]n agricultural lease is exempt from stamp duty
[illegible]nder exemption (*a*) to Article 35, Schedule I of
the Stamp Act.

A document which gives the landlord the sole right over the whole crop until the rent is paid and in which the tenants agree not to alienate or otherwise do away with the crops without his consent until such payment, is an instrument evidencing an agreement relating to the hypothecation of moveable property by way of security for the repayment of a future debt and as such is liable to stamp duty chargeable on a bill of exchange under Article 13 (*b*) of Schedule I of the Stamp Act. **L B** MAUNG HTAT *v.* MAUNG SAN DUN **109**

—— —— **Art. 23** **261**

—— —— —— **Art. 35** **109**

Stare decisis, *doctrine of—Wrong application of law, effect of.*

An unconscious application of wrong law cannot set up a principle of *stare decisis* merely because it has been left unchallenged for a few years owing to the ignorance of the people affected by it. **N** UJIYARA *v.* TILOCHAN **435**

Succession—*Posthumous son, suit by—Burden of proof—Legitimacy, proof of.*

In cases of succession to landed property of a large value as well as to a *jagir*, more than ordinary care should be taken to place the legitimacy of a posthumous son beyond all possible dispute.

One *T.*, a *jagirdar* and landowner, having died, his landed property was mutated in the names of his widows and his *jagir* lapsed to the Government. Plaintiff brought a suit for possession basing his claim on the ground that he was the deceased's posthumous son. There was no documentary evidence and the claim rested entirely upon the oral evidence of witnesses, the majority of whom were in some way or other interested in the plaintiff. It appeared that the alleged mother of the plaintiff supported his claim but avoided a medical examination even when called upon by the other widows to do so:

Held, that under the circumstances the plaintiff had failed to prove that he was the son of the deceased proprietor. **P** JAGIR SINGH *v.* DALIP KAUR, 42 P. W. R. 1918 **57**

Succession Certificate Act (VII of 1889), s. 4—*Succession certificate, whether necessary where one member of a plaintiff firm dies.*

[illegible]In a suit on a hand note executed in favour of a [illegible]m, the full amount of the claim should be decreed [illegible]n where one of the members of the firm dies [illegible]ing the pendency of the suit and his legal da[illegible]esentative who is added as a plaintiff doe[illegible] produce any succession certificate to the decre[illegible]ed partner. **C** PULIN BEHARY ROY *v.* ABDUL J. 132; 40 A. [illegible] **911**

Revision (Civ[illegible]*suit by heir of deceased against debtor, without certificate.*

—— *High Court,* [illegible]ection 4 of the Succession
Executory stage [illegible]ing of a decree in favour

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of a person, claiming to be entitled to the effects of a deceased person against a debtor of the latter for payment of the debt, without the production of a certificate as required by the section. The section is no bar to the maintainability of such a suit. **Pat** ALICE THORP *v.* SHAMAT LAL, 3 P. L. J. 160 **733**

Suit *financed by third person, effect of.*

If the case of a plaintiff is a genuine one it does not matter much who found the money to finance the suit. **C** AHAMUDDIN TAMIJUDDIN *v.* AMIRUDDIN **216**

Taluqa, *suit for possession of—Lord Canning's Proclamation of* 1858, *result of—Second Summary Settlement in Oudh, effect of—Governor-General's letter, dated 10th October* 1859, *effect of*—Sanads, *title conferred under, nature of—Hindu widow holding* sanad *in her name, position of—Trustee--Succession to* taluqa—*Oudh Estates Act* (*I of* 1869), *s.* 22—*Limitation Act* (*IX of* 1908), *Sch. I, Arts.* 141, 144—*Limitation to be determined on case set up in plaint—Evidence Act* (*I of* 1872), *s.* 116—*Estoppel of tenant, not applicable to person setting up under-proprietary title by adverse possession—Civil Procedure Code* (*Act V of* 1908), *s* 11, *Expl. IV*—Res judicata, *partial.*

At the time of the annexation of Oudh a *taluqa* was in the possession of a Bais Thakur *B. S.* After the annexation the First Summary Settlement of the *taluqa* was made with him. He died issueless in 1857 and was succeeded in possession by his widow *D. K.* belonging to the clan of Amethia Thakurs. She was in possession when Lord Canning's Proclamation of confiscation was issued in 1858.

The Second Summary Settlement of the *taluqa* was made with her. and in the various proceedings relating to this settlement she was described as the wife or widow of *B. S.* She never in any way acknowledged that any third person had a right in the *taluqa*, although she made subsequent declarations to the effect that she had no intention of giving it to Amethia Thakurs. She was still in possession when the letter of the Governor-General, dated the 10th of October 1859, was published, by which it was declared that every *taluqdar* with whom a Summary Settlement had been made subsequent to the date of the re-occupation of Oudh had thereby acquired permanent, heritable and transferable proprietary rights in the *taluqa* for which the engagement had been taken.

As provided by this letter, a *sanad* in the original form was granted to *D. K.* in her own name in 1860. In 1861 a *sanad* in the revised form, *i.e.*, the primogeniture *sanad*, was similarly granted to her. Her name was subsequently entered in Lists I and II of the Oudh Estates Act.

After her husband's death she took steps to provide for the devolution of the *taluqa* upon a collateral relative of her deceased husband *B. S.*, but later on cancelled the provision in 1866 and 1873. In the proceedings held at the time of the First Regular Settlement she described herself as the wife or widow of *B. S.* and gave the history of the *taluqa* as having come down in the family of *B. S.* This Regular Settlement was made with her not on the basis of these representations but on the ground that she had acquired the full title to the *taluqa* under the *sanads.*

Taluqa—contd.

She continued in possession of the *taluqa* till her death intestate in 1893, after which the above-mentioned collateral relative of *B. S.* took possession of the entire *taluqa*.

Then *R. B. S.*, as the right heir of *D. K.*, being her brother's grandson, sued the collateral relative of *B. S.* for possession of the *taluqa* and succeeded in obtaining a decree in 1900. In 1911 *R. B. S*, setting out his title to the entire *taluqa* under this decree, brought a suit in ejectment against *B. B. S.* as a trespasser, who was at that time in possession of one of the villages comprised in the *taluqa*. *B. B. S.* was at that time aware of the facts upon which he relied in the present suit, mentioned below, for the purpose of showing that he was the rightful owner of the whole *taluqa*, but he set up an under-proprietary title in respect of the village, his case being that he and his predecessors had been in adverse possession as under-proprietors for many years upon payment of the revenue and cesses due in respect of the village. The suit of *R. B. S.* was, however, decreed in 1911 on the finding that *B. B. S.* was not an under-proprietor of the village.

In 1913 *B. B. S.* instituted the present suit against *R. B. S.* He claimed to be the nearest male heir of *B. S.* and as such to be entitled to possession of the *taluqa* in preference to *R. B. S.* who was a stranger to the family. *R. B. S.* relied upon his title arising from the provisions of section 22, clause 6, of the Oudh Estates Act and pleaded limitation as well as *res judicata* as a bar to the suit:

Held, (1) that Lord Canning's Proclamation of 1858 having resulted in divesting all landed property from proprietors in Oudh and transferring and vesting the same in the British Government, the Second Summary Settlement did not of itself vest the absolute proprietary and heritable rights in *taluqas* but amounted to a permission to the persons with whom the settlements were made to engage for the payment of the Government revenue; the effect of the declaration contained in the Governor-General's letter, dated the 10th of October 1859, being to invest the *taluqdars* in possession under the Summary Settlements with permanent, hereditary and transferable proprietary rights in their *taluqas*, including the perpetual privilege of engaging with the Government for the revenue of those *taluqas*; the two *sanads* addressed to *D. K.* having purported to confer upon her and her heirs for ever the full proprietary right, title and possession of the *taluqa*, and the intention of the Government in the matter being deducible from the acts of the Government itself and not from the conduct and declarations of *D. K.*, *D. K.* took the *taluqa* in her own right as full owner, and not in the right of her husband *B. S.* as a Hindu widow, nor as such widow with special powers of alienation superadded, so that if she failed to exercise the special powers of transfer conferred upon her the *taluqa* would revert after her death to the nearest male heir of her deceased husband according to the rule of primogeniture, nor even as a trustee for the reversioners of her deceased husband *B. S.*, for there was no evidence to show that she had by any express or implied acknowledgment, declaration or conduct constituted herself such a trustee: and that, therefore, succession to the *taluqa* was governed by the terms of section 22 of the Oudh Estates Act, under which *R. B. S.* was the right heir of *D. K.*;

(2) that *D. K.* having been found to be in possession of a full estate, the case was governed by Article 144 and not by Article 141, Schedule I, of the Limitation Act; but that, as the point of limitation was to be determined in view of the plaint allegations, which were to the effect that the plaintiff was entitled to succeed on the death of *D. K.* not as her heir but as an heir of her husband *B. S.*, Article 141 applied and the suit was barred;

(3) that *B. B. S.* not being debarred under section 116 of the Evidence Act from raising in the previous suit the proprietary title in respect of the village then in dispute, inasmuch as he asserted at that time an adverse subordinate title and not a title derived from the superior proprietor, or from setting up both proprietary and under-proprietary titles at one and the same time on the ground of inconsistency, the present suit was barred by *res judicata* under section 11, Explanation IV, Civil Procedure Code, so far as the said village was concerned, and not in respect of the entire *taluqa*, inasmuch as title to the entire *taluqa* was not a point which properly belonged to the subject of the previous litigation. **O** BISHESHAR BAKHSH SINGH *v.* RAMESHAR BAKHSH SINGH, 4 O. L. J. 648; 21 O. C. 1 **368**

Temple lands in Tanjore District, *incidents of.*

Nature and incidents of lands held by temples in Tanjore District discussed. **M** MUNA MUHAMMAD *v.* MUTHU ALAGAPPA CHETTIAR, 23 M. L. T. 161; 34 M. L. J. 234; 7 L. W. 380 **894**

Testamentary direction *for disposal of occupancy holding, whether can be given by occupancy tenant.*

An occupancy tenant in the Central Provinces cannot leave any testamentary direction for the disposal of his tenant right by his widow after his death. **N** KALWA *v.* BHAWAR SINGH **1001**

Transfer of Property Act (IV of 1882), s. 26 **26**

——— s. 41—*Transfer by ostensible owner—Consent of Hindu widow, whether consent of person interested.*

Quære:—Whether the "consent of the person interested" required by section 41 of the Transfer of Property Act can be said to be furnished where the only consent given is that of a Hindu widow, as tenant for life, the remainderman being no party to such consent. **B** GIR JAYAGAVRI *v.* PURSHOTAMDAS, 20 BOM. L. R. 177 **92€**

——— s. 43—*Mortgagor—Mortgagor having no title but subsequently obtaining one—Attesting witness of mortgage deed purchasing property subject of.*

A mortgagor had lost title to a property at the time he mortgaged it along with other properties. But the title to that property had come back to the mortgagor when an attesting witness to the mortgage bond purchased the equity of redemption:

Held, that the provisions of section 43 of the Transfer of Property Act would come into operation and that, therefore, the mortgagee's lien was enforceable against that property in the hands of the purchaser of the equity of redemption, who being an attesting witness to the mortgage bond could not be held to be a *bona fide* transferee

without notice: C NIBARAN CHANDRA SEN v. NAGENDRA CHANDRA SEN, 22 C. W. N. 444 984
——— s. 51 753
——— s. 52 718

——— **s. 52**—Lis pendens, *doctrine of, applicability of—Mortgage—Subrogation—Mortgagee decree-holder consenting to grant time to mortgagor for paying off mortgage by loan from third person—Mortgage, whether kept alive.*

The essence of section 52 of the Transfer of Property Act is that a transaction entered into during the pendency of a suit cannot prejudice the interests of a party to the suit who is not a party to the transaction.

A mortgagee, who held two mortgages on the same property, obtained a decree on his first mortgage and during the execution of that decree consented to the postponement of the sale and the granting of time to the mortgagor to enable him to pay off the mortgage with money borrowed from one *H*:

Held, that *H.* by paying off the first mortgage obtained a lien over the mortgaged property prior to the second mortgage, and that the transaction being acquiesced in by and being presumably for the benefit of the mortgagee, section 52 of the Transfer of Property Act had no application to it. **Pat** BENODE BEHARI BOSE *v.* HIRA SINGH, (1915) PAT. 76 **726**

——— **s. 52,** *scope of*—Lis pendens, *doctrine of, applicability of, to parties ranged on same side—'Any other party', meaning of—Purchases at auction sale, applicability of doctrine to.*

The doctrine of *lis pendens* contained in section 52 of the Transfer of Property Act is applicable only as between opponents with regard to alienations made by any one of them during suit and it cannot be extended to parties to the suit who are ranged on the same side and between whom there is no issue for adjudication. The section does not bar a transferee from one of the parties pending suit from raising an issue which his transferor and transferees from his transferor after decree are at liberty to raise.

The expression 'any other party' in the section means any other party who can be said to be arrayed on the opposite side to the party alienating owing to the existence of some issue between them upon which the Court is called to adjudicate in the suit, which may thus be regarded as a contentious suit between them in which each of them requires the protection of the doctrine against alienations by the other.

The doctrine of *lis pendens* is an extension of the doctrine of *res-judicata* and makes the adjudication in the suit binding on alienees from the parties pending the suit, just as the law of *res judicata* makes the adjudication binding on parties to the suit and alienees from them after decree.

The doctrine of *lis pendens* applies to purchases at auction sales in execution of decrees against parties to the suit as well as to private alienations by the parties. **M** MANJESHWARA KRISHNAYA *v.* VASUDEVA MALLYA, 7 L. W. 104; 23 M. L. T. 70; 34 M. L. J. 263; 41 M. 458 **471**

——— **s. 53,** *scope of.*

Section 53 of the Transfer of Property Act does not expressly give a right to sue, but gives to a creditor an option to avoid certain transactions, and the right to sue does not accrue until he exercises that option. **M** VENKATESWARA AIYAR *v.* SOMASUNDARAM CHETTIAR, 7 L. W. 280; (1918) M. W. N. 244 **551**

——— **s. 55**—*Vendor and purchaser—Promissory note, execution of, for part of consideration—Suit on pro-note—Lien for unpaid purchase-money, enforceability of—Intention of parties - Co-vendors not impleaded, effect of.*

Where a pro-note is executed by a vendee of immoveable property for part of the sale consideration, it is a question in each case whether the parties intended that the security was to be in lieu of the actual cash and whether the vendor was thereby to abandon his lien for unpaid purchase-money.

The lien created by section 55 (4) of the Transfer of Property Act is different from the equitable lien known to English Law, for under the latter though the legal estate passes at the time of sale, the equitable estate does not pass until the purchase-money has been completely discharged.

Ordinarily one of several vendors of immoveable property cannot enforce his charge on the property without making his co-vendors parties to the suit, save where the share of the party seeking enforcement thereof has been definitely fixed.

Where one of two vendees executed a pro-note for part of the sale price in favour of one of two vendors and amounts in discharge thereof were entered on the pro-note and the vendor in whose favour the note was executed sued on it without impleading his co-vendor:

Held, that the above circumstances indicated an intention to abandon the lien allowed by section 55 of the Transfer of Property Act. **M** KRISTNASWAMI IYENGAR *v.* SUBRAMANIA GANAPATHIGAL, 23 M. L. T. 85; 7 L. W. 210; (1918) M. W. N. 231 **523**

——— **ss. 58, 100**—*Mortgage and charge, distinction between—Sale in execution of decree without attachment, validity of—Consent decree, whether can affect properties not subject-matter of suit.*

In a suit on a mortgage a compromise was effected, by which the mortgagor consented to a decree being passed against him on condition that if the decretal amount were not paid according to the instalments specified in the decree, the mortgagee would be entitled to recover it by sale of the mortgaged properties and in case of a deficiency in the sale-proceeds by sale of certain other properties (lot No. 2 specified in the schedule to the compromise petition). Payments not having been made in accordance with the decree, the mortgaged properties as also the other properties (in lot No. 2) were put up to auction-sale and were purchased by the mortgagee himself, who was put in possession by the Court. The mortgagor applied for setting aside the sale, and again a compromise was made under which the sale was to be set aside on the mortgagor paying the full amount of the decree within two months. The mortgagor failed to carry out this compromise and the sale to the mortgagee was confirmed In the meantime the mortgagor had mortgaged lot No. 2 to the plaintiff for the express purpose of paying off the decretal amount due to the mortgagee:

Held, (1) that, inasmuch as before the mortgage to the plaintiff lot No. 2 had been auction-purchased

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by the mortgagee, the mortgagor had no subsisting title, right or interest in those properties which he could pass to the plaintiff by the mortgage;

(2) that, as the auction-sale in execution of the mortgage decree was with the consent and at the request of the mortgagor, it was immaterial whether there was a formal attachment of lot No. 2 or not.

Semble.—Though the consent decree could not affect the properties comprised in lot No. 2 which were not the subject-matter of the suit, yet a valid charge was created thereon outside the suit by the compromise petition of the mortgagor.

The distinction between a mortgage and a charge under section 100 of the Transfer of Property Act is that in the case of the former there is a transfer of the property to the creditor which requires registration, while in the case of the latter there is no such transfer the debtor only agreeing that the property shall be security for the re-payment of the debt. **C** SAMIRUDDIN *v.* ABDUL SYED **734**

——— **s. 59**—*Mortgage, proof of.*

A mortgage need not be contained in one or any other particular number of documents. It may be collected from a variety of documents so long as the effective document is a duly signed, attested and registered instrument in accordance with section 59 of the Transfer of Property Act. **A** MOTI CHAND *v.* LALTA PRASAD, 16 A. L. J. 121 **596**

——— **s. 60** **447**

——— **ss. 60, 88, 89**—*Mortgage, suit on—Decree, sale under, not in compliance with Transfer of Property Act—Redemption, right of—Civil Procedure Code (Act XIV of* 1882*), s.* 244*—Questions arising between auction-purchaser at sale under mortgage decree and mortgagor, whether to be decided in execution—Suit, maintainability of.*

In a mortgage suit for sale the decree made did not specify a day for payment as prescribed by sections 86 and 88 of the Transfer of Property Act. In execution of the decree the mortgaged property was attached, sold and purchased (with the permission of the Court) by the decree-holder. The sale was confirmed. The mortgagor thereafter sued for redemption:

Held, that as the property and all right, title and interest of the defendants in the suit for sale had in fact been sold under the decree of a competent Court, and such decree had not been appealed against, it was immaterial whether or not the provisions of the Transfer of Property Act were complied with and that even though such provisions had not been complied with, the mortgagor was debarred from a right to redeem;

Held, also, that the present suit was barred by section 244 of the Code of Civil Procedure, 1882, inasmuch as the questions now raised could and sould have been raised before the sale was confirmed and, if so raised, would have been decided by the Court executing the decree. **P C** GANAPATHY MUDALIAR *v.* KRISHNAMACHARIAR, 23 M. L. T. 198; 27 C. L. J. 367; 34 M. L. J. 463; 4 P. L. W. 310; (1918) M. W. N. 310; 22 C. W. N. 553; 16 A. L. J. 353; 41 M. 403; 20 BOM. L. R. 580 **855**

——— **ss. 88, 89** **855**

——— **s. 100** **734**

——— **s. 111A** **212**

——— **s. 123** **483**

Trial, *de novo* **328, 337**

U. P. Land Revenue Act (III of 1901), s. 36 **51**

U. P. Municipalities Act (II of 1916), s. 326 (1), *applicability of, to criminal proceedings—Cattle Trespass Act (I of* 1871*), s.* 22*—Illegal seizure of cattle—Compensation.*

Section 326 (1) of the U. P. Municipalities Act has nothing to do with proceedings in a Criminal Court. It relates only to suits of a civil nature in a Civil Court. It does not, therefore, apply to prosecutions under the Cattle Trespass Act.

Accused, servants of a Municipality, seized and impounded cattle belonging to the complainant which had not done any damage to Municipal trees:

Held, that the seizure was illegal and unjustified and that the accused were liable to pay compensation under section 22 of the Cattle Trespass Act. **A** SATOLA *v.* EMPEROR, 16 A. L. J. 148; 19 CR. L. J. 368 **592**

Will, *interpretation of.*

Where a Will executed by a Hindu gentleman in favour of his wife declared that he left his property to her absolutely and entirely, that he liked her to retain certain old servants in her employment so long as they behaved themselves, and that if she wished to utilise the powers she possessed in order to make an endowment of a religious or a charitable nature, such an object would meet with his approval, though if she did this he would be opposed to her giving the manager of the endowment too free a hand:

Held, that under the above Will the testator devised a full and complete estate, and not merely a life-estate, to his wife. **O** GANGA BAKHSH SINGH *v.* GOKAL PRASAD, 4 O. L. J. 744 **645**

Zarpeshgi ijara, *construction of—Mortgagor and mortgagee—Interest and rent.*

No general rule can be laid down as to the effect of a *zarpeshgi* transaction. Every case must depend upon its own facts.

Plaintiff executed a *zarpeshgi ijara* in favour of defendant, which stipulated that in the event of the plaintiff's failure to re-pay the *zarpeshgi* money the defendant would be entitled to retain the land till re-payment. It further stipulated that out of the annual consolidated *jama* of the property transferred to the possession of the defendant, estimated at Rs. 112-8-0, the defendant was entitled to retain a certain sum on account of interest, revenue, cesses and irrigation charges and that the balance should be paid to the plaintiff:

Held, that the intention of the parties was to create the relationship of mortgagor and mortgagee, and that the amount advanced to the plaintiff could not be viewed as an advance of the rent fixed upon the land. **Pat** MOHAMAD HANIF *v.* MOORAT MAHTON, 4 P. L. W. 146 **153**

Zemindari papers, *value of—Enhancement of rent—Proof.*

Zemindari papers, such as *jamabandis*, being *ex parte* papers, ought to be carefully scrutinized before they are held sufficient to make the tenant liable for the rent shown in them. Every case in which a Zemindar seeks to obtain enhancement on the strength of his papers must depend upon its own facts. **Pat** CHARITTER RAI *v.* KAILASH BEHARI, 4 P. L. W. 213; (1918) PAT. 145; 3 P. L. J. 306 **422**

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